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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105224/2022

Final Hearing held in person at Glasgow on 13, 14 and 15 February 2023, and continued Final Hearing (in person, but partly hybrid) on 5 April 2023; and Deliberation at Members' Meeting held in person on 18 May 2023

Employment Judge Ian McPherson
Tribunal Member Fiona Paton
Tribunal Member Robin Taggart

Mr George Gallacher	**Claimant** **Represented by:** **Mr Craig McCracken - Trainee Solicitor**
JOA Leisure Limited	**First Respondents** **Represented by:** **Mr Matthew Melling - Operations Director [Flip Out UK]**
Flip Out Limited	**Second Respondents** **Not present and Not represented** **[No ET3 response]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **unanimous** reserved judgment of the Employment Tribunal is that: -

(1) The Tribunal finds that the claimant's employer as at the effective date of termination of his employment on 29 June 2022 was the first respondents, JOA Leisure Limited, trading as Flip Out Glasgow, and accordingly, of consent of both compearing parties, dismisses the second respondents, Flip Out Limited, from these Tribunal proceedings, in terms of **Rule 34 of the Employment Tribunal Rules of Procedure 2013,** on the basis that they

were wrongly included by the claimant, and there are no issues between that respondent and the claimant which it is in the interests of justice to have determined in these proceedings.

(2) Having heard the evidence led by the claimant and first respondents, and thereafter having heard closing submissions from their representatives, and having reserved judgment to be given later, after time for private deliberation in chambers, and the full Tribunal, having resumed consideration of the case at a Members' Meeting held in person on 18 May 2023, the Tribunal, after private deliberation in chambers, now gives its **reserved judgment** as follows:

(a) In respect of the claimant's complaint of unfair dismissal contrary to **Section 98 of the Employment Rights Act 1996,** the Tribunal finds that the claimant was unfairly dismissed by the first respondents, as they have failed to show that the claimant was redundant, and that they fairly dismissed him for that reason.

(b) In respect of the claimant's complaint of detriment for having made a protected disclosure, contrary to **Section 47B of the Employment Rights Act 1996,** the Tribunal finds that head of complaint against the first respondents is well-founded.

(c) Further, in respect of the claimant's complaint of automatically unfair dismissal, for having been dismissed after having made a protected disclosure, contrary to **Section 103A of the Employment Rights Act 1996,** the Tribunal finds that head of complaint against the first respondents is also well-founded.

(d) Accordingly, in respect of those successful heads of complaint, upheld by the Tribunal, the Tribunal awards no basic award of compensation for unfair dismissal to the claimant, in terms of **Section 118 of the Employment Rights Act 1996,** payable to him by the first respondents, because they paid to him a redundancy payment in the amount of **Four thousand, two hundred and eighty two pounds, fifty pence (£4282.50)** on 5 July 2022, and that payment reduces his

basic award to **£ nil,** in terms of **Section 122(4) of the Employment Rights Act 1996.**

(e) Further, in respect of his unfair dismissal by the first respondents, the Tribunal awards a compensatory award of compensation to the claimant, in terms of **Section 123 of the Employment Rights Act 1996,** payable to him by the first respondents, in the amount of **FIFTY-FOUR THOUSAND, NINE HUNDRED AND TWENTY-SEVEN POUNDS, FORTY-SIX PENCE (£54,927.46).**

(f) For the purposes of the **Employment Protection (Recoupment of Benefits) Regulation 1996**, as amended, the claimant having been in receipt of Jobseekers' Allowance paid by the Department for Work and Pensions, the prescribed element, applicable to the claimant's past loss in the 40-week period between 29 June 2022 and 5 April 2023, is **£32,485.08**, and **£22,442.38** is the amount by which the monetary award exceeds the prescribed element. The Secretary of State may seek to recoup that benefit by service of a Recoupment Notice upon the first respondents.

(g) In respect of injury to the claimant's feelings, in respect of whistleblowing detriment, contrary to **Section 47B of the Employment Rights Act 1996,** the Tribunal awards compensation for injury to feelings, payable to him by the first respondents, in the further amount of **FIFTEEN THOUSAND POUNDS (£15,000).**

(3) The Tribunal declines to impose a financial penalty on the first respondents, in favour of the Secretary of State, in terms of **Section 12A of the Employment Tribunals Act 1996**, as it would not be in the interests of justice to do so, and so it restricts its awards to the monetary awards of compensation payable by the first respondents to the claimant as made in terms of this Judgment.

(4) In summary, and taking account of grossing up for tax purposes, the first respondents are ordered to pay to the claimant, **within 14 days of issue of this Judgment**, subject to any Recoupment Notice to be served upon them

by the Secretary of State, the total amount of **EIGHTY-ONE THOUSAND, THREE HUNDRED AND EIGHTEEN POUNDS, TWENTY-SIX PENCE (£81,318.26).**

REASONS

Introduction

1. This case first called before us as a full Tribunal on the morning of Monday, 13 February 2023, for a 3-day Final Hearing in person, previously intimated to parties by the Tribunal, by Notice of Final Hearing dated 30 November 2022.

2. It was listed for full disposal, including remedy, if appropriate. A copy Notice of Final Hearing was also sent to the second respondents, for information only, as they had not lodged an ET3 response defending the claim.

3. In the event, the case did not conclude within the allocated 3 sitting days, and it had to be continued, part-heard, to a Continued Final Hearing held on Wednesday, 5 April 2023, the earliest mutually convenient date for both parties and the Tribunal, when the evidence concluded, and the Tribunal also heard closing submissions from both compearing parties. On 5 April 2023, Judgment was reserved, and the case was continued for private deliberation by the full Tribunal, in chambers, on Thursday, 18 May 2023, the earliest mutually convenient date for the full panel.

4. While the Judge had advised parties' representatives, via the Tribunal's letter of 19 May 2023, that he would progress to draft a written Judgment and Reasons to the two non-legal members of the Tribunal within the Tribunal administration's target of 4 weeks, and aim for final sign off by Friday, 30 June 2023, that target date did not happen, on account of other judicial business, and annual leave. On the Judge's behalf, a written apology and explanation for the further delay was sent to both parties' representatives on 7 July 2023 under cover of a follow up letter from the Tribunal. The full Tribunal has agreed the terms of this our finalised, unanimous Judgment, by email correspondence, and without the need for a further Members' Meeting.

Claim and Response

5. The claimant, acting through his solicitor, Mr Musab Hemsi, from Anderson Strathern LLP, solicitors, Glasgow, presented his ET1 claim form in this case to the Tribunal, on 22 September 2022, against two separate respondents, following ACAS early conciliation between 10 August and 21 September 2022.

6. His claim was accepted by the Tribunal administration, and served on both of the named respondents by Notice of Claim issued by the Tribunal on 28 September 2022.

7. The claimant named two separate respondents, being JOA Leisure Limited, trading as Flip Out Glasgow, as first respondents, and Flip Out Limited as second respondents.

8. The claimant alleged unfair dismissal, automatically unfair dismissal by reason of having made a protected disclosure, and also whistleblowing detriment, and he further alleged that he was owed other payments.

9. He set forth the nature of his complaints at section 8.2 of his ET1 claim form, as follows:

> **1.** ***The Claimant was employed by Flip Out Glasgow from November 2016 to 29 June 2022.***
>
> ***2.*** ***The Respondent is the owner and operator of trampoline parks in the UK. In 2021, JOA Leisure Limited was purchased by Flip Out Ltd.***
>
> ***3.*** ***The Claimant was employed as a senior manager at Flip Out Glasgow for many years. He was formerly a part-owner of the business. He had contractual entitlements to a company car and quarterly bonus. He also had a contractual discretion to award performance related bonuses to other management staff at Flip Out Glasgow.***

4. On or around 20 April 2022, the Claimant and his Glasgow management colleagues raised a collective grievance and whistleblowing complaint. This was sent to Matthew Melling, Operations Director of Flip Out UK. The whistleblowing complaint pertained to failure to adhere to legal obligations under TUPE and the unilateral alteration of contractual terms by the Respondent. The collective grievance also highlighted other important issues, such as the unlawful withholding of contractual bonus payments due to the management team, unilateral amendment of contractual hours, concerns over pension contribution payments by the business. The letter also contained Subject Access Requests on behalf of the Claimant and other employees. This Subject Access Request was not complied with. That disclosure was a qualifying disclosure because it contained information tending to show that the Respondent had failed, was failing or was likely to fail to comply with a legal obligation to which it was subject, that obligation being under the TUPE Regulations. The disclosure was in the public interest as it impacted the Claimant and a number of his colleagues, particularly those named in the collective grievance. The Claimant had a reasonable belief that the information disclosed was substantially true and was a matter in respect of which the Respondent had prescribed responsibility.

5. The Claimant's grievance was acknowledged on 21 April and further information was sought on 7 May 2022. Thereafter, the Claimant's grievance heard and rejected. The Respondent's approach to the grievance was closed minded and adversarial. The Claimant believes the outcome was pre-determined. The Claimant contends his grievance and whistleblowing complaint were handled unreasonably and unfairly. The outcome of the grievance was appealed by the Claimant.

6. By letter dated 9 June 2022, Mr Melling wrote to the Claimant confirming the unilateral withdrawal of his contractual bonus entitlement, notwithstanding the Claimant's contractual position, the collective grievance and the lack of consultation/agreement to the change.

7. By separate letter dated 9 June 2022, Richard Beese, Co-owner and Director of Flip Out UK issued the grievance appeal outcome letter to the Claimant. All of the grounds of appeal were rejected. The Claimant does not agree with the rationale or outcome of the grievance appeal. The Claimant's position is that Mr Beese was determined to find against the grievance, as it supported his desired outcome to remove the Claimant's contractual bonus entitlement.

8. On 22 June 2022, the Claimant received an email from Mr Melling. The email confirmed the bonuses that were the subject of the prior collective grievance were being awarded, however the contractual right to bonuses was still being withdrawn thereafter.

9. The Claimant believes the Respondent wished to remove him from the company as a result of the grievance and/or whistleblowing complaint.

10. Alongside the grievance process, the Respondent commenced a sham redundancy process to reduce the number of Glasgow senior managers from three to two. The Claimant was one of three senior managers in Glasgow, alongside Fraser Watt and Alex Bruce. Shortly after the redundancy process commenced, Mr Bruce resigned as he has secured new employment. Notwithstanding that resignation, the Respondent continued with the Redundancy process with a view to removing the Claimant. The Claimant participated in the redundancy process and asked for more information regarding the alternative roles. The Respondent was closed-minded during the redundancy process

and was not forthcoming with answering points advanced by the Claimant during consultation. The Claimant does not believe the Respondent purposefully consulted.

11. On 28 June 2022, the Claimant was informed by the Respondent that his employment was being terminated on the ground of redundancy. The letter was from Colin Perry, Regional Operations Manager from Flip Out UK.

12. The Claimant does not accept that there was a genuine redundancy situation. Rather, the Claimant contends the redundancy process was a cover for the desire to remove the Claimant from his employment, or, alternatively, force him into a role where he would be stripped of his contractual entitlements such as a company car and bonus.

13. The Respondent did not consider "bumping" the *[Claimant]* ***into another role which it should have done.***

14. The Respondent did not choose selection criteria which were fair and objective. The Claimant was not consulted about the selection criteria or the weightings given to them. The Respondent did not apply the selection criteria fairly or reasonably.

15. The Claimant was not informed of his score in relation to the selection criteria. He was not informed of any colleagues' scores so he was unable to participate properly in the redundancy consultation by challenging any score.

16. The Respondent did not undertake a genuine consultation with the Claimant. There were potentially suitable alternative vacancies that was not offered to me. When I sought further information regarding these roles, the Respondent was not forthcoming.

17. The Claimant being subjected to a sham redundancy process, rejection of his grievance and grievance appeal, having his contractual entitlements withheld, altered and unilaterally removed and/or his employment being terminated amounted to detriments as a result of his grievance and/or his protected disclosure. Therefore the Claimant's dismissal was contrary to section 103A of the Employment Rights Act 1996 and is automatically unfair.

18. In the circumstances I contend that my dismissal was unfair and I seek: (a) a declaration that I have suffered a detriment contrary to section 47B of the ERA 1996; (b) a declaration that I have been automatically unfairly dismissed under section 103A of the ERA 1996 or unfairly dismissed under section 98 of the ERA 1996; (c) compensation for detriment suffered during employment; (d) compensation for unfair dismissal".

10. In respect of remedy, in the event that his claim was to be successful, the claimant stated, in section 9.1 of the ET1 claim form, that he sought an award of compensation against the respondents, although no specific amount was then stated at section 9.2.

11. The claim form was served on both of the named respondents, at their stated addresses for service, by Notice of Claim and Notice of Preliminary Hearing sent to them by the Tribunal on 28 September 2022.

12. A Case Management Preliminary Hearing was listed for 22 November 2022, and the two respondents were each informed that they should submit an ET3 response by 26 October 2022, which failing, if no extension of time had been agreed by an Employment Judge, they would not be entitled to defend the claim.

13. Thereafter, on 20 October 2022, a Mr Matthew Melling, Operations Director with Flip Out UK, presented an ET3 response, on behalf of the first respondents, JOA Leisure Limited, trading as Flip Out Glasgow, stating that

those respondents defended the claim, and attaching a 7-page paper apart grounds of resistance.

14. It did not mention that it was being lodged on behalf of both respondents, and the Tribunal thereafter regarded the claim as being undefended by the second respondents. No ET3 response, on behalf of the second respondents, Flip Out Limited, was lodged at any time.

15. In its ET3 response, the first respondents, JOA Leisure Limited, trading as Flip Out Glasgow, denied that the claimant was unfairly dismissed, and they stated that the dismissal, by reason of redundancy, was fair, and that the claimant received the redundancy payment to which he was entitled, together with all other applicable contractual entitlements. The first respondents denied that the claimant was owed any other payments, stating that they had paid all the claimant's contractual entitlements.

Procedural History of the Case prior to this Final Hearing

16. The ET3 response on behalf of the first respondents, JOA Leisure Limited, trading as Flip Out Glasgow, was accepted by the Tribunal administration on 25 October 2022.

17. A copy was sent to the claimant's solicitor and ACAS, together with a further copy, for information only, to the second respondents, who had not lodged any ET3 response defending the claim insofar as directed against them.

18. Following Initial Consideration by Employment Judge Laura Doherty on 3 November 2022, she ordered that the claim proceed to the listed Case Management Preliminary Hearing on 22 November 2022.

19. The claimant's solicitor, Mr Hemsi, lodged a claimant's completed PH Agenda on 31 October 2022. Thereafter, on 10 November 2022, a Mr Steve Bloor, Director of Cando HR, on behalf of Mr Melling, Director of Operations for Flip Out UK, submitted a respondents' completed PH Agenda, copied to Mr Hemsi.

20. In that respondents' PH Agenda, at section R1.1, it was accepted that the claimant's employer was correctly named as JOA Leisure Limited, trading as Flip Out Glasgow, and it was further submitted (at section R1.3) that Flip Out Limited should be removed from these proceedings.

21. Further, at section R2.1, it was denied that the claimant had made a protected disclosure on 21 April 2022, or subsequently, when making a collective grievance. Finally, at section R6.1, it was stated that the respondents would call no witnesses, stating that none were relevant.

22. At the Case Management Preliminary Hearing held, by way of telephone conference call on 22 November 2022, Employment Judge Ronald Mackay heard from Mr Hemsi, solicitor for the claimant, and Mr Melling, the respondents' representative.

23. Judge Mackay clarified the claims being brought by the claimant against the first respondents, and he fixed a 3-day Final Hearing to cover liability and remedy, assigning 13 / 15 February 2023 for that Hearing.

24. In his written PH Note and Orders, issued to parties on 24 November 2022, Judge Mackay made various case management orders for the exchange of documents, a respondents' list of witnesses, a claimant's Schedule of Loss, and for a Joint Bundle, as well as noting a List of Issues for determination by the full Tribunal at the Final Hearing.

25. On 4 December 2022, Steve Bloor, on behalf of Flip Out UK, advised the Glasgow Tribunal, with copy to Mr Hemsi for the claimant, that Mr Melling would present the respondents' case, and appear as a witness. No other witnesses for the respondents were identified by him.

26. Mr Bloor also asked that the Tribunal agree that Mr Matthew Melling, Operations Director, be allowed to join the Final Hearing by video link, explaining that the scheduled three-day Hearing would require Mr Melling to arrange travel and hotel accommodation in Glasgow at significant extra cost to the respondent company.

27. On 9 December 2022, a claimant's Schedule of Loss was intimated to the Glasgow ET by Mr McCracken, the claimant's representative, with copy to Mr Melling and Mr Bloor for the respondents, in a total sum of **£196,393.33,** given the complaints of automatically unfair dismissal and whistleblowing detriment included in the claim. A sum of **£29,600** was sought by way of non-financial loss for asserted injury to the claimant's feelings.

28. Also, on that date, Mr McCracken made an application to the Tribunal for an order for disclosure of documents by the respondents, in accordance with **Rules 30 and 31 of the Employment Tribunals Rules of Procedure 2013.** His application was copied to Mr Melling and Mr Bloor.

29. In that application, Mr McCracken submitted as follows:

"In accordance with rule 30 of the Employment Tribunals Rules of Procedure 2013 (SSI 2013/1237) (ET rules), we are writing to request an order for disclosure of documents by the Respondent under rule 31.

The Claimant made a subject access request (SAR) as part of a collective grievance dated 20 April 2022. The Respondent acknowledged the Claimant's SAR by letter dated 7 May 2022 however, the Claimant's SAR was not complied with.

The Claimant made a further request to the Respondent by email on 6 August 2022 for all emails received and sent relating to the 'Glasgow management reset process'. The Respondent refused to provide such emails.

The following documents and requests for information are relevant to this application:

1. All documents requested as part of the Claimant's SAR on 20 April 2022 including all documents from management meetings in which the Claimant was discussed, messages, emails and discussions where the Claimant was spoken about, and any data in emails about the Claimant which feature his name or any variation of it, such as abbreviations or incorrect spellings.

2. All documentation relating to Respondent's 'Glasgow management rest (sic) *[reset]* ***process' including the Respondent's business case for the proposed redundancy, the minutes from telephone meeting between the Claimant and Colin Perry held on 25 April 2022, the internal/business decision not to cancel the redundancy process following Alexander Bruce's resignation.***

3. The minutes of the grievance hearing held on 23 May 2022 and the minutes from the grievance appeal hearing dated 8 June 2022.

This material is relevant to the case because it will allow the tribunal to understand the Respondent's decision-making process for the redundancy exercise. In particular, the Claimant has challenged a number of elements of the procedural and substantive fairness of the redundancy exercise therefore, this material will assist the tribunal in determining those points in dispute. We consider that an order in the terms requested would assist the tribunal in dealing with the proceedings efficiently and fairly and in accordance with the overriding objective placing the parties on equal footing.

If the tribunal grants the order, the Claimant would be obliged if the tribunal would order the material to be provided by 23 December 2022 to allow it to be included in the joint agreed bundle."

30. On 12 December 2022, Mr McCracken, the claimant's representative, emailed Glasgow ET, with copy to Mr Melling for the respondents, to object to the respondents' application for Mr Melling to be allowed to give his evidence remotely. The grounds of objection were set out, as follows:

"*Dear Employment Tribunal*

I refer to the above matter in which I act for the Claimant and to the correspondence sent from Mr Steve Bloor on 7 December 2022. The Claimant opposes the Respondent's request to allow Mr Matthew Melling to appear virtually. The Respondent has failed to provide

sufficient information with regards to the costs involved, or the distance in which he would be required to travel to attend the final hearing in person. Further, the Respondent is a large sized company, which is describes on its website as a 'worldwide family-focused leisure entertainment brand.' The Respondent has failed to provide any detail on why having to attend the final hearing in person would put the Respondent at a financial difficulty or why the Respondent is not in a position to incur the cost of attending the final hearing in person. As Mr Melling has intimated that he will be representing the Respondent at the final hearing and appearing as the Respondent's only witness, if the Tribunal were to allow his request to appear virtually, it would mean that the final hearing would require to be conducted via a remote hearing, which would be prejudicial to the Claimant's claim. The Employment Tribunal "road map" for 2022/2023 provides that the President's firm wish is for final hearings of open track claims (discrimination and whistleblowing) to default to in-person and in Scotland, it will be the default approach. The Tribunal must, of course, consider its duty under the overriding objective to deal with cases fairly and justly, which includes ensuring that the parties are on an equal footing, dealing with a case in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay and saving expense to the parties and the tribunal. The Claimant has challenged a number of elements of the procedural and substantive fairness of the Respondent's redundancy exercise therefore, conducting the final hearing in person would assist the Tribunal in determining the evidence in dispute. Further, the Claimant intends on calling two witnesses who are both located in Glasgow. The Claimant contends that conducting the final hearing in person would better allow the tribunal to assess the credibility and reliability of the witness evidence and would assist the tribunal in dealing with the proceedings efficiently and fairly and in accordance with the overriding objective placing the parties on equal footing."

31. On 14 December 2022, Mr Bloor made detailed objections to the claimant's application for disclosure of documents, with copy sent to Mr Hemsi for the claimant, and Mr Melling for the respondents, but not copied to Mr McCracken. It is not necessary, for present, purposes to set out those objections verbatim. The application was considered, on the papers, by Employment Judge Peter O'Donnell.

32. By letter from the Tribunal, to both parties' representatives, dated 16 December 2022, they were advised that the application for Mr Melling to give evidence remotely was refused by Judge O'Donnell, on the basis that:

"… the reasons given do not adequately explain why it would be in keeping with the overriding objective to allow one witness to attend remotely where all other witnesses, agents and parties are attending in person. The Judge does not consider that the mere fact that travel or some form of overnight stay will be involved is sufficient; these are inconveniences which can arise as a result of litigation but the fact that the witness considers themselves inconvenienced is not sufficient to depart from the position that this is a hearing in person."

33. Further, by that same letter of 16 December 2022, both parties were also advised by the Tribunal, as follows:

"The claimant's application for an Order under Rule 31 is also refused. Employment Judge O'Donnell considers that, in its present terms, the request from the claimant is simply too wide and amounts to a fishing expedition particularly in respect of the first call. The claimant is reminded that the provisions of the data protection legislation and subject access requests are a different regime from the powers of the Tribunal. In respect of the second and third calls, it is not said that these are documents which exist and which are capable of disclosure."

34. Also, on 16 December 2022, Mr Steve Bloor, from Cando HR, emailed the Glasgow ET, with copy to Mr Hemsi and Mr Melling, to confirm that a combined document file and Bundle was provided to Mr Hemsi, as the

claimant's solicitor, further to Judge Mackay's case management orders issued on 24 November 2022.

35. Thereafter, by email on 18 January 2023, the Tribunal was provided, by Mr Steve Bloor, from Cando HR, with an email advising that copies of the ring-binders, containing the Joint Bundle, had been despatched to Glasgow ET, and Mr Hemsi, using the Post Office's special next-day delivery service.

36. The Joint Bundle, comprising 92 separate, indexed documents, extending to 305 pages, was received by the Tribunal in four large, A4 size ring-binder folders, in advance of the start of this Final Hearing: 3 sets for the Tribunal, and one set for the witness table.

37. In the course of this Final Hearing, we allowed certain additional documents to be added to the Bundle, and we note and record here that we did so because we considered it in the interests of justice to allow us to have access to the maximum documentary evidence available.

38. That said, it was disappointing for the Tribunal that in a case where both compearing parties were represented, and Employment Judge Mackay's case management orders from November 2022 were clear and unequivocal, that there was so much late production of relevant and necessary documentation to the Tribunal. It very much gave the impression that the case had not been fully prepared by either party in advance of the start of this Final Hearing.

39. Finally, it is important that we also note and record that, after the first 3 days of evidence, and in advance of the continued Final Hearing on 5 April 2023, yet further documents were received from the claimant's representative, as part of ongoing correspondence with the Tribunal, copied to the respondents' representative, relating to written closing submissions, and these further additional documents from the claimant were also added to the Joint Bundle.

Final Hearing before this Tribunal: Clarification of the Issues

40. When the case first called in public Final Hearing before the full Tribunal on Monday, 13 February 2023, it did not do so until 10:30am, as a 10:00am start

was not possible as the Tribunal required some reading time, from which it emerged that there were a number of preliminary matters that the Tribunal required to clarify with both compearing parties before the Tribunal could start to hear any witness evidence.

41. The claimant was in attendance, represented by Mr Craig McCracken, trainee solicitor with Anderson Strathern LLP, replacing Mr Musab Hemsi, the claimant's solicitor on record, as per Mr McCracken's earlier email to the Tribunal, copied to Mr Melling, on 6 February 2023, advising that he had been instructed by the claimant to carry out the advocacy at the Final Hearing, and that the claimant would be calling one witness, Mr Alexander Bruce.

42. The first respondents were represented by Mr Matthew Melling, Operations Director with the Flip Out UK group, as their representative, and as a witness. In his email to Glasgow ET, on 7 February 2023, copied to Mr Hemsi, he confirmed that the respondents would present their evidence first, and that he would be the only witness called, estimated at around one-hour.

43. Mr Melling advised us that he is not an employee of the first or second respondents, but a director of FO Admin Limited. He clarified that Mr Steve Bloor, from Cando HR, is their external HR consultant, but that Mr Bloor was not acting as their representative at this Final Hearing,

44. Further, Mr Melling confirmed to the Tribunal that the second respondents, Flip Out Limited, are a property company, and that they have no interest in this case, and he sought their removal as per **Rule 34 of the Employment Tribunal Rules of Procedure 2013.**

45. In reply, Mr McCracken stated that the claimant was employed by the first respondents, JOA Leisure Limited, but both respondents had been included in the ET1 claim form, after the second respondents, Flip Out Limited, had purchased the first respondents' business.

46. Mr McCracken further stated that, as all correspondence received by the claimant came from Flip Out Limited, and / or Flip Out UK, so it was not clear

whether the claimant's employment had TUPE'd across or not to the second respondents.

47. He further submitted that matters were still not clear, and that the Tribunal should keep the second respondents, Flip Out Limited, in the proceedings meantime, and not order their removal.

48. Mr Melling submitted that there was no ET3 response for the second respondents because they were never the employer of the claimant, and so they should be removed from the claim.

49. On the application of the claimant's representative, Mr McCracken, he asked that additional documents be added to the Joint Bundle, being **pages 76 a/f**, and **81 a/h**. He explained that the documents only came to light, on 6 February 2023, during preparation for this Final Hearing when taking a witness statement from Mr Alexander Bruce, who was to be led as a witness for the claimant.

50. Despite copying them to Mr Melling and Mr Bloor, on 6 February 2023, Mr McCracken stated that Mr Bloor had refused to allow the Joint Bundle index to be updated to include them, because Judge Mackay had ordered documents to be produced by 9 December 2022, and the Joint Bundle finalised by 23 December 2022.

51. Mr Melling advised the Tribunal, in his comments by way of reply, that these additional documents for the claimant were late, and they should not be allowed in. He confirmed that his objection was purely on the basis of the lateness of the application, saying that they added nothing to the numerous other documents already in the Joint Bundle, and that they are not directly relevant to this case.

52. Mr McCracken, referring us to document 8 in the Joint Bundle, at pages 87 and 88, being Mr Melling's email of 20 April 2022 to the claimant, regarding quarterly bonus conclusion, stated that the proposed additional documents gave a bigger picture, and a more detailed analysis, and showed the

claimant's reasonable belief that the employer was failing to comply with its legal obligations about contractual bonus.

53. Further, Mr McCracken submitted that the other additional documents are relevant and necessary for this Final Hearing, as they show that the collective grievance lodged on 21 April 2022 showed that the respondents had failed to comply with the TUPE regulations as regards Mrs Carol Hughes, one of the claimant's former colleagues.

54. In response, Mr Melling stated that the documents relate to that other person's circumstances, not to the claimant, and that TUPE did not apply to Mrs Hughes, or the claimant either, as when the JOA Leisure business was acquired, it was proposed to make her role redundant and give her a new role in the business, but this was all concluded before the collective grievance was submitted.

55. Further, Mr Melling stated that he felt this additional documentation does not further the claimant's case, and it is probably to the respondents' benefit as it shows TUPE was not applied.

56. Having heard both parties' representatives, the Judge stated that the full Tribunal would discuss the opposed application in chambers, and give a ruling, but first he raised the claimant's Schedule of Loss, intimated by Mr McCracken's email on 9 December 2022, copied to Mr Melling and Mr Bloor, and in the Tribunal's casefile, but surprisingly not included in parties' Joint Bundle lodged with the Tribunal.

57. In reply, Mr Melling apologised for a possible oversight on the respondents' behalf, in compiling the Joint Bundle, and he confirmed that he had no objection to that Schedule of Loss being added into the Joint Bundle.

58. At this stage, Mr McCracken then stated that he had mitigation documentation for the claimant, prepared the previous week, and he had hard copies (3-page mitigation table, plus 48 pages of supporting documents) for use by the Tribunal, and copy for Mr Melling as the respondents' representative, adding that he proposed to deal with it in his closing submissions.

59. When the Judge stated that it would require to be led in evidence from the claimant first, before it could be referred to in closing submissions, Mr McCracken then invited the Tribunal to allow in this further documentation, although late, and for it to be added to the Joint Bundle.

60. Mr Melling stated that he was not sure that the respondents had ever been ordered to produce a Counter Schedule, and / or comment on the claimant's mitigation documentation, so he would need to read what was now being produced, but he meantime intimated an objection to it being received late, and objected to it on that basis that it had been provided after the 9 December 2022 deadline set by Judge Mackay.

61. Judge McPherson noted that Judge Mackay's PH Note had simply ordered a Schedule of Loss from the claimant, but no standard case management orders had been issued then or thereafter, as is commonly the case, as standard practice, in any defended case listed for a Final Hearing.

62. On the matter of witness timetabling, where Mr McCracken had emailed the Tribunal, on 6 February 2023, with his proposals, Mr Melling stated that he was not sure how that would work if he was a witness, as well as the respondents' representative, and he sought clarification from the Judge.

63. Further, Mr Melling stated that Mr Bloor, the external HR consultant, was not comfortable acting as the respondents' representative in Tribunal, and in any event, it would be "***cost prohibitive***" to get such representation.

64. Having heard Mr Melling, the Judge stated that, as per **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, and the Tribunal's overriding objective to deal with the case fairly and justly, there was a duty on the Tribunal, so far as practicable, to ensure that the parties are on an equal footing.

65. In those circumstances, the Judge then proposed that he would ask relevant and focused questions of Mr Melling, as the respondents' witness, to obtain his evidence in chief, then pass him over to Mr McCracken, the claimant's representative, for cross-examination in the usual way, before any questions

from the Tribunal panel, and thereafter any necessary re-examination of the witness.

66. Further, the Judge stated that the Tribunal would allow Mr Melling, in terms of the **Equal Treatment Bench Book (ETBB) guidance,** to take his own notes, while he was being cross-examined, so that he could, if he felt it appropriate, deal with any points arising when it came to his re-examination.

67. In reply to the Judge's proposals, Mr McCracken stated that he was concerned that Mr Melling was involved in discussions about the claimant's bonus, and in his grievance, but he had had no involvement in the redundancy process, the claimant's dismissal, or the grievance appeal.

68. Mr McCracken further stated that his estimated time for cross-examination of Mr Melling, included in his timetable as one hour, might now be longer, and he apologised that his timetable had not included any proposed time for questions from the Tribunal panel.

69. In terms of his evidence for the respondents, Mr Melling stated that he would refer to written documentation in the Joint Bundle, and, as the respondents' only witness, he appreciated that he was going into this Final Hearing with his eyes wide open, explaining that it was not thought appropriate to bring other witnesses for the respondents, from the time and resource perspective of the respondents' business, where many other matters required their attention.

70. Further, Mr Melling commented that it was not practical to get so many people from the respondents' business up to Glasgow to deal with this matter, given Employment Judge O'Donnell had confirmed an in person Final Hearing, as ordered by Judge Mackay, and Judge O'Donnell had refused an application for the respondents' evidence from Mr Melling to be given remotely using the CVP video conferencing platform. He added that he felt the respondents' documents themselves would suffice.

71. No application was made by Mr Melling to allow a hybrid Final Hearing, with other witnesses from the respondents attending remotely by CVP. While Mr

McCracken's timetable had suggested 3 hours for the claimant's evidence in chief, and 2 hours for Mr Bruce's evidence in chief, with closing submissions on the morning of day 3, Wednesday, 15 February 2023, that timetable was not achieved by parties.

72. As regards closing submissions, Mr McCracken advised the Tribunal that he would speak to written submissions, to be sent to the Tribunal, and he estimated between 30 minutes and one-hour for his submissions, and he indicated that he would have case law authorities to refer to.

73. For the respondents, Mr Melling stated that he would put together some closing note, like a statement by him, and he asked if, prior to closing submissions, there would be any opportunity for him to outline documents in the Joint Bundle.

74. In reply, the Judge stated that the Tribunals were always open to parties jointly submitting a Joint Agreed Statement of Facts, to record matters not in dispute.

75. Referring to the claimant's Schedule of Loss, Mr McCracken then stated that "ordinary" unfair dismissal compensation is capped, whereas the other whistleblowing complaints are not, and he had a separate Schedule of Loss for the "ordinary" unfair dismissal head of claim only, copies of which he then produced, asking that they too be added to the Joint Bundle.

76. In that "ordinary" unfair dismissal Schedule of Loss, the claimant sought total compensation for **£73,548.80** financial loss, before grossing up.

Interlocutory Ruling by the Tribunal

77. Having heard from both parties' representatives, and it then being 11:38am, the Tribunal adjourned into chambers, for private deliberation, upon the various applications made by both parties. When the Tribunal resumed again, in public Hearing, at 12:36pm, the Judge read verbatim from a note, written in chambers, and agreed by the full Tribunal, as follows:

"Having carefully considered parties' various applications made this morning, the Tribunal, acting in accordance with the Tribunal's overriding objective, under Rule 2 to deal with the case fairly and justly, has decided as follows:

(1) Mr Melling's application for respondent 2 (Flip Out Limited) to be removed from these proceedings, as per Rule 34, is refused. While the respondents sought removal in the PH Agenda lodged on 10 November 2022 by Steve Bloor at Cando HR, the matter was not dealt with by Employment Judge Mackay in his PH Note dated 24 November 2022, and there has been no subsequent application for the matter to be revisited. It was only the Judge today raising the matter that brought it to light, because no ET3 was lodged by Flip Out Limited, so the claim is proceeding as undefended by them, but defended by the first respondents, JOA Leisure Limited, trading as Flip Out Glasgow.

(2) As regards Mr McCracken's application to lodge additional documents to the Bundle, the Tribunal accepts Mr Melling's objection that the documents are late and should have been provided by 9 December 2022 as per Employment Judge Mackay's PH Note, but lateness of the application is but one factor for the Tribunal to take into account. In the interests of justice, we allow the additional documents to be received late and added to the Bundle at pages 76 a/f and 81 a/h. Both parties can then be examined and cross examined on those documents, and the Tribunal can assess their relevance to the proceedings, once the evidence from both parties has been heard. Parties' representatives can address us on that in their closing submissions on Wednesday 15th February.

(3) As regards the claimants' mitigation documentation pack (48 pages) lodged today by Mr McCracken, the Tribunal notes Mr Melling's objection that these are late and should not be admitted.

We disagree. Lateness of the application is but one factor for us to consider but so too is the interests of justice. It is part of the Final Hearing process for the claimant to give evidence about the compensation sought from the respondents, and how that has been calculated, and for that evidence to include evidence about the claimant's current circumstances and how he has mitigated his losses since employment with the first respondents ended on 29th June 2022. The respondents' representative can cross examine him on the Schedule of Loss and these documents and put to him any relevant and necessary questions, including any suggestion that he has failed to mitigate his losses, and / or that the sums sought in the Schedule of Loss are not due for any specific reason : for example, redundancy payment paid and therefore falls to be deleted from any basic award for unfair dismissal; any issue of statutory uplift / downlift for unreasonable failure to comply with the ACAS code of practice on disciplinary and grievance procedures; contributory conduct / fault, or whatever. As the respondents have not provided a Counter Schedule, we order the respondents' representative to do so by no later than 10:00am tomorrow, Tuesday 14th February 2023, so that the claimant can be cross examined on his evidence on remedy, with fair notice having been given by the respondents of their position as detailed in a Counter Schedule.

(4) As issues for the case, the Tribunal will adopt those set forth by Employment Judge Mackay in his PH Note of 24 November 2022, but we will refine them to include - who was the claimant's employer? (given there are two respondents on the claim form) and to breakdown the compensation / remedy questions into smaller sub paragraphs, once we have seen the respondents' Counter Schedule.

(5) We will discuss timetabling now."

78. The Judge having read out our interlocutory ruling, there was no request for clarification from either compearing party's representative. On the ***"key information"*** provided in section 1 of the claimant's Schedule of Loss, we were informed that it was all agreed, bar one point, relating to the claimant's contractual bonus, stated to be an annual contractual bonus of **£15,000**. The first respondents' position, then and repeated in Mr Melling's written closing submissions to the Tribunal, was that the claimant did not have a contractual entitlement to a specified bonus payment amount.

79. When Mr Melling advised us that he was not familiar with the **Vento** bands for injury to feelings, it was suggested by the Judge that he consult with Mr Bloor, the respondents' external HR consultant.

80. We were informed that parties' representatives could not agree an exact figure for bonus as that amount was not mentioned in the claimant's contract of employment with JOA Leisure Limited, and the respondents' position was that they did not accept the claimant was due anything, as their position is that his claim should not succeed.

81. Finally, before we adjourned proceedings for a lunch break, at 12:45pm, it was agreed that it would be helpful to the Tribunal if parties' representatives could signpost us to key dates and documents in the Joint Bundle, and if they could work together to do so by drafting a Joint agreed Statement of Facts by 1:45pm, for a 2:00pm start of evidence in the case from Mr Melling to be elicited by questions asked by the Judge.

Agreed Chronology

82. When proceedings resumed in public Hearing, at 2:07pm that afternoon, the Tribunal was provided with an Agreed Chronology, jointly prepared by Mr McCracken and Mr Melling over the lunch break, running to 36 separate paragraphs, and extending over 3 typewritten pages.

83. We were invited to, and we agreed to, allow that document to be received as a Joint Statement of Facts, adding to it in manuscript a further paragraph 3A, which had been missed by parties' representatives in their drafting, as

dictated to the Judge by Mr McCracken, and agreed by Mr Melling, which we noted, being a recording of an email exchange produced in the Bundle.

84. The Judge expressed the Tribunal's thanks for the document having been prepared and provided by them for our use at this Final Hearing.

85. The terms of that Agreed Chronology (for that is how parties labelled it) including that further paragraph 3A are not set out here, but we have inserted them in our own findings in fact, at paragraph 90 of these Reasons, with an identifying suffix **[AC]** followed by the relevant paragraph number, for ease of reference.

86. On day 2, Tuesday 14 February 2023, the Tribunal received, and added to the Joint Bundle, a 3-page typewritten Respondent Counter Schedule dated 13 February 2023 prepared by Mr Melling, responding to the claimant's original Schedule of Loss.

87. We also added to the Joint Bundle, on that day 2, a copy of the claimant's P45 issued by JOA Leisure Limited on 12 July 2022, showing his leaving date of 29 June 2022, as emailed to the Tribunal, and copied to Mr McCracken, by Mr Melling on the evening of 13 February 2023 at 18:18, along with two payslips for the claimant dated 5 June and 5 July 2022.

Findings in Fact

88. We have not sought to set out every detail of evidence which we heard nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are as set out below, in a way that it is proportionate to the complexity and importance of the relevant issues before the Tribunal.

89. Certain limited facts were agreed between the parties, as per the Agreed Chronology, to which we referred earlier in these Reasons, at paragraph 82 above. We have had regard to them, and incorporated them into our findings in fact, but, given the extent of the evidence led by both parties, and the disputed facts in this case, we do not consider ourselves restricted by only

the agreed facts in that Chronology, and our own findings in fact are accordingly more extensive in scope and extent, and often more detailed, than in parties' jointly Agreed Chronology.

90. On the basis of the sworn evidence heard from both parties before us over the course of this Final Hearing, and the various documents in the Joint Bundle of Documents provided to us, along with additional documentation received and allowed by the Tribunal, the Tribunal has found the following essential facts established:

(1) The claimant, aged 61 at the date of this Final Hearing before the Tribunal, was formerly employed by the first respondents, JOA Leisure Limited, as General Manager.

(2) JOA Leisure Limited run a trampoline park in Glasgow known as Flip Out Glasgow. There are another 10 parks on the group owned portfolio operated by the Flip Out UK group. Overall, there are 26 Flip Out parks across Great Britain, but none in Northern Ireland.

(3) Flip Out Glasgow is their only park in Scotland. Flip Out UK is a franchisor, and FO Franchise Limited holds all the franchise agreements for all the parks, both company owned and franchisee owned.

(4) JOA Leisure Limited is a private limited company, company number 10260650, incorporated on 4 July 2016, according to Companies House, and with a registered office address at Anglia House, Norwich, NR7 0HR.

(5) Richard James Beese is a director of JOA Leisure Limited, having been appointed director on 21 March 2022, according to Companies House, following the resignation of the former directors, Clive Joseph Aronson, Jacob Aronson, and Wendy Avia Aronson, on 8 March 2022.

(6) In his evidence in chief to the Tribunal, Mr Melling described Mr Beese as one of the two majority shareholders of the entire Flip Out UK group,

being a director and co-founder, the other being a David White, whom he described as being the CEO.

(7) According to the ET3 response lodged by the first respondents, JOA Leisure Limited, they employ 600 people in Great Britain, and 80 of them are employed at the place where the claimant worked, being their premises at 89a, Southcroft Road, Rutherglen, Glasgow, G73 1UG.

(8) The claimant, who was employed as a senior manager at Flip Out Glasgow for many years, was originally employed by the first respondents, via the Aronson family, then owners of the business, and he previously reported to Clive Aronson as then managing director of JOA Leisure Limited.

(9) Further, the claimant was formerly a part-owner of that business. He had contractual entitlements to a company car and quarterly bonus. He also had a contractual discretion to award performance related bonuses to other management staff at Flip Out Glasgow.

(10) As General Manager at Flip Out Glasgow, the claimant had overriding responsibility for that business. As at March 2022, there were circa 100 staff working for Flip Out Glasgow.

(11) The other members of the senior management team at Flip Out Glasgow in March 2022, led by the claimant as General Manager, were Alexander Bruce (Assistant General Manager) and Fraser Watt (Assistant Manager).

(12) Susan Ferguson was Finance Manager at Flip Out Glasgow, and Carol Hughes was Customer Outreach Manager there. All 4 were direct reports to the claimant as General Manager.

(13) The claimant, Mr Bruce and Mrs Ferguson all left the employment of JOA Leisure Limited by reason of redundancy. Mr Bruce left on 17 June 2022, and Mrs Ferguson left before the claimant's employment ended on 29 June 2022.

(14) In his ET1 claim form, at section 6, the claimant provided no details about his earnings and benefits from employment, other than to confirm that he had been paid for a period of notice when his employment ended on 29 June 2022.

(15) In the first respondents' ET3 response, it was stated, at section 5, that the claimant's (annual) earnings from JOA Leisure Limited were £49,258 gross pay before tax, and £32,708 net normal take-home pay.

(16) It was further stated that the claimant was entitled to 5 weeks' notice, and that this was honoured and paid on a pay in lieu of notice basis, and that as regards employee benefits, the claimant had a quarterly bonus, subject to KPI targets; 100% discount on meals purchased from the venue; company vehicle up to the value of £650 per month; and the cost of a contract telephone.

(17) When the business of JOA Leisure Limited was acquired by Flip Out Limited, in or around February / March 2022, Mr Aronson resigned as a director of JOA Leisure Limited, and the claimant's line management was thereafter arranged though the Flip Out UK group, although the identity of his employer remained, throughout, JOA Leisure Limited.

(18) Flip Out Limited is a private limited company, company number 08432888, incorporated on 6 March 2013, according to Companies House, and with a registered office address at Anglia House, Norwich, NR7 0HR.

(19) Richard James Beese is a director of Flip Out Limited, having been appointed director on 2 July 2021, according to Companies House, and he holds various other directorships in other companies operating as part of the Flip Out UK group.

(20) Matthew Melling, Chief Operating Officer with FO Admin Limited, is the Operations Director of Flip Out UK and, in the period relevant for these Tribunal proceedings, he had meetings and correspondence with the

claimant concerning the bonus for his employment by JOA Leisure Limited.

(21) FO Admin Limited provide central support functions to companies in the Flip Out UK group, but it has no internal HR function. Its HR function is sourced externally from Steve Bloor at Cando HR.

(22) FO Admin Limited employs Mr Melling. Mr Melling did not line manage nor supervise the claimant's work at Flip Out Glasgow.

(23) After Flip Out Limited acquired the JOA Leisure Limited business, in or around March 2022, the claimant reported to Colin Perry, Regional Operations Manager with Flip Out UK.

(24) Mr Perry was, like Mr Melling, employed by FO Admin Limited. Mr Perry, in turn, reported to a Jon Thomas, National Operations Manager with Flip Out UK.

(25) The Claimant was employed as a General Manager at JOA Leisure Limited. He had contractual entitlements which included a quarterly bonus, 100% staff discount on meals purchased from the Flip Out Glasgow venue, an executive company vehicle value £650 per month (including fuel, insurance and upkeep costs), and a company telephone. His employer's pensions contributions were also at a rate of 8%. (document 2, pages 69, contract of employment) (document 8, page 87 and 88) [AC3]. The claimant did not have a contractual entitlement to a specified bonus payment amount.

(26) The Claimant was a member of the Respondent's pension scheme, which he understands was a defined contribution scheme. Under the Claimant's contract of employment, the Respondent made contributions of 8% of the Claimant's annual salary. The Claimant also made contributions of 5% towards his pension. The Claimant's pension contributions are shown on the Claimant's payslips.

(27) Document 1 is the staff handbook for Flip Out Glasgow (document 1, pages 1 – 68). Page 15 relates to the grievance procedure and page 65 relates to whistleblowing. [AC1]

(28) The staff handbook, dated 2020, but with no specific date of issue / re-issue, relates to Flip Out Glasgow trampoline arena, and runs to 68 pages, with content spread across 22 separate sections.

(29) At section 1 to the staff handbook (introduction), at page 3 of 68, it is stated that: “This Handbook is not contractual and does not form part of your terms and conditions of employment.”

(30) The grievance procedure, at section 6 of the staff handbook, at page 5 of 68, encourages staff, if they are unhappy with something which affects them at work, to raise it with their manager in the first instance, which failing speak to a member of the management team, as it is expected that most issues should be capable of being resolved in an informal manner without the need to undertake a formal investigation under the procedure outlined for raising a grievance.

(31) If a staff member feels that a matter would benefit from being raised formally, they should do so by making a written complaint, stating that it is being made under the grievance procedure, and a grievance will normally be dealt with by their manager and should be addressed to then directly. Where the grievance is directly concerned with the manager’s behavior, it is stated that it should be submitted to another member of the management team who will arrange for somebody who is not directly involved in the issue to deal with it.

(32) Provision is made for a grievance hearing to be arranged, and for a staff member to receive a written decision. If they are dissatisfied with the outcome of a grievance, then they may appeal, and separate provision is made for appeal in writing, and for an appeal hearing to be convened and conducted by an appropriate member of the senior management team, and the outcome of any appeal will be final.

(33) Whistleblowing is dealt with at section 20 of the staff handbook, at page 65 of 68. It states as follows:

"We encourage all our people to raise any concerns that they may have about any wrongdoing at any level within the business. Wrongdoing in this content means any breach of a legal obligation, risk to health and safety, a criminal offence being committed, a miscarriage of justice occurring or likely to occur, damage to the environment, or an attempts to conceal any of the above.

Any initial concern should be raised with your manager. However, if this is not appropriate then you should contact another member of the management team who will ensure that your concern is properly addressed.

You will not be treated unfavourably for raising a concern which you believe to be true and which is in the public interest.

Even if your concern proves to be unfounded you will not be subject (to) any reprisals from your manager, colleagues or any other employee. However, you must not make a deliberately false, malicious or allegation.

If you are the subject of an allegation of wrongdoing, and where it is appropriate to do so, you will be informed of the allegation and given every opportunity to explain the situation and put your side of the story. Disciplinary action will only be taken following a full investigation in accordance with our Disciplinary Procedure."

(34) The Claimant was employed by JOA Leisure Limited trading as Flip Out Glasgow from 6 November 2016 until 29 June 2022, where he was dismissed (document 2, page 69 – contract of employment) (document 80 and 81, pages 243 and 244 – 246 - dismissal letter) **[AC2].** As at the effective date of termination of employment on 29 June 2022, the

claimant had five years' continuous employment with the first respondents, and he had a clean disciplinary record clear of default.

(35) In terms of the claimant's contract of employment dated 30 November 2021, signed by the claimant, and by Mr Aronson for the company, as per copy produced to the Tribunal as document 2, at pages 69 to 75 of the Joint Bundle, it bears to have been entered into between JOA Leisure (trading under the name Flip Out Glasgow) and the claimant, and confirms that his employment under that contract began on 6 November 2016, and that the claimant was employed as General Manager, to be paid £56,000 gross salary per year, payable at 4 weekly intervals directly into his bank account, with his normal place of work as Flip Out Glasgow.

(36) There was no set pattern of work nor a set number of hours per month, and the claimant was to be provided with a schedule each week with at least weeks' notice of his shifts. He had a holiday entitlement of 33 days in each calendar year, excluding normal bank holidays; as a member of the senior management team, the business would contribute to his pension at the rate of 8% earnings; and for 2 years or more, but less than 12 years' continuous service, the company could bring his employment to an end by giving him 1 weeks' notice per year.

(37) There was reference to a first three-month probationary period, and, at clause 5, as regards "***Benefits***", it is stated (at pages 69 and 70 of the Joint Bundle) that:

"You will have (sic) ***be able to achieve a quarterly bonus at the discretion of the general manager this will be subject to KPI targets as defined in the quarterly review process. Whilst you are working you are entitled to a 100% staff discount on meals purchased from the venue. You will also be entitled to an executive company vehicle up to the value of £650 per month. The company will also cover the costs of any insurance or fuel along with the upkeep of this vehicle. The company will also cover the***

cost of your contract telephone during your employment as you will be required to use this for business use. We may offer to buy out these provisions at any time but only after consultation and agreement with yourself."

(38) A copy of the P45 issued to the claimant by JOA Leisure Limited on 12 July 2022, showing his leaving date of 29 June 2022, was produced to the Tribunal as an additional document lodged by Mr Melling, and added in to the Joint Bundle, at pages 306 to 310, along with two copy payslips issued by JOA Leisure Limited to the claimant, dated 5 June and 5 July 2022.

(39) Two earlier payslips dated 25 March 2022 and 5 May 2022 were also produced to the Tribunal, and added into the Joint Bundle, at page 307.

(40) In the copy payslip dated 25 March 2022, the claimant was paid by JOA Leisure Limited a gross salary of £3,384.62, less deductions for PAYE tax, NI and employee pension, producing net pay of £2,383.00.

(41) In the copy payslip dated 5 May 2022, the claimant was paid £8,105.13 gross, comprising salary of £4,666.67, backpay of £1,938.46, and additional pay (bonus) of £1,500, less deductions for PAYE tax, NI and employee pension, and pre-paid £1,252.03, producing net pay of £3,763.07.

(42) In the copy payslip dated 5 June 2022, the claimant was paid a gross salary of £4,666.67, less deductions for PAYE tax, NI and employee pension, producing net pay of £2,937.38.

(43) Further, in the copy payslip dated 5 July 2022, the claimant was paid £19,772.17 gross, comprising salary of £4,511.11, bonus of £2,500, notice of £1,076.92, holiday pay of £214.56, and redundancy pay of £4,282.50, less deductions for PAYE tax, NI and employee pension, producing net pay of £13,065.56.

(44) There were produced to the Tribunal, and added into the Joint Bundle, as pages 311 to 319, various Bank of Scotland bank statements for

the claimant's joint account with his wife, Mary Gallacher, vouching FPI (faster payments in) payments received by the claimant from JOA Leisure Limited (or others, on its behalf) in the period 27 January to 5 July 2022, namely:

- payment of £4,063.50 on 31 March 2022 paid by FO Ventures Limited
- payment of £3,036.51 on 29 April 2022 paid by FO Ventures Limited
- payment of £3,763.07 on 5 May 2022 paid by FO Admin Limited
- payment of £2,937.38 on 1 June 2022 paid by FO Admin Limited
- payment of £4,063.51 on 6 June 2022 paid by FO Ventures Limited, and
- payment of £13,065.56 on 5 July 2022 paid by FO Admin Limited.

(45) As part of the Flip Out UK acquisition of Flip Out Glasgow, it was considered appropriate and necessary, by Mr Perry, Regional Operations Manager, Flip Out UK, to re-set the senior management roles and arrangements in place at Flip Out Glasgow, with the intention to put in place at Glasgow changed management team arrangements that matched those in place at all other Flip Out UK parks.

(46) On 25 March 2022, Matthew Melling, Operations Director with Flip Out UK, had sent an email to Steve Bloor (external HR consultant, and Flip Out UK HR Advisor), Jon Thomas (National Operations Manager, Flip Out UK), and Mike Randall (Head of Compliance & Facilities, Flip Out UK), to begin preparation for the Glasgow management team re-set programme, after the Easter school holiday period.

(47) A copy of that email was produced to the Tribunal as document 3, at page 76 of the Joint Bundle. It referred to a review of the Glasgow operation and team continuing, and being in a position to initiate the reset process.

(48) There was also produced to the Tribunal, as document 4, at page 77 of the Joint Bundle, a subsequent email from Steve Bloor to Jon Thomas and Mike Randall, dated 3 April 2022, attaching draft letters (from Mike Randall) to George (Gallacher), Alex (Bruce), and Fraser (Watt), to set out the change process and consultation period.

(49) Those draft letters included notification of at-risk position on Monday, 25 April 2022, end of consultation on Friday, 6 May 2022, and notification of applicable redundancy entitlements based, for illustrative purposes only, on an effective date of termination of employment, by reason of redundancy, on Tuesday, 31 May 2022. The first draft re-set letter (dated 25 April 2022) intended for the claimant was produced to the Tribunal, as document 5, at pages 78 to 81 of the Joint Bundle.

(50) A revised, second draft re-set letter for the claimant was attached to Mr Bloor's subsequent email of 19 April 2022 to Colin Perry, Jon Thomas and Mike Randall, as produced to the Tribunal, as documents 6 and 7, at pages 82 to 86 of the Joint Bundle. It removed the "draft" watermark, changed the sign off name to Colin Perry, Regional Operations Manager, and changed the email address for any consultation comments from Mr Randall to Mr Perry. The timeline remained as before.

(51) There was an exchange of emails between the Claimant and Mr Melling between 22 March and 30 March 2022 regarding the bonus – additional documents at 76 a/ f. [AC3A]

(52) In terms of that email exchange, it arose because, on 15 March 2022 (page 76e of the Joint Bundle) the claimant, having returned from holiday, had a meeting with his managers the previous day, and they had asked him what bonus they would be getting that month, as they

normally got it quarterly, and the last bonus was paid mid-December (2021), and the next bonus for the last quarter was due that week. He had therefore emailed Mr Melling to enquire.

(53) Mr Melling's email of 18 March 2022 (page 76d) asked the claimant to outline what he was proposing in terms of the actual monetary value each manager would receive, by way of bonus, and the claimant replied, by email on 22 March 2022 (page 76c/d) with proposals for 9 staff, totalling £7,700, including £2,500 for himself.

(54) When Mr Melling replied to the claimant, on 29 March 2022 (page 76b/c), he stated that he was happy for a bonus to be awarded for the quarter, however, "***the value must be in line with the equivalent maximum bonuses that the other group park management teams can achieve."***

(55) He stated that the maximum monthly bonus based on role was £500 for a General Manager, £250 for an Assistant General Manager, and £125 for a Duty Manager, and so he suggested the claimant fall into the £500 bracket, with Alex and Fraser at £250 each.

(56) When the claimant responded to Mr Melling, by email later that same day, 29 March 2022 (page 76b), he stated that:

"***All managers in the business have a contract with JOA Leisure Ltd and the bonus system that they have been getting paid reflects this. These contracts have been in use since April 2017 and I do not think it would be prudent or legal for you to change the bonus system that was in place before you bought the company…. The bonus is now 2 weeks overdue and seems to be causing negative feedback from managers who are still coming to terms with the takeover and I know some of them have been taking advise*** (sic) ***from employment lawyers. …. I think that you have to look at these contracts and not just expect everyone to move over to your system without any consultation periods."***

(57) When Mr Melling replied to the claimant, on 29 March 2022 (page 76a), he stated that he had reviewed the contracts prior to responding to his original email on the subject, and he stated as follows:

"***The wording in the contracts surrounding the bonus scheme does not mention any links to a % of profits in excess of targets, nor does it mention any minimum level. There will be a consultation period before changing the metrics of the bonus scheme, but given the above, I do not believe there is one needed in relation to the monetary value of the awarded bonuses under the current scheme. I can fully appreciate that the team will naturally feel disappointed & disheartened that they are not receiving a figure they were hoping for. However, as I'm sure you can appreciate as an experienced business person, we simply cannot have the management team of one park earning a bonus 5 times higher than that of the other 10 parks on the group owned portfolio."***

(58) In the claimant's reply to Mr Melling, later on 29 March 2022 (page 76a), it was stated that:

"I think that this will fall into the Custom and Practice part of an employee contract, doesn't matter that there are no % figures etc the bonuses that they have received in the past the dictates the policy, also I don't think that the new owners can dictate the bonus figures from December up until 11 Feb, I understand that you cannot have 2 different bonus structures but to change the existing one will require consultation and agreement from the people it will affect, the custom and practice has been brought to my attention by the managers who are in contact with employment law specialists so think this has to be checked."

(59) On 20 April 2022, Mr Melling emailed the claimant about the quarterly bonus conclusion. A copy of his email was produced to the Tribunal, as document 8, at pages 87 and 88 of the Joint Bundle. He

commented that he had reviewed everything that had been submitted and he had determined that "***there is no clear pattern on how bonuses have previously been calculated & awarded"***.

(60) He summarised some of the "***key discrepancies & conflicting information"*** that had led him to that conclusion, and stated that he had overlooked the lack of consistency in prior awarded bonuses, and he had decided to approve bonus payments of £1,500 for the claimant, and £750 each for Alex and Fraser, along with some other bonuses of £650 or £375 for 6 other named staff.

(61) On 21 April 2022, the Claimant and his senior management colleagues at JOA Leisure Limited submitted a grievance which was sent to Mr Matthew Melling, Operations Director of Flip Out UK (document 9 and document 10, pages 89 and 90 – grievance) **[AC4]**

(62) Described as a "***Collective Grievance***" in the document attached, the covering email from the claimant to Mr Melling on 21 April 2022 stated that: "***After sitting down with the management team and putting forward the changes in bonus structure that you have proposed, we feel that this is a major change from our contracts and after taking advice have been advised to submit the attached formal grievance letter."***

(63) The grievance letter (produced as document 10, at page 90 of the Joint Bundle) was signed by each of the claimant, Alex Bruce, Fraser Watt, Carol Hughes, and Susan Ferguson. It stated as follows:

"Dear Matthew

We are writing to raise a collective formal grievance.

On numerous occasions, verbally and in writing (in March), you have provided assurances that our terms and conditions would remain the same, following the sale of JOA Leisure to Flip Out UK. However, that has not been the case on that several important areas:

(i) ***For some of us you are proposing that our employer would change to Flip Out UK. We have not gone through any proper consultation process under TUPE for that. It is unfair for you to impose that change without following the proper legal processes. For those of us affected by a proposed TUPE transfer, our belief is that our terms and conditions should remain the same.***

(ii) ***Our contractual bonus scheme is really different to what you are proposing to pay us for our bonus and we have not agreed to this change. We wish to keep our existing bonus scheme. If that isn't possible, our contracts say you can consult and make us an offer to buy those terms out. If not, we expect to be paid in line with the current contractual method. You cannot change this unilaterally.*** (sic) ***Without discussion and agreement from the person named on the contract.***

(vi) (sic) ***For some of us, you are proposing to change our hours of work under the proposed new contract. This is very different to what those people have under their contracts right now.***

(vii) (sic) ***We would like clarification on the pension contributions that are being applied to us since you bought JOA Leisure as we believe we are suffering a loss now.***

You have withheld our February bonus payments while you tried to enforce contractual changes on us. That is unlawful and a breach of our contracts. We expect to be paid our full February bonus, plus interest, without further delay. We also seek clarification on the upcoming bonus, which we are already two thirds of the way to securing. Given the fantastic sales achieved

by the team despite the stressful work environment this situation is causing.

Separately, as part of our grievance and as a separate subject access request, we each individually would request copies of our personal data that the company hold including any data from management meetings when we have been discussed, messages, emails and discussions where we are spoken about, and any data in emails about us which feature our names or any variation of it, such as abbreviations or incorrect spellings. Each person requests this information separately and privately from everyone else named in this collective grievance.

You should respond to each person privately on this Subject Access Request point, and collectively via George and Alex on the grievance point please.

We look forward to hearing from you.

Kind regards

Flip Out Glasgow Management Team."

(64) In relation to point (i) of the grievance, there was produced to the Tribunal, as additional documents added in to the Joint Bundle, at pages 81a / 81h, copy of an email exchange between Carol Hughes, Customer Outreach Manager, at Flip Out Glasgow, and Matthew Melling, Operations Director at Flip Out UK, between 31 March and 8 April 2022, concerning her quarterly bonus from JOA Leisure Limited, and whether or not TUPE would apply to her post in the event of its transfer to the Flip Out UK central team.

(65) In particular, in his email of 8 April 2022 to Ms Hughes, Mr Melling had stated that: "***I have determined that the TUPE process is not the correct process for these circumstances."***

(66) On 21 April 2022, Mr Melling acknowledged the grievance and advised that he was going on 2 weeks annual leave and would fully investigate the collective grievance on his return (document 11, pages 91 and 92) **[AC5]**

(67) In the interim, in his email message on 21 April 2022 to the claimant and Mr Bruce, Mr Melling put forward to the claimant and Mr Bruce some initial observations and asked for some further information and clarity that would help him with the investigation when he returned**.**

(68) In particular, Mr Melling's email of 21 April 2022 stated: ***"I can confirm that no employee from JOA leisure has been TUPE'd to our FO UK company."***

(69) On 21 April 2022, Mr Bruce replied by email to Mr Melling regarding his timeline for dealing with the grievance, as per copy produced to the Tribunal as document 12, at page 93 of the Joint Bundle, stating that it was not acceptable as the team were suffering financial restrictions due to their bonuses being withheld.

(70) Mr Bruce further stated:

"I understand that circumstances arise and annual leave is a factor in the delay. However the company is of sufficient size and has other senior officers who can resolve this matter in your absence. Therefore I would suggest but our grievance is considered in a timeous manner without delay as per the ACAS approved codes of practice. If you feel you cannot delegate this process to your subordinate managers, may I suggest escalating the matter to a senior officer."

(71) On 23 April 2022, the Claimant emailed Mr Richard Beese and Mr David White and attached a copy of the grievance. (document 13, page 94, 95, 96) **[AC6]** [Note by Tribunal – the Agreed Chronology wrongly dated this email as 25 April 2022– we have inserted the correct date]

(72) On 25 April 2022, Richard Beese replied to the claimant's email of 23 April 2022, with copy to David White. His reply, copy produced to the Tribunal as document 14, at page 97 of the Joint Bundle, stated that he had read the claimant's email and attached correspondence, and, as far as he was concerned at that stage, Mr Melling had simply requested further information; he had allocated bonus amounts to be paid in the upcoming payroll, and as Mr Beese was only picking this up third hand, the claimant would have to wait Mr Melling's return, but they were discussing the formal grievance letter internally and they would come back to him shortly.

(73) On 25 April 2022, the Respondent's Mr Colin Perry (Regional Operations Manager) called a meeting with the Claimant, Alexander Bruce (Assistant General Manager for Flip Out Glasgow) and Fraser Watt (Assistant Manager for Flip Out Glasgow). During the meeting Mr Perry made the Claimant, Mr Bruce and Mr Watt aware that they would be carrying out a redundancy process and that their jobs were at risk. (follow up email from Mr Perry as per below) **[AC7]**

(74) Following the 'at risk meeting', Mr Perry issued the Claimant and his colleagues with an 'at risk letter' dated 25 April 2022 (document 15, Pages 98 and 99, document 16, pages 100 – 103, document 17, pages 104 – 106 and document 18, pages 107 – 109) **[AC8]**

(75) That "at risk" letter (document 16, pages 100 to 103) gave notification of at-risk position and start of consultation on Monday, 25 April 2022, with Friday, 29 April 2022 to express interest in either of the two new jobs, with end of consultation on Tuesday, 3 May 2022, and Friday, 6 May 2022, to be slotted in to one of the two new jobs, or notified of redundancy.

(76) Notification of applicable redundancy entitlements based, for illustrative purposes only, on an effective date of termination of employment, by reason of redundancy, on Tuesday, 31 May 2022, were provided.

(77) In his letter, Mr Perry advised the claimant (as also Mr Bruce and Mr Watt, who received similar letters) that the changed arrangements for Flip Out Glasgow included the replacement of the existing General Manager, Assistant General Manager and Assistant Manager job roles at Glasgow, by a new General Manager job role and a new Assistant General Manager job role.

(78) Job descriptions were attached for the two new jobs and Mr. Perry highlighted the key points of change as follows:

- ***"The new job roles are focused on the operational management of the park.***
- ***Within Flip Out UK the commercial, financial management, and other professional portfolios of work are carried out by the central team. These types of functions do not exist at park level within Flip Out UK.***
- ***The salary level of the new General Manager role is circa £ 35-40K pa.***
- ***The salary level of the new Assistant General Manager role is circa £23-25k pa.***
- ***The Flip Out UK bonus scheme applicable to the new job roles operates on KPIs set by the relevant National and Regional Operations Managers, and can be expected yield significantly reduced individual bonus payments than are currently the case at Flip Out Glasgow.***
- ***There are no company car or free meal arrangements applicable to the new job roles."***

(79) Mr Perry's letter further stated to the claimant that:

"We recognise that in the short period since the acquisition we have not been able to gain a comprehensive knowledge about the

actual content of the three job roles currently in place at Flip Out Glasgow. Our direct observations to date point to the existing jobs roles having a very different purpose and focus from the new operational management roles to be introduced. However, if you feel we are wrong about this, please provide your existing job description directly to me, and I will be happy to review any such information in discussion with you as part of the consultation arrangements that are set out below.

Notwithstanding the opportunity to review your current job description, I want, at the outset, to re-assure you that I recognise that the changes summarised above are significant and substantive. In relation to your own existing employment, I fully understand and accept that neither of the two new job roles can be classified as offering suitable alternative employment.

Regrettably this therefore creates a so-called 'at risk' position affecting your current job role at Flip Out Glasgow. This means that if you decide that you do not wish to be slotted in to either of the new job roles, it is probable that the Company would reluctantly need to make you redundant.

Very importantly, the notification of this at-risk position is accompanied by a period of individual consultation with you. The purpose of the consultation Is to work with you to try to avoid the at-risk position becoming an unwanted compulsory redundancy, and also to respond to any ideas or questions that you may have."

(80) Further, Mr Perry's letter to the claimant also stated that:

"*Whilst I recognise that neither of the two job roles can be classified as suitable alternative employment, it is certainly the case that they represent alternative jobs. As part of the at-risk position and the consultation, I therefore want to provide the opportunity for you to express any interest you may have in either of the two new job roles.*

… It is also important to underline that because I recognise the significant changes that slotting in to either of the new job roles would entail, I would expect to operate a 3-month trial period in the new job role. This would operate on a mutual no-obligation basis, with the purpose of giving you a good 'real world' opportunity to see whether you want to continue in the new role, and also for the Company to assess whether you are well suited to the changed role.

For your re-assurance, if during or at the end of the trial period either party was not content or did not wish to continue with the new job, you would still be eligible for the redundancy arrangements that might have applied in relation to your current job at Flip Out Glasgow. The only change would be that the effective date of redundancy, used for the calculation of your redundancy entitlements, would be updated to the new end of trial period date.

I therefore hope that you will give careful consideration to each of the two new alternative job roles."

(81) The Claimant responded to Mr Perry's email (document 19, page 110). Mr Perry emailed the Claimant, Mr Watt, Mr Bruce and advised that he had taken the decision to pause the consultation arrangements (document 21, page 113). **[AC9]**

(82) This exchange of correspondence was on 25 April 2022. The claimant, in his e-mail to Mr. Perry, copied to Mr Bruce and Mr Watt, had stated as follows:

"*We are extremely upset and disappointed that the business has placed us at risk of redundancy despite verbal and written assurances less than 1 month ago that nothing in our contracts would be changing. We firmly believe this has happened because of the grievance we submitted to Matthew last week. This is victimisation and it should not be happening. We request the*

consultation be stopped immediately, and our grievances heard properly. Matthew was corresponding with us on our grievances before he went off on holiday, so you are incorrect to state that he was on annual leave when we sent it to him.

Please treat this as a further grievance on the grounds of victimisation. We have been placed at risk because we raised a grievance."

(83) Mr Perry sought guidance from Jon Thomas and Steve Bloor, by email (page 110), and there was then an email exchange between Mr Perry and Mr Bloor, the Flip Out UK HR Advisor, about the text of an email reply to be sent to the claimant (at pages 111 / 112), with Mr Perry emailing the claimant later on 25 April 2022, at 20:00 hours, as per pages 113 / 114.

(84) In that email to the claimant, at page 113 of the Joint Bundle, copied to Mr Bruce and Mr Watt, as well as Mr Thomas, National Operations Manager, Mr Perry stated that:

"… I hereby advise my decision to pause the consultation arrangements associated with the proposed re-set programme. This means that there will be no further action order the proposed re-set programme until further notice, and the timeline set out on page 4 of my letter to you no longer applies.

It would be wholly inappropriate for me, or any other Flip Out UK senior colleague, to make any comment about (quote) "a further grievance on the grounds of victimisation" until the first grievance is determined.

Based on what Matthew has set out in his e-mail to you on 21 April, I would therefore expect that the next action will be after 5 May. At that time I would anticipate that Matthew will be in touch again with you all."

(85) On 7 May 2022, Mr Melling sent a letter entitled 'your letter of grievance' to Claimant (document 22, pages 115 and 116). **[AC10]**

(86) In that letter, Mr Melling replied to the claimant's grievance letter dated 20 April, sent to him on 21 April 2022. He requested further information from the claimant by no later than 12 noon on Wednesday, 11 May 2022, and, subject to receiving the claimant's written response to his set questions, he planned to conclude his investigations by close of play on Friday, 13 May, and then be in a position to write to him about convening an individual grievance meeting.

(87) On 11 May 2022, the Claimant emailed Mr Beese (document 23, page 117). **[AC11]**

(88) In that email to Mr Beese, the claimant stated as follows:

"I am sad it has come to this, however due to Mathew's continued disregard for our employment rights, I have been forced to take legal advice. My legal advisor has told me to make you all aware of the following points:

1. ***Under the ACAS Code, I do not believe Matthew should be handling the grievance as these issues have been raised to him previously and I am concerned over his ability to conduct a fair grievance procedure. I now formally Request that this is handled by a more senior manager to ensure Fairness.***

2. ***The Acas Codes of practice say that the next step in the process is to hold the grievance meeting.***

3. ***Our employment lawyer has advised me not to proceed any further until Matthew is removed from handling the process. Please can you arrange a suitable replacement and advise.***

I would like to request that this procedure is handled within the timeframes recommended by ACAS to avoid any further detrimental effects on my mental health as this has been a major issue since the takeover in Feb.

I look forward to your response."

(89) In his evidence to this Tribunal, the claimant stated that he had taken this legal advice from Mr Musab Hemsi, solicitor with Anderson Strathern, Glasgow, the solicitor who later lodged his Tribunal claim.

(90) A similarly worded email, from Mr Bruce to Mr Melling, Mr White and Mr Beese, was emailed to them on 11 May 2022, as per document 24, at pages 118 and 119 of the Joint Bundle.

(91) Further, the claimant also emailed a similarly worded email to Mr Melling, Mr White and Mr Beese, on 11 May 2022, as per document 25, at pages 120 and 121of the Joint Bundle.

(92) On 12 May 2022, Mr Melling emailed the Claimant entitled 'your letter of grievance' (document 28, pages 128). **[AC12]**

(93) Mr Melling advised the claimant that Mr Beese and Mr White had asked him to make it clear that they would not be replying to the claimant's email of 11 May 2022, and that "***for you to be trying to escalate your grievance to a more senior manager presents as disingenuous."*** He noted that the claimant had not answered the questions first asked of him on 21 April and asked for a second time on 6 May, and asked him again, for a third sand final time, to reply by no later than 5:30pm on Friday, 13 May 2022.

(94) In writing to the claimant, Mr Melling stated as follows:

"***It is beholden on the company to make it clear to you that you should respond properly to the company's questions. You should not continue to act in ways that obstruct or delay the company's quite proper enquiries into the grievance you have raised…. My***

letter to you on 6 may set out very clearly how I planned to move forward with your grievance... Any further delay created by you will be unacceptable."

(95) The claimant replied to Mr Melling's questions by email, sent to him on 12 May 2022 – document 28, at pages 127 and 128, of the Joint Bundle.

(96) On 16 May 2022, Mr Melling issued a grievance caller letter (document 31, pages 137 – 140). **[AC13]**

(97) It called the claimant to an online, Googlemeet meeting, to be held on Monday, 23 May 2022, under the Flip Out UK grievance procedure, as a Stage 2 formal grievance, a copy of which was attached for the claimant's reference.

(98) A copy of that Flip Out UK grievance procedure was produced to the Tribunal, as document 32, at pages 141 and 142 of the Joint Bundle. It is stated to be an abstract taken from the standard Flip Out UK employee handbook, May 2022, involving a 3-stage grievance procedure.

(99) Mr Melling's grievance caller letter identified his understanding of the claimant's grievances as follows:

"1. That the bonus paid to you in March 2022, and two other employees named by you, was different to the bonus payment amounts you had submitted, and was different to your other bonus payment submissions for all other managers.

2. That your pension contribution, as paid by the company, is lower than was previously the case with JOA Leisure (trading as Flip Out Glasgow.)"

(100) On 19 May 2022, the claimant emailed Mr Melling (page 153 of the Joint Bundle) to confirm he would attend on 23 May 2022, along with

Mr Bruce as a witness, but asking why they were using the Flip Out UK grievance procedure as his current contract was still with JOA Leisure Limited.

(101) On 21 May 2022, Mr Melling emailed Mr Gallagher in relation to the grievance procedure to be used at grievance meeting (document 38, page 155). **[AC14]**

(102) Mr Melling pointed out to the claimant that his JOA Leisure Limited contract stated very clearly that the grievance procedure did not form part of the contract, and commented that, while there were no material differences of any significance between the two procedures, the claimant "***is an employee of Flip Out UK group, it is right that the Flip Out UK grievance procedure should be applied".***

(103) Notwithstanding this, and as a gesture of goodwill, Mr Melling then confirmed that the grievance meeting on 23 May 2022 would be conducted in accordance with the JOA Leisure Limited grievance procedure.

(104) On 23 May 2022, Mr Melling heard the Claimant's grievance meeting (document 42. page 165). **[AC15]**

(105) In his evidence in chief to the Tribunal, Mr Melling referred to his handwritten, one-page notes of the grievance meeting with the claimant, held on 23 May 2022, produced as document 42, at page 165 of the Joint Bundle, and he stated that they were his full notes of the meeting, which he had recorded started at 3pm, and while it did not record an end time, he thought it was maybe 30 to 45 minutes duration.

(106) Mr Melling recalled that Mr Bruce was brought along by the claimant as his employee representative, as per the company's grievance procedure, but he was not there to speak on behalf of the claimant, and he described Mr Bruce as being more a companion, for moral support.

(107) On 25 May 2022, Mr Melling issued the Claimant with the grievance outcome letter ([document] 39, pages 157 – 159) **[AC16]**

(108) He made separate findings on each of the two points of the claimant's grievance.

(109) Mr Melling decided that, notwithstanding the fact that using the claimants own declared approach would have yielded no bonus payment to him for the period, Mr Melling's decision at the end of the grievance meeting meant that he would not be changing or withdrawing the bonus amount he decided the claimant should receive for the period in question.

(110) On the matter of pension contributions, the company undertook to rectify inadvertent miscalculations, and the claimant stated that that would remedy his grievance on that matter.

(111) On 26 May 2022 Mr Melling emailed the Claimant relating to pension. On 26 May 2022, the Claimant responded to Mr Melling's email (document 33, 34 and 35 pages 143 – 146). **[AC17]**

(112) Mr Melling attached calculations from the payroll provider showing the pension catch up payments that would be made by the company for the claimant, and 3 other affected employees. The claimant confirmed that the figures looked ok to him.

(113) On 27 May 2022, the Claimant emailed Mr Melling regarding grievance appeal document 40, page 160,161). **[AC18]**

(114) The claimant stated that he was disappointed with the outcome, and that he would be submitting a letter of appeal. He asked for a copy of Mr Melling's notes, and also asked who would be conducting the appeal process, as his letter of appeal would be a direct criticism of Mr Melling and his decisions.

(115) On 27 May 2022, Mr Melling responded to the Claimant's email above (document 41, page 162) **[AC19]**

(116) Mr Melling confirmed that the claimant's appeal should be submitted in writing direct to him, and he would directly pass it to the person to be designated to conduct the appeal hearing once that had been determined by the company.

(117) He further confirmed that he would not be conducting the appeal hearing, and that any subsequent correspondence to the claimant would be from the person the company designated to conduct the appeal hearing.

(118) On 27 May 2022, Mr Melling a provided copy of notes of meeting above at point 13 (document 42. page 165). **[AC20]**

(119) On 30 May 2022, the Claimant submitted his appeal (document 43, pages 166 and 167). **[AC21]**

(120) In his appeal, the claimant stated that he did not believe that Mr Melling's proposed resolution was justified, and that he believed he had been treated unfairly on five specific points, as follows:

"I. Was heard by Matthew Melling, Matthews own decisions have been drawn into contention during the grievance and himself appointing as the grievance chair is a direct contravention of the ACAS codes of practice.

2. As highlighted by myself and my colleagues during their meetings, the three senior managers including myself received job at risk letters a day after we submitted our grievance. We believe this to be direct retaliation by Mr Melling and the company.

3. I can clearly demonstrate that the bonus payable to the managers is entirely at the company "discretion" (as it states in the contract) of the general manager, at no point did I state but I was the one who determined that my bonus, this was entirely at the discretion of Clive and Jacob, under normal procedures I would have been awarded at least

double assistant GM bonus but on this occasion only awarded 60% increase for the period in question however Mr Melling took the decision to reduce this. This is entirely out with my contracted terms.

4. Mr Melling refuses to acknowledge the case put forward by myself but the business made an additional £I02k which was used by Clive Aronson to pay off additional debts to facilitate the sale of the business. This income was still received by JOA Leisure and should the business not have changed ownership would have shown as profit. The sale of the business is no fault the management team, we should not be penalised financially for this.

5. I also prior to sending this letter of grievance asked who it should be addressed to as again addressing a letter of appeal to the person or persons whose decisions it calls into question is a direct contravention of the ACAS codes of practice and awards Mr Melling an unfair advantage with regards to preparation time ahead of the appeal meeting. However, the response was that I was to send this to Mr Melling and no more discussion was to be had."

(121) Further, the claimant stated that he had been employed for five plus years with an exemplary employee record, his commitment and dedication to the business also made him invest over £50k off his own money into the business, and all of this time working only under the direct supervision and guidance of the owners within Flip Out Glasgow, when he had always received a bonus closer to double the managers.

(122) The claimant further stated as follows:

"This whole process has been very stressful to me and my family, the fact that a lot of processes etc have been changed without prior notice or consultation makes me sure that FO UK have an

alterior (sic) [ulterior] ***motive in removing a management team that have went above and beyond what has been requested of them.***

If I am successful with this appeal, I would expect that Mr Melling's conduct during this process is thoroughly investigated by a senior staff member and systems are put in place to avoid anyone else being subjected to this type of treatment which in my belief is paramount to bullying in the workplace as demonstrated by this blatant refusal to follow ACAS guidelines once pointed out or his refusal to alter his approach in relation to these matters even after these direct breaches of guidelines have been continuously pointed out. I would also expect that the remainder of my bonus is paid in full immediately along with any bonuses due for the current quarter."

(123) On 30 and 31 May 2022, there was an email exchange between the Claimant and Mr Melling regarding bonus awards for March – May 2022 (document 46, pages 171, 172 and 173). **[AC22]**

(124) These related to the claimant and other staff. The claimant was to be paid £2,500 bonus by the next payroll of 5 June 2022. The claimant asked Mr Melling for an itemised rationale for each of the individual amounts set out by Mr Melling, commenting that the actual profit figure for the period would not be known until the month end accounts after 5 June 2022. So as not to prejudice in any way the progress of the claimant's grievance appeal, Mr Melling stated that he would refrain from any further comments.

(125) On 31 May 2022, Mr Beese emailed the Claimant regarding his appeal (document 47, page 174 and 175). **[AC23]**

(126) Mr Beese, whose email sign off was co-owner of Flip Out UK, advised the claimant that he would be conducting the appeal hearing against the grievance decision dated 25 May 2022. He confirmed that the appeal hearing would again be conducted as set out in the JOA Leisure Limited grievance procedure, and that he would review the grounds of

appeal set out by the claimant, as also review the relevant case papers and decide how he would be conducting the claimant's appeal hearing.

(127) In particular Mr Beese stated as follows:

"***Based on my initial reading of the five grounds you set out, I need to make a couple of important procedural points, as follows-***

Your point 1. Your appeal was not heard by Matthew Melling. Matthew conducted your grievance meeting. I will be conducting your appeal hearing.

Your point 2. This was not part of your grievance as heard on 23 May. You cannot now introduce something but was not part of your grievance as heard on 23 May. I will therefore not be admitting your point 2 as part of your appeal hearing.

Your point 5. I am concerned by your reference to quote "awards Mr Melling an unfair advantage with regards to preparation time ahead of the appeal hearing." The grievance procedure, including your appeal hearing, is not about 'advantage' or 'disadvantage'. Your reference suggests you have another agenda. I must also underline but I will decide how I will be conducting your appeal hearing."

(128) On 31 May 2022, the claimant emailed Colin Perry to let him know that he had been given a sick line for stress from his local GP that lasted until the end of June 2022, and that he therefore would not be in work the following day, but confirming that he would still, during this time, be available for his appeal process, as he stated that "***I feel that I need to get this out of the way to help my recovery."***

(129) A copy of this message was produced to the Tribunal as document 48, at page 176 of the Joint Bundle. A copy of the GP sickness absence certificate dated 30 May 2022, received from the claimant, was produced to the Tribunal as document 54, at page 185 of the Joint

Bundle. It stated that the claimant was not fit for work, for 28 days, because of stress at work.

(130) On 1 June 2002, Richard Beese, co-owner / director of Flip Out UK, emailed to claimant, giving him early notification that his appeal hearing would be held on Friday, 10 June, and it would be conducted online, and the relevant information would be provided in due course. A copy of this message was produced to the Tribunal as document 49, at page 177 of the Joint Bundle.

(131) The claimant replied to Mr Beese, by email on 1 June 2022, advising that he was not available for that date, but he could do any other date up to and including 9 June 2022. A copy of this message was produced to the Tribunal as document 50, at page 179 of the Joint Bundle.

(132) Mr Beese replied to the claimant, on 1 June 2022, offering an alternative on Wednesday, 8 June 2022, again via online link up, and stating that his preference is always to hold an appeal hearing in person, however, in view of the claimant's current period of absence due to illness, he recognised that the claimant might prefer a modified format.

(133) A copy of this message was produced to the Tribunal as document 51, at page 180 of the Joint Bundle. Mr Beese offered the following options: a re-arranged on line appeal hearing at 9:30am on Wednesday 8 June; a special written submission appeal to take place on Wednesday, 8 June; a special written submission appeal to take place before Wednesday 8 June (offering a choice of Friday 3 June, Monday 6 June, or Tuesday 7 June).

(134) On 2 June 2022, the claimant replied to Mr Beese, stating that he would go with option 1 (the online appeal hearing), and commenting that: "***I would have preferred a face to face meeting but this will have to do.***" A copy of this message was produced to the Tribunal as document 55, at page 186 of the Joint Bundle.

(135) On 6 June 2022, Mr Beese emailed the Claimant regarding appeal meeting (document 56, pages 187 - 188 and document 57, pages 189 - 192) **[AC24]**

(136) Mr Beese's covering letter of 6 June 2022 set out the arrangements for the claimant's grievance appeal hearing online, via Zoom, for 9:30am on Wednesday, 8 June 2022. An attachment to his letter set out how Mr Beese would conduct and chair the hearing.

(137) On 7 June 2022, the claimant confirmed to Mr Beese that he would attend the online appeal hearing, and that Alex Bruce would be his witness. A copy of this message was produced to the Tribunal as document 58, at page 193 of the Joint Bundle.

(138) On 8 June 2022, the Claimant's grievance appeal hearing was heard by Mr Beese (document 59 and 60, pages 193 – 194). **[AC25]**

(139) The claimant attended, online, via Zoom, accompanied by Mr Bruce, as a companion / witness. Mr Beese, as chair of the hearing, was supported by Steve Bloor, Flip Out UK's HR Advisor.

(140) There was produced to the Tribunal, as documents 59 and 60, at page 194 and 195 of the Joint Bundle, 2 pages of handwritten notes of the claimant's grievance appeal hearing with Mr Beese, those notes having been taken by Mr Bloor.

(141) Scheduled to start at 09:30am, the Zoom meeting did not start until 09:51, while awaiting the link up, according to Mr Bloor's notes, and he recorded it as closing at 10:09 am.

(142) Mr Melling was not in attendance at that grievance appeal hearing, but he was made aware of the outcome.

(143) On 9 June 2022, Mr Beese emailed the Claimant attaching grievance appeal outcome letter (61, pages 196 – 197 and document 62, pages 198 – 203) **[AC26]**

(144) As per the findings and decision part of Mr Beese's letter of 9 June 2022, at page 6 of 6, point (2), as produced to the Tribunal at page 203 of the Joint Bundle, Mr Beese dismissed each of the four admitted grounds of the claimant's appeal. Mr Beese had earlier rejected another ground of appeal as not admissible, as advised by him to the claimant on 31 May and 6 June 2022.

(145) Further, Mr Beese commented, at his point (3) , that:

"More generally I note the marked divergence between the tone of what you presented in your appeal hearing and the reality of your preceding actions and communications."

(146) At his point (5), Mr Beese noted that, in accordance with the JOA Leisure grievance procedure, his decision as set out in his 6-page outcome letter to the claimant was final.

(147) On 9 June 2022, Mr Melling issued a letter entitled 'Glasgow Bonus Scheme withdrawal' to the Claimant and other employees (document 63, page 204 and document 64, page 204). **[AC27]**

(148) The Tribunal notes that the covering email from Mr Melling referred to in [AC27] was so entitled, document 63, at page 204, but the letter from Mr Melling (document 64, at pages 205 / 206) was entitled "Bonus scheme arrangements at Flip Out Glasgow".

(149) Mr Melling's letter was written on the back of Mr Beese's grievance appeal outcome sent to the claimant, and Mr Beese's instruction to Mr Melling to change the bonus scheme.

(150) As per point (4) of the findings and decision part of Mr Beese's letter of 9 June 2022, at page 6 of 6, as produced to the Tribunal at page 203 of the Joint Bundle, Mr Beese had stated:

"I am also very concerned about how the Glasgow bonus arrangements have been operating. I cannot allow this to continue. Alongside my decision in relation to your grievance

appeal, I will be asking Matthew Melling to take the appropriate steps to put the bonus arrangements on to a more proper footing with immediate effect."

(151) In his letter of 9 June 2022, Mr Melling had written:

"Over the last few months it has been necessary to examine how the bonus scheme arrangements have been operating at Flip Out Glasgow.

This examination has included scrutiny of the arrangements as part of considering a number of employee grievances that had been lodged. So as not to prejudice the progress of those grievances, the Company has had to delay the required actions to put the bonus scheme onto a proper footing. Now that those grievances have run their course, it is possible to move forward.

The bonus scheme arrangements that have been operating at Glasgow are wholly unsatisfactory and on acceptable. Flip Out UK cannot allow this situation to continue. The Company would have acted sooner but for the delay created by the need to respect the progress of the grievances lodged by several people.

This letter provides formal notification that the bonus arrangements previously in operation at Glasgow are withdrawn.

… With effect from 1 June 2022 the Flip Out UK bonus scheme will apply at Glasgow. This will operate on the same basis as in all other Flip Out UK parks."

(152) On 13 June 2022, Mr Beese issued a letter entitled 'grievance follow up' (document 65, page 207 – 208) **[AC28]**

(153) In that letter to the claimant, Mr Beese stated as follows:

"In my letter to you on 9 June I stated that I was struck by the marked divergence between the tone of what you presented in your appeal hearing and the reality of your preceding actions and

communications. As part of moving forward I need to be clear with you about a number of things.

As part of my careful and thorough preparation for your grievance appeal hearing I reviewed all the documents and emails applicable to this case. I assess your actions and communications to have been vexatious. In my e-mail to you on 31 May I suggested that you had another agenda. Your actions seemed to be more intent on creating delay and disruption than about a grievance being pursued in good faith.

The vexatious nature is exemplified by your action and communication on 30 May, concerning the bonus position to end-May. Your e-mail to Matthew Melling was sent just 20 minutes after you had lodged your appeal grievance. Your action was clearly planned and was blatantly provocative and vexatious. It was not the action of an employee seeking a resolution of a grievance.

…. I will be consulting with Matthew Melling to make sure that the planned re-set programme gets underway again without further unwarranted delay.

The Company cannot and will not accept the misuse of the grievance procedure as a means to frustrate and delay the proper forward management of Flip Out Glasgow.

…. In conclusion, your actions have damaged the relationship of trust and confidence that needs to exist between you and Flip Out UK. It has affected your health and well-being, and that of other colleagues. I express the hope that you will reflect, and that your actions and communications from this point forward are about rebuilding trust and confidence and moving forward."

(154) On 17 June 2022, Mr Perry emails the Claimant and encloses document number 68 (document 67, pages 211 – 213 and document 68, pages 214 – 217). **[AC29]**

(155) Mr Perry's letter of 17 June 2022 to the claimant was entitled: "***Re-set of the Flip Out Glasgow senior management team arrangements: At-risk notification letter."***

(156) That "at risk" letter (document 67, pages 211-213) gave notification of at-risk position and, other than the consequent adjustment of the timeline, confirmed that the core content of the re-set programme remained unchanged from that set out in his earlier letter to the claimant on 25 April 2022. Similar at risk letters were sent by Mr Perry, on 17 June 2022, to Mr Bruce and Mr Watt, as before.

(157) Mr Perry stated that the start of consultation period was Friday, 17 June 2022, with Friday, 24 June 2022 to express interest in either of the two new jobs, with end of consultation on Monday, 27 June 2022, and Tuesday, 28 June 2022 to be slotted in to one of the two new jobs, or notified of redundancy, with a need to write to notify of a redundancy-based termination of employment.

(158) On 17 June 2022, Mr Bruce had emailed Mr Perry regarding his decision to accept the offer of redundancy (document 69, page 218 – 219) **[AC30]**

(159) Mr Bruce's email stated as follows:

"***As discussed earlier I would like to accept the offer of redundancy based on the events since the takeover including the recent grievance outcome, appeal and subsequent communication from Richard Beese stating that I have damaged the trust between myself and the company. I no longer feel like I would be able to work in such a hostile environment. As you are aware this entire situation has had an adverse effect on my health,***

and I would hope this could be taken into account to allow me to bring this to a close as soon as possible."

(160) Mr Perry's reply to Mr Bruce, on 17 June 2022, acknowledged his email, and confirmed that he could still express an interest in either of the two new jobs by no later than 12:00 noon on Friday, 24 June, if he so wished. Unless Mr Bruce advised him differently, Mr Perry stated that he would write to him on Tuesday, 28 June, to provide formal notification of his redundancy.

(161) Mr Bruce replied to Mr Perry, on 17 June 2022, stating that it was not a decision he had taken lightly, and he was certain of his decision, and he was more than willing to waive his rights to the consultation period, if that was acceptable.

(162) On 22 June 2022, Mr Melling emailed the Claimant regarding the bonus payments March – May 2022 (document 71, pages 221 – 222). **[AC31]**

(163) He advised the claimant that whilst the Flip Out Glasgow profit for the period did not exceed the Flip Out UK budget figures, it did exceed the Glasgow internal budget, and he had decided to measure performance against those internal figures, rather than the official budget figures, and he confirmed that a £2,500 bonus would be paid to the claimant on the next pay day, as well as identified bonuses to other staff at Glasgow.

(164) On 22 June 2022, Mr Perry and the Claimant exchanged emails regarding reset programme (document 74, pages 228 and 229). **[AC32]**

(165) On 22 June 2022, the claimant emailed Mr Perry in reply to his email of 17 June 2022. A copy was produced to the Tribunal, as document 74, at page 226 of the Joint Bundle.

(166) The claimant advised Mr Perry that he was in the process of emailing Richard Beese with a reply to his most recent communication, as that

would help him decide what he wanted to do moving forward. As such, he requested a week's extension to the timeline to help him make an informed decision.

(167) Mr Perry's reply, on 22 June 2022, copy produced as document 75, at page 228 of the Joint Bundle, stated to the claimant that the re-set programme is a separate and self-standing programme, distinct from the grievance appeal hearing by Mr Beese, and that the deadline of 12 noon on Friday, 24 June for him to express his interest in either of the two new jobs remained unchanged.

(168) On 23 June 2022, the Claimant and Mr Beese exchanged emails regarding the grievance appeal decision (document 76, pages 230 – 232 and document 77 pages, 233 – 236). **[AC33]**

(169) In the claimant's email to Mr Beese, copy produced as document 76, at pages 230-231 of the Joint Bundle, he stated as follows:

"I have received my grievance appeal outcome and I am incredibly disappointed, both in the decision and the unfair manner you handled the appeal. You were accusatory, aggressive and close-minded to my appeal points.

You are clearly trying to force me from the business. You stated that I was destroying confidence between me and the business; I remind you that it is the business refusing to honour contractual bonus (even now I have not been paid properly) and threatening redundancy.

I am aware that Alex has now resigned from his role. Please confirm by return that there is no longer he requirement to reduce the number of managers from 3 to 2 in Glasgow, as Alex' departure means both Fraser and I should be safe from redundancy.

I raised the grievance as I hoped you would honour the contractual bonus entitlements for me, like they have been

honoured for others. I have not been treated fairly, legally or equally. I am taking legal advice on my options to receive the bonus payments the business continue to unlawfully withhold from me. It is genuinely not my desire to invest time, energy and resources in pursuing claims, but I will not roll over while you withhold money I am legally due.

I remain off sick as a result of the way I am being treated at work. I hope to come back and be a productive manager of this business, as I have been for many years, once the current difficult situation is fairly resolved.

I look forward to your considered response shortly and within 5 days."

(170) Mr Beese in his email of 23 June 2022, document 77, at page 233, advised the claimant but he had nothing further to add to his grievance appeal decision later, or his follow up later to the claimant, and that the re-set programme is separate and self-standing.

(171) He further stated that he was aware that the programme was underway, and that the timeline and associated requirements had been clearly and repeatedly made clear to the claimant by the team.

(172) On 23 June 2022, there was an exchange of emails between the Claimant the Respondent regarding the reset programme/redundancy process (document 79, pages 239 – 242). **[AC34]**

(173) The claimant, in his email of 23 June 2022, copy produced as document 78, at page 238, had been waiting on Mr Perry's call at midday concerning the reset programme, and he advised him that he had received legal advice from his employment lawyer that under no circumstances could he agree to any changes in his contract and that what was being proposed was not proper in law.

(174) Mr Perry, in his reply to the claimant, copy produced as document 78, at page 237, set out his position in relation to the re-set programme,

urged the claimant to carefully read the original re-set programme letter provided to him on 25 April, and stated that the timeline was by no later than 12 noon on Friday 24 June.

(175) By further e-mail from the claimant to Mr. Perry, on 24 June 2022, copy produced as document 79, at page 239 of the Joint Bundle, the claimant stated as follows:

"As per the attached I have made my position clear with regards the reset programme. It is obvious to me that FO UK do you not want me as part of their management and the character assassination by Richard is very hard to understand. I invested a lot of time in this company and to see what is happening to it has made me ill. At no point during any of the takeover process has the communication from the people above you been acceptable and has totally destroyed management and staff moral (sic) ***. I will be visiting my doctor again soon. At this stage I once more state that I want the company to honour my existing contract and do not accept any changes to it."***

(176) On 28 June 2022, Mr Perry emailed the Claimant and attached the letter entitled 'redundancy notification letter' (document 80, page 243 and document 81, pages 244 – 246). **[AC35]**

(177) Mr Perry's letter of 28 June 2022 to the claimant was entitled: "***Termination of your employment by reason of redundancy."*** It was emailed by him to the claimant at 12:39 as an attachment to his email entitled "***Glasgow Management Re Set."***

(178) In that emailed letter, Mr Perry informed the claimant that in consequence of his decision not to register any interest in being slotted in to either of the two new available alternative jobs, the consequences of that decision by the claimant was the move to a redundancy situation in relation to his current job role at Flip Out Glasgow.

(179) There being new other appropriate job vacancies at either Flip Out Glasgow or within Flip Out UK for which the claimant could be considered, Mr Perry notified the claimant of the termination of his employment with the company by reason of redundancy.

(180) Mr Perry's letter advised the claimant that the effective date of termination of employment with Flip Out UK would be Wednesday 29 June 2022, which would also be classified as his last day of working with the company, although, at a practical level, Mr. Perry recognised that the claimant had been absent from work for several weeks.

(181) Mr Perry's letter advised the claimant that he would receive his full normal pay up to and including 29 June, together with any accrued but not-used holiday entitlement, also calculated to 29 June.

(182) In accordance with his contract of employment, the claimant was entitled to five weeks' notice. The company decided this would be honoured on a pay in lieu of notice basis.

(183) The claimant was further informed that his length of service with the company meant he qualified for a statutory redundancy payment, and that was calculated in the sum of £4,282.50 calculated to 29 June.

(184) The claimant was asked to make arrangements to return of all company property, keys, and the company vehicle. He was informed that his P45 would be forwarded to his home address as soon as possible after 29 June.

(185) The claimant did not register any internal appeal against his dismissal by the first respondents, although advised of his right to do so in writing (by no later than 12 noon on Tuesday, 5 July 2022) in Mr Perry's letter of termination of employment.

(186) The claimant did not consider it reasonable to appeal against the decision to dismiss him, given that the two alternative roles were wholly unsuitable, given the reduction in salary and contractual benefits, and given the comments made by Mr Beese in his grievance follow-up

letter dated 13 June 2022 that the claimant had broken the trust and confidence that needs to exist between employee and employer, and the claimant's actions had been described as vexatious.

(187) On 29 June 2022, Mr Perry emailed the Claimant regarding payslip and extension of company car usage (document 83, page 248). **[AC36]**

(188) On 30 June 2022, Mr Perry and Mr Thomas, from Flip Out UK, issued an internal communication bulletin to the team at Glasgow describing the changes to the Glasgow management team.

(189) A copy of this bulletin was produced to the Tribunal as document 84, at page 249 of the Joint Bundle. It recorded that the claimant and Mr Bruce had left the company on a redundancy basis, and that, with effect from 1 July 2022, Fraser Watt, the former Assistant Manager, would step into the new Assistant General Manager job role, with arrangements underway to recruit a new General Manager.

(190) After ACAS early conciliation, between 10 August and 21 September 2022, the claimant' solicitor presented his ET1 claim form to the Tribunal on 22 September 2022.

(191) A copy of the ACAS early conciliation certificate issued on 21 September 2022 was produced to the Tribunal and included in the Joint Bundle, as document 87, at page 256.

(192) A copy of the claimant's ET1 claim form and paper apart was produced to the Tribunal and included in the Joint Bundle, as document 88, at pages 257 to 274.

(193) On 20 October 2022, the claim was defended by the first respondents, JOA Leisure Limited, per their ET3 response, submitted by Mr Melling, a copy of which was produced to the Tribunal and included in the Joint Bundle, as document 89, at pages 275 to 290.

(194) In his evidence in chief to the Tribunal, Mr Melling stated that that constituted the first respondents' defence to the claim. He accepted that his response did not reply to paragraph 18 of the ET1 claim form, where the claimant contended that his dismissal was unfair, and he explained that he did not accept that view, and he submitted that the claimant was fairly dismissed, by reason of redundancy.

(195) He further stated that, regrettably, no ET3 response had been lodged for Flip Out Limited, and it probably would have been better to have responded in its own right, but they had missed that, or they were naive, so he did not complete a separate ET3 for the second respondents.

(196) Following termination of his employment with the first respondents on 29 June 2022, and as at the close of this Final Hearing, on 5 April 2023, the claimant had not secured new employment with another employer.

(197) There was produced to the Tribunal, and added into the Joint Bundle, a 3-page Table of Mitigation, together with 48 attached pages of supporting documents as his evidence.

(198) It shows the claimant's attempts to mitigate his losses, post termination of employment with JOA Leisure Limited, in the period from 23 August 2022 to 2 February 2023, by applying for new roles with other companies, and signing up for newsletters, business opportunities, and recruitment alerts with various agencies.

(199) In further information provided to the Tribunal, on 22 February 2023, by the claimant's representative, per Mr McCracken's email sent at 12:38, the Tribunal was advised as follows:

"Please find attached a copy of the Claimant's bank statement showing the payments of £714.73 and £865.39 received from Wonder World Soft Play Limited on 29 July 2022. As Judge McPherson has indicated on his Order, this was erroneously described on the Claimant's schedule of loss as 7 days' work as

a consultant from 22 – 29 June 2022. The Claimant has confirmed that this was in fact work carried out between 19 - 27 July 2022 and that he received a total of £1,580.12, which will be reflected on the Claimant's updated schedule of loss, which is still to be provided.

With regards to the Claimants DWP vouching, the Claimant does not have any documents from the DWP. The Claimant had a meeting with DWP on Monday 19 February 2023. He requested these documents during this meeting but unfortunately DWP advised that they were unable to provide the Claimant with a physical copy of the documents at that time. DWP also advised that they were not able to email a copy of the documents to him. The DWP advised that they would require to send out a physical copy in the post which the Claimant is still awaiting receipt of. The Claimant will provide this documentation as soon as it is received. In the meantime, please find attached the Claimant's bank statements which show the fortnightly payments received from DWP, which started on 24 November 2022. "

(200) Supporting productions were intimated, as attachments, and these were added to the Joint Bundle, in advance of the continued Final Hearing held on 5 April 2023.

(201) From the mitigation evidence provided by the claimant, the following facts are established:

(202) Following the Claimant's dismissal on 29 June 2022, he worked as a Consultant for Wonder World Soft Play Limited from 17 – 29 July 2022 and received a total payment of £1,580.12 in respect of this work, as shown by the Claimant's bank statement (dated 29 July 2022), which was provided to the Tribunal on 22 February 2023.

(203) The Claimant has applied for a number of roles through various recruitment agencies such as Caterer, Recruitment, Cherry Red Recruitment, Goodwin Recruiting and Xpress Recruitment.

(204) The roles in which the Claimant has applied for are set out in the Claimant's table of mitigation.

(205) The Claimant has been unable to secure employment since the date of his dismissal and considers that his age is a major barrier. The Claimant has applied for roles in which he felt confident in securing because of his experience but unfortunately was unsuccessful.

(206) The Claimant attended two interviews for two roles at Popeyes UK.

(207) The Claimant attended an interview for the position of General Manager on 11 November 2022 (page 19 of the Claimant's table of mitigation). On Thursday 1 December 2022, the Claimant then attended a Discovery Day at Popeyes UK (please see attached email confirming attendance at Discovery Day) however, the Claimant was unsuccessful as Popeyes removed the role of General Manager.

(208) The Claimant also attended an interview for an Operations Manager role at Popeyes UK in January 2023 however, he was also unsuccessful.

(209) The Claimant has also made a number of enquiries into business opportunities. The Claimant made enquiries into becoming a Papa Johns' franchise owner on 16 September 2022 (pages 11 – 12 of the table of mitigation). He also made an enquiry into a West End coffee shop with hot food consent in Glasgow on 10 October 2022 (pages 17 – 18 of the table of mitigation).

(210) The Claimant has also signed up for Retain Human Resources CV Bank (pages 39 – 40 of the table of mitigation), TRG Concessions talent pool (page 43 of the table of mitigation), Point Franchise newsletter (page 46 of the table of mitigation), and Right Biz alerts (page 47 of the table of mitigation).

(211) The Claimant is currently in receipt of Job Seekers Allowance. The Claimant receives fortnightly payments of £154.00, which started on 24 November 2022.

(212) The Claimant has provided a copy of his bank statements showing the payments he has received from DWP in respect of Job Seekers Allowance from 24 November 2022 and 9 February 2023.

(213) On the evidence provided to the Tribunal, the Tribunal is satisfied that the claimant had made reasonable efforts to mitigate his losses by seeking opportunities for new employment, and the first respondents have failed to show otherwise in proving that the claimant has acted unreasonably in failing to mitigate his losses.

(214) While the first respondents seek to rely on the fact that the claimant did not accept one of the two alternative roles to show that the claimant failed to mitigate his losses, and so he did not use the opportunity to take up a no-obligation 3-month trial period, the claimant did not consider it reasonable to do so, given that the two alternative roles were wholly unsuitable, given the reduction in salary and contractual benefits, and given the comments made by Mr Beese in his grievance follow-up letter dated 13 June 2022 that the claimant had broken the trust and confidence that needs to exist between employee and employer, and the claimant's actions had been described as vexatious.

(215) In the event of success with his claim before the Tribunal, the claimant stated that he did not seek to be re-instated, or re-engaged by the first respondents, but he sought an award of compensation against them, as per his Schedules of Loss produced to the Tribunal.

(216) As those Schedules of Loss were later updated by Mr McCracken, for the purposes of his closing submissions to the Tribunal, we reproduce here, the two full finalised versions of those documents.

(217) The finalised versions of the two Schedules of Loss for the claimant, intimated by Mr McCracken, in his email of 3 March 2023, sent at 10:10, read as follows:

CLAIMANT'S SCHEDULE OF LOSS (ORDINARY UNFAIR DISMISSAL)

1. **Key information**

Gross annual basic pay: £56,000

Gross weekly basic pay: £1,073.97

Net weekly basic pay (average from payslips January 2022 until June 2022: £765.71

Net monthly basic pay (average from payslips January 2022 until June 2022): £3,327.21

Respondent's weekly pension contributions (8%): £85.92

Claimant's weekly pension contributions (5%): £53.70

Annual contractual bonus: £15,000

Contractual notice period: 5 weeks

Claimant's date of birth: 16/06/1961

Claimant's age at effective date of termination (EDT): 61 years

Period of service: 06/11/2016 to 29/06/2022

Total continuous service: 5 years

2. **Basic award**

Basic award

1.5 x 5 x £571: £4,282.50

Less

Amount received as statutory redundancy pay: (£4,282.50)

Total basic award £0.00

3. **Financial loss (detriment)**

Loss to date of continued final hearing 5 April 2023 (40 weeks)

Loss of basic salary (40 x £765.71):	£30,628.40
Loss of contractual bonus (40 x £287.67):	£11,506.80
Loss of pension benefit:	
Respondent's contribution (40 x £85.92):	£3,436.80
Claimant's contribution (40 x £56.70):	£2,268
Loss of other employment benefits:	
Loss of private health care (40 x £23.01):	£920.40
Loss of company car (40 x £149.59):	£5,983.60
Loss of company car insurance (40 x £23.01):	£920.40
Loss of company car fuel (40 x £69.04):	£2,761.60
Loss of statutory rights:	£300
Loss to hearing	**£58,726**
Less	
Sums obtained from DWP for Job Seekers Allowance since 24 November 2023 (£154.00 per fortnight) (£1,705)	
Sums obtained through mitigation (work as a consultant from 17-29 July 2022): (£1,580.12)	
Less (£3,285.12)	
Total loss to hearing	**£55,440.88**
Future loss (12 weeks)	
Future loss of earnings (12 x £765.71):	£9,188.52
Loss of contractual bonus (12 x £287.67):	£3,452.04
Future loss of pension:	

Respondent's contribution (12 x £85.92) £1,031.04

Claimant's contribution (12 x £56.70) £680.40

Future loss of other employment benefits:

Future loss of private health care (12 x £23.01): £276.12

Future loss of company car (12 x £149.59): £1,795.08

Future loss of company car insurance (12 x £23.01): £276.12

Future loss of company car fuel (12 x £69.04): £828.48

Future loss **£17,527.80**

4. **Total**

Unfair dismissal basic award: £0.00

Financial loss: £72,968.68

Total (before grossing up) **£72,968.68**

Total award (after grossing up taxable amount in excess of £30,000*) **£81,542.51**

*For grossing up calculation, please see below.

Grossing up calculation

Tax bands for Scotland 2022/2023

Over £12,571 to £14,732 – 19%

Over £14,733 to £25,688 – 20%

Over £25,689 to £43,662 – 21%

Over £43,663 to £150,000 – 41%

Calculation

£72,968.68 - £30,000 = £42,968.68

Amount between 12,571 and 14,732 at 19% = £2,161

Amount between 14,732 and 25,688 at 20% = £10,956

Amount between 25,688 and £42,968.68 at 21% = £17,280.68

Amount between £43,663 and £111,930.44 at 41% = £0.00

£12,571 tax free

£2,161 @ 19% = £2,667.90

£10,956 @ 20% = £13,695

£17,860.80 @ 21% = £22,608.61

£68,267.44 @ 41% = £0

Grossed up total - £30,000 + 12,571 + £2,667.90 + £13,695 + £22,608.61 = £81,542.51

CLAIMANT'S SCHEDULE OF LOSS (AUTOMATIC UNFAIR DISMISSAL AND DETRIMENT)

1. **Key information**

Gross annual basic pay: £56,000

Gross weekly basic pay: £1,073.97

Net weekly basic pay (average from payslips January 2022 until June 2022: £765.71

Net monthly basic pay (average from payslips January 2022 until June 2022): £3,327.21

Respondent's weekly pension contributions (8%): £85.92

Claimant’s weekly pension contributions (5%): £53.70

Annual contractual bonus: £15,000

Contractual notice period: 5 weeks

Claimant's date of birth: 16/06/1961

Claimant's age at effective date of termination (EDT): 61 years

Period of service: 06/11/2016 to 29/06/2022

Total continuous service: 5 years

2. **Basic award**

1.5 x 5 x £571:	£4,282.50
Less	
Amount received as statutory redundancy pay:	(£4,282.50)

Total basic award £0.00

3. **Financial loss**

Loss to date of continued final hearing 5 April 2023 (40 weeks)

Loss of basic salary (40 x £765.71):	£30,628.40
Loss of contractual bonus (40 x £287.67):	£11,506.80
Loss of pension benefit:	
Respondent’s contribution (40 x £85.92):	£3,436.80
Claimant’s contribution (40 x £56.70):	£2,268
Loss of other employment benefits:	
Loss of private health care (40 x £23.01):	£920.40
Loss of company car (40 x £149.59):	£5,983.60
Loss of company car insurance (40 x £23.01):	£920.40
Loss of company car fuel (40 x £69.04):	£2,761.60

Loss of statutory rights: £300

Loss to hearing **£58,726**

Less

Sums obtained from DWP for Job Seekers Allowance since 24 November 2023 (£154.00 per fortnight) (£1,705)

Sums obtained through mitigation (work as a consultant from 17-29 July 2022): (£1,580.12)

Less (£3,285.12)

Total loss to hearing **£55,440.88**

Future loss (26 weeks)

Future loss of earnings (26 x £765.71): £19,908.46

Loss of contractual bonus (26 x £287.67): £7,479.42

Future loss of pension:

Respondent's contribution (26 x £85.92) £2,233.92

Claimant's contribution (26 x £56.70) £1,474.20

Future loss of other employment benefits:

Future loss of private health care (26 x £23.01): £598.26

Future loss of company car (26 x £149.59): £3,889.34

Future loss of company car insurance (26 x £23.01): £598.26

Future loss of company car fuel (26 x £69.04): £1,795.04

Future loss **£37,976.90**

4. **Non-financial loss**

Injury to feelings (The Claimant being subjected to a sham redundancy process, rejection of his grievance and grievance appeal, having his contractual entitlements withheld, altered and unilaterally removed and/or his employment being terminated amounted to detriments as a result of his grievance and/or his protected disclosure): £29,600

Total non-financial loss **£29,600**

5. **Total**

Unfair dismissal basic award: £0.00

Financial loss*: £93,417.78

Non-financial loss: £29,600

Uplift on compensation of 25% for failure to comply with Acas Code (£93,417.78 + £29,600 = £123,017.78 x 25%) = £30,754.45:

£153,772.23

*Statutory cap does not apply because the Claimant is claiming Automatic Unfair Dismissal under section 103A of the Employment Rights Act 1996 and detriment under section 47B of the Employment Rights Act 1996. However, in the event that the tribunal finds that the Claimant was not Automatically unfairly dismissed or subjected to detriment but finds that the Claimant was ordinarily unfairly dismissed, the compensation should be subject to the statutory cap as per the Claimant's separate schedule of loss for ordinary unfair dismissal.

Total (before grossing up) **£153,772.23**

Total award (after grossing up taxable amount in excess of £30,000*) **£196,894.66**

* For grossing up calculation, please see below.

Grossing up calculation

Tax bands for Scotland 2022/2023

Over £12,571 to £14,732 – 19%

Over £14,733 to £25,688 – 20%

Over £25,689 to £43,662 – 21%

Over £43,663 to £150,000 – 41%

Calculation

£153,772.23 - £30,000 - £29,600 = £94,172.23

Amount between 12,571 and 14,732 at 19% = £2,161

Amount between 14,732 and 25,688 at 20% = £10,956

Amount between 25,688 and £43,662 at 21% = £17,974

Amount between £43,663 and £123,772.23 at 41% = £50,509.23

£12,571 tax free

£2,161 @ 19% = £2,667.90

£10,956 @ 20% = £13,695

£17,974 @ 21% = £22,751.90

£50,509.23 @ 41% = £85,608.86

Grossed up total - £30,000 + £29,600 + 12,571 + £2,667.90 + £13,695 + £22,751.90 + £85,608.86 = £196,894.66

Tribunal's Assessment of the Evidence led at the Final Hearing

92. In considering the case before the Tribunal, we have had to carefully assess the evidence heard from Mr Melling, as the only witness for the respondents led before the Tribunal, the claimant (Mr Gallacher), and his witness, Mr Bruce, and to consider the many documents produced to the Tribunal in the Joint Bundle and assorted additional documents lodged and used at this Final Hearing, insofar as spoken to in evidence, which evidence and our assessment we now set out in the following paragraphs.

93. The first witness from whom the Tribunal heard was **Mr Matthew Melling**, aged 32, the Chief Operating Officer for FO Admin Limited since November 2022. We heard Mr Melling's evidence on the afternoon of day 1, being Monday, 13 February 2023, and continued into the afternoon of the following day.

94. As agreed with both Mr McCracken for the claimant, and Mr Melling for the respondents, Mr Melling's evidence in chief was elicited by questions from the Judge. He was thereafter cross-examined by Mr McCracken, the claimant's representative, before some questions of clarification from the Tribunal, and some brief re-examination of the witness, looking at his own cross-examination notes, which we had allowed him to do, and him making some further points.

95. Overall, we found Mr Melling to be a plain speaking, straightforward witness, who was polite and business like in his approach to the twin task of being a representative, as well as a witness. He was open and frank that the claimant had never worked to him, nor had he been supervised by Mr Melling.

96. Where Mr Melling did not know, he said so, an example being that he believed the claimant had been paid a redundancy payment by JOA Leisure Limited, as his former employer, but he could not say when it was paid, or in what amount.

97. Likewise, he thought that the claimant's P45 would have said JOA Leisure Limited, as he could see no reason why it would state Flip Out Limited, but he could not say with any certainty, acknowledging that there was no relevant documentation included in the Bundle.

98. Those matters were later agreed between parties' representatives by production of additional documentation not included in the original Joint Bundle.

99. When he spoke to his handwritten, one-page notes of the grievance meeting with the claimant, held on 23 May 2022, produced as document 42, at page 165 of the Joint Bundle, Mr Melling stated that they were his full notes of the

meeting, which he had recorded started at 3pm, and while it did not record an end time, he thought it was maybe 30 to 45 minutes duration.

100. Mr Melling was clear that Mr Bruce was brought along by the claimant as his employee representative, as per the company's grievance procedure, but he was not there to speak on behalf of the claimant, and he described Mr Bruce as being more a companion, for moral support.

101. When, on day 2, Mr Melling spoke, in his continued evidence in chief, about the terms of the respondents' Counter Schedule, and what he saw as the claimant's failure to mitigate his losses, Mr Melling stated that there was no failure by the respondents to comply with the ACAS Code, which he believed applied to a redundancy dismissal, although he did add that he was not 100% certain about his knowledge of the ACAS Code.

102. On the matter of the various payments made to the claimant, as shown on the bank statements provided by the claimant, as additional documents to add in to the Joint Bundle, Mr Melling was not clear on them all, as some were prior to Flip Out UK acquiring JOA Leisure, and he thought some of the payments, made by FO Ventures Limited, may have related to the claimant's part ownership of JOA Leisure.

103. Explaining that FO Admin Limited was not the claimant's employer, Mr Melling stated that it did payroll on behalf of JOA Leisure Limited, and within the Flip Out UK group, there were regular payments made by one company on behalf of another, by way of inter-company loans.

104. Mr Melling stated that he could not recall if he had seen the claimant's termination of employment letter dated 28 June 2022, at that time, as that matter was being dealt with by Mr Perry, but he stated that it was fair to say that it was Mr Perry who was the decision maker to make the claimant redundant. He added that Mr Perry would have done so with assistance from Steve Bloor, the HR advisor to Flip Out UK, although, it was hard to recall, after the event, if he (Mr Melling) had had sight of it before it was issued.

105. When asked about the number of employees, stated at 600 staff in GB, according to section 2.8 of the ET3 response lodged on behalf of JOA Leisure Limited, Mr Melling apologised for his mistake in using staff figures across the Flip Out UK group, and not just JOA Leisure Limited.

106. While, in that ET3 response lodged on behalf of JOA Leisure Limited, Mr Melling acknowledged that he had, at paragraph 17 of his reply to the claimant's ET1 claim form, referred to the claimant's references to whistleblowing and protected disclosures in his ET1 claim being new, and presenting as a "***retrospective contrivance***", Mr Melling stated that he was not 100% sure whether he knew if the claimant's grievance was a protected disclosure, or not. That said, he was clear it was a dismissal for redundancy, and not a sham redundancy.

107. Mr McCracken's time estimate to cross-examine Mr Melling had to be reviewed on day 2, when he stated that his revised estimate was one hour, 30 minutes, and, having used up that period, he then stated that he required a further 45 minutes.

108. In starting the afternoon session on day 2, the Tribunal had a housekeeping discussion with both compearing parties about their timetable estimates, and we allowed Mr McCracken a further maximum of 30 minutes to conclude his cross-examination of Mr Melling.

109. Using both parties' revised time estimates for the remaining witness evidence, we stated that we would impose those time estimate *maxima* by way of a formal Timetabling Order under **Rule 45**.

110. We did so as we were concerned that the case would not conclude within the 3-day allocated sitting. Our concerns proved well-founded, as the case did not conclude within the allocated time, and it went to a continued Final Hearing, on 5 April 2023, as part heard.

111. In his evidence to the Tribunal, Mr Melling was clear and consistent that he had made decisions relating to the claimant's grievance about quarterly bonus, and he denied that he had pre-determined that matter. He stated that

he believed that he had been impartial and unbiased in dealing with the grievance.

112. As the claimant's contract was silent on the value of any bonus, Mr Melling explained that he had sought to fill that gap, and assign a fair value, given that the Flip Out Glasgow bonus was five times higher than at another 10 parks in the Flip Out UK group portfolio.

113. Mr Melling was equally clear and consistent in his evidence that there was a genuine redundancy situation, and that the redundancy exercise was not created to force the claimant into a role with less contractual entitlements.

114. He explained that Flip Out UK had been involved in a due diligence exercise from December 2021, and that there had been site visits before and after the acquisition of the Glasgow site on 12 February 2022. Further, Mr Melling stated, there had been a review of the Glasgow operation and team ongoing before the claimant raised the bonus issue.

115. In his evidence, Mr Melling was also clear and consistent that the planning and preparation for the re-set process at Glasgow had been initiated long before the grievance was ever known about, and they had put forward new job descriptions for the intended new roles of General Manager and Assistant General Manager based on their observations of the existing Glasgow management team roles.

116. Mr Melling further stated that they had enough information to do so, as they believed the new structure was the best fit for the business. Although there were no documents in the Joint Bundle to show this work, Mr Melling stated that he had a spreadsheet that he would lean on, but he had not shared that with the claimant at the time of their meeting, just prior to the acquisition, on 12 February 2022, and, anyway, nothing had been provided to him by the claimant as regards his existing job description.

117. In his evidence, Mr Melling stated that Mr Beese, who dealt with the grievance appeal, was not involved in the redundancy process, but there was an

opportunity there, via Mr Perry, for the claimant to take on another role, rather than be made redundant.

118. He described any redundancy process as being stressful for all parties involved, and while he was not sure, he thought the claimant was off work for 4 weeks, with stress, although he could not recall seeing the GP medical certificate dated 30 May 2022, at that time. In any event, Mr Melling stated that he was aware of the situation, and that the claimant did not come back to work before the end of the redundancy process.

119. In answer to a question from Mrs Paton, Tribunal panel member, Mr Melling stated that after his discussion with the claimant, when he (Mr Melling) had prepared his spreadsheet, the claimant should have been able to assess the old compared to new job descriptions.

120. Mr Melling confirmed that TUPE did not apply to the claimant, or others, as Flip Out UK acquired JOA Leisure Limited as a going concern, by way of a share acquisition, rather than an asset purchase, and there was no TUPE transfer of employees.

121. In answer to a question from the other Tribunal member, Mr Taggart, Mr Melling stated that it was just co-incidental, and completely unconnected, that the grievance was submitted on 21 April 2022 and the re-set letters were issued on 25 April 2022.

122. Further, in answer to questions from the Judge, Mr Melling stated that Steve Bloor was an external HR consultant, as the business had no internal HR role, and that he received advice from Mr Bloor about the ACAS Code and the process to follow, to ensure they were following the proper steps.

123. He also confirmed that there were different decision makers for different things affecting the claimant – namely himself re the bonus and grievance, Mr Perry re the re-set process and redundancy, and Mr Beese re the grievance appeal.

124. While we had no issues with Mr Melling's general credibility as a witness, we did have some reservations about his reliability on certain matters, where he

was not directly involved, and where he spoke by reference to documents written by others, namely Mr Perry, and Mr Beese, as produced in the Joint Bundle.

125. Our concern with this aspect of Mr Melling's evidence, on matters where he had not been directly involved, was because he sought to give his own view on what he said was in the mind of those other decision makers, in particular Mr Perry, and Mr Beese, neither of whom were led in evidence on behalf of the first respondents.

126. No reason for their non-attendance as witnesses for the first respondents was given by Mr Melling, other than his brief comment, at the start of the Final Hearing, that they were otherwise engaged. Nor was any full explanation provided by him to this Tribunal, other than briefly responding to the Judge, in those terms, when the Judge raised a question, when discussing housekeeping matters at the start of proceedings on day 1, about the respondents' witness list, only including Mr Melling.

127. It seemed to the Tribunal at that time, and indeed still now, when writing up this Judgment, where the first respondents have the burden of proof to show the reason for the claimant's dismissal, which they submit is a genuine redundancy, and which the claimant challenges as a ***"sham"***, that leading no evidence from Mr Perry and Mr Beese as the decision makers, on dismissal, and grievance appeal, in respect of the claimant's dismissal, and rejection of his grievance appeal, is somewhat bewildering.

128. That said, the Tribunal notes and records that the claimant's representative, Mr McCracken, made no application to the Tribunal to consider making a Witness Order to compel Mr Perry's and / or Mr Beese's attendance at this Final Hearing as relevant and necessary witnesses.

129. Given the burden of proof on the respondents, the Tribunal well understands why Mr McCracken did not do so, and we address the absence of Mr Perry and Mr Beese later in these Reasons when discussing and deliberating upon parties' competing closing submissions.

130. The first respondents having decided not to call them, and proceed with Mr Melling as their one and only witness, it was not for this Tribunal, acting on its own initiative, to consider issuing a Witness Order for Mr Perry's and / or Mr Beese's attendance.

131. Indeed, in writing up this Judgment, we note and record here the judgment of the Court of Appeal in England & Wales in **QX v Secretary of State for the Home Department [2022] EWCA Civ 1541,** where the judgments of Lady Justice Elisabeth Laing, Lord Justice Nugget, and Lord Justice Coulson, issued on 22 November 2022, are a timely reminder that a Court cannot compel a party to call a particular witness whom a party does not wish to call.

132. ***"Party autonomy is paramount"*** in civil litigation, per Lord Justice Coulson, at paragraphs 133 to 135, agreed with by the other judges at paragraphs 128 and 129. In our view, the same principle applies here in the Employment Tribunal by analogy. That said, we were surprised throughout the course of this Final Hearing that not only were key individuals not led in evidence by the first respondents, specifically Mr Perry and Mr Beese, but that was coupled with a lack of contemporary documentation pre-April 2022 disclosed by the first respondents about their review of the business at Flip Out Glasgow. This made it difficult for this Tribunal to pin down with any certainty the often vague and general evidence given by Mr Melling, about who were the decision-makers, pre-April 2022, when and why decisions were made, and the underlying factual basis to the planning and preparation for the re-set process.

133. The next witness to be heard by the Tribunal was the claimant himself, **Mr George Gallacher**. We heard the claimant's evidence starting at 3:00pm on the afternoon of day 2, being Tuesday, 14 February 2023, for one-hour of a 2-hour estimated allocation, and continued into the following day, concluding late afternoon on day 3.

134. The claimant was examined in chief by his legal representative, Mr McCracken, and he was thereafter cross-examined by Mr Melling, the

respondents' representative, before some questions of clarification from the Tribunal, and some brief re-examination of the witness.

135. Mr Gallacher explained, in his evidence in chief, that he was quite astonished that David White and Richard Beese had spent some £2million purchasing the Glasgow business, but, both before and after the takeover, he was not asked for his opinion at all as resident General Manager.

136. He spoke of arrangements at Flip Out Glasgow under the former Aronson family management, and how the collective grievance of 21 April 2022 arose out of a concern that the new owners were trying to make major changes to the staff's existing contracts with JOA Leisure Limited.

137. Mr Gallacher also spoke of how they had taken legal advice from Mr Musab Hemsi, employment lawyer with Anderson Strathern LLP, as all 5 members of senior staff at Glasgow wanted Flip Out UK to honour their contracts, as a buy-out of their contractual entitlements was never discussed. He spoke of feeling threatened, after the collective grievance was put in, and how they felt that they had to fall in line with the rest of Flip Out UK parks. Further, Mr Gallacher spoke of the concerns about Mr Melling's decision making.

138. After further housekeeping discussion about timetabling, and agreeing Wednesday, 5 April 2023 as a continued Final Hearing date for closing submissions, Mr Gallacher's evidence in chief continued on the morning of day 2, for the further one-hour not used the previous day, to be followed by Mr Melling's cross- examination estimated at one hour.

139. In the event, the Tribunal required to allow Mr McCracken further time to complete his examination in chief, as too did we require to allow Mr Melling further time to conduct his cross-examination of the claimant, thus varying the Timetabling Order made the previous day.

140. In his further evidence in chief, the claimant described how Mr Melling was trying to change things, without going through proper discussion and consultation, and how, from day 1 with Flip Out UK, he and his management team were like "***outcasts***", and not involved in any decision making on the

site. While the claimant thought he was an "***asset"*** to the business, the claimant stated that what was going on made him feel like he was now ***"insignificant."***

141. No matter what was said, explained the claimant, nothing that was said by him was listened to, and while he supposed Mr Beese would be non-biased, he stuck with Mr Melling, and so the claimant and his management team felt that their concerns were just being ignored, and his position as General Manager was being undermined.

142. The claimant likened the situation to the ***"new boys***" (from Flip Out UK) being in town, the claimant and his team had their JOA Leisure contracts, but the new boys did not care. They were saying that the Glasgow bonus system was not correct, and they would move them over to a new Flip Out UK system, without any consultation, or buy-out : it was, the claimant said, a *fait accompli.*

143. Further, stated the claimant, Flip Out UK took no account of his contract with JOA Leisure Limited, as that contract "***meant nothing to them***." They had made their mind up, and it was as if the existing JOA contract was irrelevant to them. He described it as "***absolutely amazing***" for Richard Beese, in his letter of 13 June 2022, to describe the claimant as being "***vexatious***," and having abused the grievance procedure.

144. Being told by Mr Beese that he (the claimant) had damaged the relationship of trust and confidence, the claimant stated that, while he had never been confident that he and his colleagues would be heard, and his business experience listened to, Mr Beese's letter made him feel that he had no future with the company, and why would he trust them moving forward with anything.

145. The claimant stated that he was losing £35/40k pa in his package with JOA, as a result of the re-set, and that the reason for his redundancy was that his package and contract with JOA was to them at Flip Out UK more generous than what they would offer to their other site General Managers.

146. Further, the claimant stated in his evidence that there was nothing different in the new job descriptions from what he did on a daily basis at Glasgow under his existing JOA contract, and he confirmed that he did not apply for either of the two new jobs offered to him in the re-set letter.

147. He described Mr Perry's letter of dismissal, on 28 June 2022, saying his employment was terminated by reason of redundancy, was "***just a farce, and a sham to get me out of the business***." He added that he felt it was an attempt to avoid him transferring to Flip Out UK under a TUPE process on his existing terms and conditions of employment with JOA.

148. Having been unemployed since June 2022, the claimant stated that he was not in a great mind set, and he was no longer an out-going guy, where his future was uncertain, and he felt his age, at age 61 years, goes against his prospects of securing new employment.

149. Acknowledging that he had not appealed against his redundancy dismissal, the claimant explained that there was no reason for him to appeal. He stated that Mr Perry had offered him no other suitable jobs, and he felt that they were just happy to get rid of him, and they looked upon him as an inconvenience.

150. In cross-examination, the claimant accepted Mr Melling's statement that the JOA business was acquired on 14 February 2022 by Flip Out UK. He accepted that the exchange of correspondence between the parties, as produced in the Joint Bundle, was an accurate reproduction of what had been said at the relevant dates.

151. Further, under cross-examination, Mr Gallacher explained that, under the Aronson family, they never used defined KPIs for bonus allocation, as it was a family business, and he accused Mr Melling of coming into the business trying to change the custom and practice bonus system in place, and operated over the last 5 years since April 2017.

152. When Mr Melling's allocated one-hour ran out, the Tribunal allowed him a further 30 minutes to cross-examine the claimant, and suggested that in his

extra time, he should seek to address other matters, not yet covered by him, such as the reason for the claimant's dismissal, the alleged protected disclosure, and the remedy sought by the claimant, in the event of success with his claim.

153. Accepting that page 76 of the Joint Bundle, an email from Mr Melling to Mr Bloor, seemed to suggest that the re-set programme started before the grievance was raised, the claimant stated that he did not get visibility of this, prior to the Joint Bundle, but having seen it now, he could not challenge Mr Melling's statement to that effect, but he did know that this was not a full email chain.

154. The claimant stated that there were ways to change his contract, properly, but that never happened, and he felt that the company looked upon him as a "***headache.***"

155. In answer to Tribunal member, Mr Taggart, the claimant stated that clause 5 of his contract of employment with JOA Leisure Limited stated any bonus was at the discretion of the General Manager, but that was discussion by him, with Mr Aronson as owner of the business and the company's then MD. Post acquisition of the business by Flip Out UK, the claimant stated that there was no consultation with him about changes to bonus calculation.

156. In discussion with the Judge, the claimant clarified his current circumstances, as unemployed and in receipt of Job Seekers Allowance, although not mentioned in his Schedule of Loss.

157. In a single question raised by Mr McCracken, in his re-examination of the claimant, Mr Gallacher stated that he did not recall replying to Mr Perry's email of 23 June 2022, at page 237 of the Joint Bundle, but he did not apply for either of the two new jobs on offer, as he saw no point in doing so.

158. Summing up, we note and record that the claimant spoke of what had happened to him in the course of his employment with the respondents, JOA Leisure Limited, and how he had been treated by those respondents as his

former employer in the events leading up to termination of his employment on 29 June 2022.

159. Mr Gallacher came across to the Tribunal as an honest and reliable historian of events, and he recalled the impact on him as an individual of those events relating to his employment. On the evidence provided to the Tribunal, the Tribunal is satisfied that the claimant had made reasonable efforts to mitigate his losses by seeking opportunities for new employment.

160. Overall, we were satisfied that the claimant was giving the Tribunal a full recollection of events, as best he could remember them, and as he saw things, through his own lens, and he came across to the Tribunal as a credible and reliable witness.

161. The final witness heard by the Tribunal was **Alexander Bruce.** He was led as a witness for the claimant, in support of Mr Gallacher's claim. We heard this evidence on the late afternoon of day 3, Wednesday, 15 February 2023. Aged 33, Mr Bruce was previously employed by JOA Leisure Limited from February 2017 to June 2022 as Assistant General Manager, at Flip Out Glasgow, and his employment ended after the re-set and redundancy process. He is now employed as General Manager for a local hotel group.

162. Mr Bruce was examined in chief by the claimant's legal representative, Mr McCracken, and he was thereafter cross-examined by Mr Melling, the respondents' representative. There were no questions of clarification from the Tribunal, and no re-examination of the witness by Mr McCracken. In total, Mr Bruce's evidence lasted one hour, 4 minutes.

163. In answering his first question in chief from Mr McCracken, about his previous employment with JOA, Mr Bruce confessed to bring really bad with dates. Nonetheless, guided by Mr McCracken though relevant documents in the Joint Bundle, Mr Bruce clarified his knowledge of, and involvement in, the collective grievance, subsequent grievance and grievance appeal hearings with Mr Melling and Mr Beese, and the JOA re-set and redundancy processes with Mr Perry.

164. In detailing the chronology of events, Mr Bruce was, in essence, corroborating the claimant's evidence on these matters, and speaking as another former member of the JOA senior management team at Flip Out Glasgow. He was critical that Flip Out UK had given assurance that things would not change at Glasgow, but then brought forward and implemented changes.

165. Mr Bruce referred to "***Matt*** *(Melling)* ***steam rollered us***" as regards changes to the bonus arrangements at Flip Out Glasgow, and he was critical of Mr Melling's evidence that failure to pay senior management team pension contributions was an error, saying payroll don't make an error on five people's wages.

166. A former employee at Glasgow City Council, with some limited HR experience, as a former trade union representative in training, Mr Bruce stated that he had known, and instructed as JOA's legal advisor, Mr Musab Hemsi, solicitor with Anderson Strathern LLP, and he got legal advice from Mr Hemsi to help him and his colleagues at JOA.

167. He spoke of having been the claimant's supporting witness at the grievance meeting with Mr Melling, on 23 May 2022, and he described that meeting as "***terrible***", as he alleged that Mr Melling did not listen to the points made, as highlighted in the subsequent appeal to Mr Beese.

168. Mr Bruce spoke of receiving a similar letter to Mr Melling's letter of 25 May 2022 to the claimant, addressing the grievance outcome, and how all points made had been rejected, except for the one about pension contributions, described as an error, and eventually resolved by payments being made for the affected staff. He spoke of "***Matt covered his own backside***", and stated that Mr Melling had not acted fairly.

169. When asked about the original re-set and at-risk letters of 25 April 2022 from Mr Perry, Mr Bruce was adamant that, the collective grievance having raised the company's breach of their contracts, and TUPE, "***it doesn't take a genius to work out what happened there."*** He described it as a "***retaliatory attack."***

170. Mr Bruce also spoke about the grievance appeal heard by Mr Beese. He described Mr Bloor's notes of that meeting as not reflective of all that was discussed, and that, much to their expectation, the online meeting was "***very brash, a steam rollered approach",*** where he and the claimant were listened to, but there was no further investigation, or evidence gathering, and they had never been shown a company's business case to support their decision.

171. Further, Mr Bruce was critical that, while there was an email from Mike Randall to Colin Perry produced to the Tribunal about the re-set process, we should have had everything there was to show the redundancy process was fair and transparent. He described it as being "***disgusting***" and "***ridiculous"*** that the respondents were not being fair and transparent.

172. Mr Bruce spoke of receiving a similar letter to Mr Beese's letter of 9 June 2022 to the claimant, addressing the grievance appeal outcome, upholding Mr Melling, and, while laughing, he described as "***mind-blowing***" that he too received one of Mr Beese's letters of 13 June 2022, accusing him (and others) of having hidden motives, and trying to delay the redundancy process, and damaging the relationship of trust and confidence that needs to exist between staff and the company. He described that as a "***threat"*** from Mr Beese.

173. Further, Mr Bruce stated that he had stepped away from the company, to try and protect the claimant and Fraser Watt, as he felt his own skill set were suited for another role elsewhere, given he had had a panic attack, after Mr Beese's email of 31 May 2022 had suggested there was "***another agenda***", and he had then approached Mr Beese (by email on 2 June 2022 – page 182 of the Bundle) for an informal resolution, but that had been rejected by Mr Beese (page 183) as being wholly inappropriate and at marked variance with the formal grievance appeal procedure.

174. Mr Bruce further stated that he did not feel that Colin Perry was comfortable dealing with the re-set and at-risk letters re-issued on 17 June 2022, and that he felt that Mr Perry had been instructed to send them out, because the

"***writing was on the wall***", after Mr Bruce and others had received Mr Beese's follow up letter of 13 June 2022.

175. Further, Mr Bruce was clear and unequivocal that he was ***"quite happy to be rid of Flip Out and put them in my rear-view mirror".*** He further described it as ***"a sham process to demoralise and remove***" the senior management team in Glasgow, and also described it as a "***shambles of a process",*** stating at no point was there any individual consultation with those directly affected.

176. He stated that Fraser Watt was now there, as Assistant General Manager, going the same job as before, and that there had been no selection process, and no viable business case for redundancy, but what Flip Out UK wanted, having bought over a profitable business from JOA, was they did not like the Glasgow contracts and benefits, and they wanted to lower them, and so, he stated, it was a "***sham redundancy***."

177. In a brief cross-examination by Mr Melling, the respondents' representative, lasting just under 10 minutes, as against a 1/2 hour estimate previously given to the Tribunal, Mr Bruce stated that Carol Hughes and Susan Ferguson had both brought their concerns to him, and it was a collective grievance raised, because what Mr Melling was doing was considered wrong and in breach of their legal entitlements. On legal advice from Mr Hemsi, they had sought to go through the internal JOA grievance process.

178. When Mr Bruce criticised the fact that Mr Bloor, the Flip Out UK HR advisor, was not present at the Tribunal, the Judge advised him that it was a matter for JOA Leisure Ltd, as respondents, to decide upon its witnesses, and there had been no application on the claimant's behalf for any Witness Orders.

179. At the close of his evidence, Mr Bruce apologised to the Tribunal for the way that he had given his evidence, saying it was difficult for him reliving past events, and being questioned by Mr Melling.

180. Mr Bruce came across to the Tribunal as an honest and reliable historian of events, and he recalled the impact on him as an individual of those events

relating to his former employment at JOA Leisure Limited. Although now in new employment elsewhere, it was clear to the Tribunal, from his evidence, that he is still very aggrieved by his own treatment by his former employers, and supportive of the claimant's Tribunal claim against the respondents.

181. He spoke with passion, and obvious conviction in what he saw as the strengths of the claimant's case. We did not glean the impression that Mr Bruce, in giving his evidence to this Tribunal, was over-egging the position, or embellishing matters, simply to enhance the claimant's case.

182. Overall, we were satisfied that Mr Bruce was giving the Tribunal a full recollection of events, as best he could remember them, and as he saw things, through his own lens, and he came across to the Tribunal as a credible and reliable witness.

Closing Submissions from Parties, and revised List of Issues

183. Procedure for closing submissions from both parties had been set out by the Judge in the case management orders issued by the Tribunal on day 3, being 15 February 2023, when addressing housekeeping matters about conduct of these Tribunal proceedings, and assigning day 4, Wednesday, 5 April 2023, for closing submissions.

184. Those case management orders and directions were confirmed in a letter from the Tribunal dated 17 February 2023 sent to both Mr McCracken and Mr Melling.

185. While parties were content to submit written submissions, if that saved time, and avoided a further Hearing, the Judge stated that the Tribunal preferred to hear oral closing submissions, and to have the opportunity, there and then, to hear from each party in reply to the other party's closing submissions, and to ask questions of clarification, of either or both representatives, if required. The use of written closing submissions only does not allow for that facility and can end up by closing submissions by email exchange, with reply, and response, taking more time and cost.

186. As such, the Judge, on behalf of the Tribunal, indicated that they would order written skeleton closing arguments to be provided by both parties' representatives by no later than 4.00pm on Wednesday, 22nd February 2023, and the Tribunal would hear oral submissions on day 4, assigned for Wednesday, 5 April 2023, starting at 10am, for a full day, again in person at Glasgow Tribunal Centre, but with permission granted to Mr Melling, the respondents' representative, to attend remotely by CVP. The full Tribunal, claimant, and his representative were to again attend in person.

187. Formal Notice of Continued Final Hearing was issued on 16 February 2023, and the Tribunal's subsequent letter of 17 February 2023 detailed various case management orders, made by the Judge, under **Rule 29 of the Employment Tribunals Rules of Procedure 2013,** for the good and orderly conduct of that Continued Final Hearing on day 4.

188. As part of the Tribunal's letter of 17 February 2023, Judge McPherson directed that it would assist both parties, and the Tribunal, if they each addressed in their own legal submissions their respective proposed answers to each of the factual and legal issues in the case.

189. The Judge revised the list of issues, as set forth by Employment Judge Mackay, at paragraph 8 of his PH Note and Orders dated 24 November 2022, and set them out, in a revised format, to which neither Mr McCracken nor Mr Melling made any suggested changes.

190. In their respective written closing submissions, they addressed, from their differing perspectives, their proposed answers to each of the listed issues. We return to them later in these Reasons, at paragraph **213** below.

191. Parties' written closing submissions were received, and placed on the Tribunal's casefile, being Mr Melling's email of 21 February 2023 at 23:20, enclosing the respondents' 12-page closing submission, and Mr McCracken's emails (2) of 22 February 2023 at 12:38 and 12:59, enclosing his 12-page skeleton submissions, a 3-page joint list of authorities, and further mitigation documents.

192. The first respondents' executive summary, as provided by Mr Melling, at pages 1 and 2 of his closing submissions, was in the following terms, as follows:

*"**Executive summary***

1. ***The Claimant was dismissed from his employment with JOA Leisure Ltd on 29 June 2022 by reason of redundancy.*** *In accordance with Section 139 of the Employment Rights Act (ERA), the dismissal was wholly attributable to the fact that the requirement of the business for the Claimant to carry out work of a particular kind had ceased. This redundancy position applied to each of the three then-existing management team roles at Flip Out Glasgow.*

2. *In that the Claimant's existing job role was redundant and that this was the reason for the dismissal, this satisfies the requirements set out in Sections 98(1) and (2)(c) of the ERA.*

3. *In accordance with the provisions set out in Section 98(4) of the ERA, the Company acted reasonably with regard to the circumstances and merits of the case in treating the redundancy as a sufficient reason to dismiss the Claimant. The dismissal of the Claimant was therefore fair as set out in Section 98(4) of the ERA.*

4. *The Claimant received the redundancy payment to which he was entitled, together with all other applicable contractual entitlements.*

5. *The Claimant took none of the actions available to him to either challenge his dismissal or to mitigate the effects of his dismissal.*

He did not appeal against his dismissal. He did not express interest in either of the two available alternative job roles. He did not avail himself of the opportunity to be slotted-in to either of the two alternative job roles without the need to undergo any form of selection process. He did not use the opportunity to take up a no-obligation trial period in either of the two alternative job roles.

The Claimant's email dated 24 June 2022, at page 239 in the document bundle, stated (quote) ' ... I once more state that I want the company to honour my existing contract and do not accept any changes to it'. The Claimant was, as he says himself, once more stating his steadfast position of being wholly resistant to any opportunities to mitigate the effects of his redundancy dismissal.

6. ***The Claimant did not make a qualifying protected disclosure of any kind on 20 April 2022 or on any other date.*** *There are multiple reasons why the letter of grievance presented on 21 April cannot be classified or regarded as a qualifying disclosure.*

   a) *The important protections afforded to a qualifying disclosure relate to a reasonable belief of serious wrongdoing in the workplace, typically concerning some form of dangerous or illegal activity. Notwithstanding that the Company demonstrably took the complaints registered on 21 April seriously, acting promptly and purposefully, the Company would be very surprised if the complaints registered on 21 April meet the threshold to be classified into the category of serious wrongdoing in the workplace and of being in the public interest within the meaning of the ERA.*

   b) *The Claimant's letter of grievance received on 21 April did not meet one or more of the six types of failure set out in Section 43B(1) of the ERA that are required for it to be classified as a qualifying disclosure.*

   c) *Neither did the Claimant's letter of grievance satisfy the prescribed test fora qualifying disclosure of being in the public interest.*

d) The important protections afforded to a qualifying disclosure do not apply to personal employment grievances. That is the proper classification to be attached to the letter of grievance received from the Claimant on 21 April. The evidence is compelling that the Claimant's intention and expectation, from 21 April onwards, was that his complaints must be dealt with as an employment grievance. The Claimant's expectations on this were clear.

7. There was no association or connection, direct or indirect, between the activity undertaken by the Company to properly manage the grievances raised by the Claimant, and the totally separate changes flowing from the re-set programme.

The re-set programme was initiated, and the programme go-live date was set, well before the letter of grievance was received from the Claimant on 21 April 2022. It is therefore clearly the case that the start of the re-set programme on 25 April had no connection with the letter of grievance received on 21 April.

8. The Claimant was not dismissed or subjected to any other form of detriment associated with the letter of grievance he registered on 21 April or with any other form of disclosure made on 21 April or at any other time.

9. In answer to the question asked by the Employment Tribunal about what outcome is sought, ***the Respondent seeks that the Employment Tribunal dismiss all elements of the application brought by the Claimant."***

193. Following referral to Employment Judge McPherson, the Tribunal clerk wrote to both parties' representatives, on 24 February 2023, stating that the Judge had noted, with disappointment, that the claimant's closing submissions had not followed the specific directions given in the Tribunal's case management orders, as per the letter of 17 February 2023, in that no executive summary

of the claimant's submission had been provided, and the 12 page submissions did not answer, as directed, the specific issues (A), (B), and (1) to (10) in the List of Issues revised by the Judge, and for both parties to answer.

194. In these circumstances, the Judge ordered that the claimant's representative was to provide a written explanation as to why the Tribunal's clear and unequivocal orders were not followed, and provide, by no later than 4.00pm on Friday, 3 March 2023, the claimant's executive summary, and the full submissions addressing each of the issues (A) to (10). That time for compliance aligned with when the claimant's updated Schedule of Loss was due.

195. Further, the Judge allowed each party's representative no more than 7 days thereafter to make any final written representations on any matters that may arise from their consideration of the other party's written skeleton. Procedure on 5 April 2023 was otherwise to be as previously directed by the Judge, as per the Tribunal's letter of 17 February 2023.

196. The Tribunal subsequently received updated 12-page written closing submissions from Mr McCracken, the claimant's representative, on 3 March 2023, by email sent at 10:10, along with a claimant's 3-page document, entitled "***Claimant's Statement of Loss***", as well as two updated Schedules of Loss dated 2 March 2023.

197. Mr McCracken apologised for his failure to follow the Tribunal's Orders of 16 February 2023, and clarified that he had intended for paragraphs 2, 3 and 4 from his skeleton submissions tendered on 22 February 2023 to be treated as the claimant's executive summary. That executive summary read as follows:-

"Executive summary

2. The Claimant brings claims for:

a. detrimental treatment because of having made a protected disclosure under section 47B of the Employment Rights Act 1996 (ERA);

b. automatic unfair dismissal because of having made a protected disclosure under section 103A ERA;

c. alternatively, ordinary unfair dismissal under section 98 ERA.

3. The background of the claim is detailed in the ET1, ET3 and Joint Chronology. For the sake of brevity, the key dates are not repeated below.

4. The Claimant asserts that he made a protected disclosure on 21 April 2022 by way of a collective grievance and was subjected to detriments including being subjected to a sham redundancy process, (b) the rejection of the Claimant's grievance and grievance appeal, (c) the Claimant's contractual entitlements being withheld, altered and unilaterally removed, and (d) the termination of the Claimant's employment. The Claimant asserts that he was subsequently dismissed because he made a protected disclosure. If the tribunal do not find that the Claimant was automatically unfairly dismissed, the Claimant contends that his dismissal was ordinarily unfair because there was not a genuine redundancy situation and the Respondent failed to follow a fair procedure when dismissing the Claimant."

198. On 6 March 2023, Mr Melling emailed Mr McCracken, with copy to the Tribunal, with the respondents' 3-page response to the claimant's Schedule of Loss.

199. Further, on 7 March 2023, Mr McCracken forward to the Tribunal, with copy to Mr Melling for the respondents, a letter from DWP confirming the claimant's receipt of Job Seeker's Allowance.

200. On 10 March 2023, Mr McCracken then forwarded to the Tribunal, with copy to Mr Melling for the respondents, the claimant's 3-page final written

representations on matters arising from the respondents' skeleton submissions.

201. Thereafter, on 22 March 2023, Mr Bloor, on behalf of Mr Melling, who was away on holiday, forwarded to Glasgow ET, with copy to Mr McCracken and Mr Melling, the respondents' 6-page revised and updated Counter Schedule, further to Mr McCracken's email of that date at 11:46 stating that the claimant's circumstances had not changed since the updated Schedules of Loss sent to the Tribunal on 3 March 2023 were submitted, and enclosing copy of the claimant's bank statements showing receipt of Job Seeker's Allowance since 24 November 2022.

202. At the Hearing on Submissions, held on 5 April 2023, Mr McCracken produced a further document, extending to some 19 typewritten pages, with 101 separate paragraphs, as a finalised claimant's written submissions, superceding his earlier, 12-page document, extending to some 78 separate paragraphs. We noted two typographical errors, and corrected our copies: the subject heading, on page 6, immediately above paragraph 28, was amended to refer to "***protected disclosure***", rather than "***protected act***", as drafted; and, at paragraph 100, the reference to "***mitigate her loss***" was amended to read "***mitigate his loss***."

203. Mr McCracken did so, of his own volition, to produce this finalised new document, without any express direction or order from the Tribunal, to do so, explaining that he thought it would assist the Tribunal to have a more fulsome written response, expanding on his skeleton, although, in oral submissions, he only intended to summarise his main points, and refer us to case law authorities.

204. The Tribunal heard some further short, formal evidence from the claimant, he being re-sworn, of new, for that purpose, to speak to the additional documents lodged, and added to the Joint Bundle, since the first 3 days of the Final Hearing, being further mitigation evidence, and confirmation of his current circumstances.

205. Mr Melling chose not to cross-examine the claimant on his further evidence, and the Tribunal had no questions of clarification. In those circumstances, the Tribunal then heard oral closing submissions from both Mr McCracken, and Mr Melling, with a final right of reply to Mr McCracken.

206. As a full copy of each and every one of both parties' written closing submissions are held on the Tribunal's casefile, and we had access to them, and all the additional documents added to the Joint Bundle, at the continued Hearing on 5 April 2023, and during our private deliberations, it is not necessary to repeat here their full terms verbatim. That is neither appropriate, nor proportionate.

207. Both parties made detailed written submissions which the Tribunal found to be informative. The Tribunal has considered both parties' written submissions and referred to the case law authorities cited by them in the jointly agreed list of authorities, provided to the Tribunal by Mr McCracken on 22 February 2023, in his email sent at 12:38, being the following cases and statutes:

JOINT LIST OF AUTHORITIES

1.	Norton Tool v Tewson [1972] ICR 501
2.	Moon v Homeworthy Furniture (Northern) Ltd [1976] IRLR 298
3.	Ministry of Defence v Jeremiah [1980] ICR 13
4.	Thomas and Betts Manufacturing Limited v Harding [1980] IRLR 255
5.	Williams v Compair Maxam [1982] ICR 156
6.	Iceland Frozen Foods Ltd v Jones [1983] ICR 17

7.	Polkey v A E Dayton Services Ltd [1988] ICR 142, EAT
8.	R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72
9.	Safeway Stores plc v Burrell [1997] ICR 523, EAT
10.	Murray & Another v Foyle Meats Ltd [1999] ICR 827
11.	Foley v Post Office [2000] ICR 1283
12.	Parkins v Sodexho [2001] WL [2001] UKEAT 1239/00/2206
13.	Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL
14.	Babula v Waltham Forest College [2007] EWCA Civ 174
15.	Kuzel v Roche Products Ltd [2008] EWCA Civ 380
16.	Cavendish Munro Professional Risk Management Ltd v Geduld [2009] UKEAT/0195/09
17.	NHS Manchester V Fecitt & Others [2012] ICR 372, CA
18.	Barot v London Borough of Brent [2013] UKEAT/0539/11

19.	Blackbay Ventures Ltd t/a Chemistree v Gahir [2014] UKEAT/0449/12/2703
20.	Ibekwe v Sussex Partnership NHS Foundation Trust [2014] UKEAT/0072/14/WC
21.	Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2015] UKEAT/0335/14/DM
22.	Underwood v Wincanton plc [2015] UKEAT/0163/15/RN
23.	Cooper Contracting Ltd v Lindsey[2015] UKEAT/0184/15/JOJ
24.	Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401
25.	Chesterton Global Limited v Nurmohamed [2017] EWCA Civ 979
26.	Kilraine v Wandsworth LBC [2018] EWCA Civ 1436
27.	Twist DX Limited and others v Armes and another [2020] UKEAT/0300/20/JOJ (V)
28.	Secure Care UK Limited v Mr R Mott [2021] EA-2019-000977-AT
29.	Martin v (1) London Borough of Southwark and (2) The Governing Body of Evelina School [2021] EA-2020-000432-JOJ
30.	Zabelin v SPI Spirits (UK) Ltd [2022] WL 04389268 (Appeal No. ET/2207084/20)

31.	Hardy v F.O Four Ltd (ET 1806357/2020)
32.	Barot v London Borough of Brent (EAT 2013)
Statute	
33.	Employment Rights Act 1996 – s43B-43H, s47B, s48, s98, s103, s105, s123, s139
34.	Trade Union and Labour Relations (Consolidation) Act 1992 – s207A

208. References are made to essential aspects of the submissions and the cited authorities with reference to the issues to be determined in this judgment, although the Tribunal considered the totality of the closing submissions from both parties, both written submissions, and oral too, whether or not expressly mentioned in these Reasons.

Reserved Judgment

209. When proceedings concluded, on the afternoon of Wednesday, 5 April 2023, at 2:37pm, the compearing parties were advised that judgment was being reserved, and it would be issued in writing, with reasons, in due course after private deliberation by the Tribunal, at a Members' Meeting to be arranged.

210. By letter from the Tribunal, dated 6 April 2023, both parties were advised, for their information only, that a Members' Meeting would take place on Thursday, 18 May 2023, the earliest, mutually convenient date for the full panel, but that parties were not required to attend the Tribunal.

211. We discussed the evidence, and both parties' closing submissions, at our Members' Meeting held on 18 May 2023. An update letter from the Tribunal was sent to both parties, on 19 May 2023, confirming that the full Tribunal had met in chambers on 18 May 2023, and that, following that private

deliberation, the Judge was progressing to draft a written Judgment & Reasons, which he would seek to agree with both non-legal members within the Tribunal administration's target of 4 weeks, subject to member availability to comment to the Judge on the draft. As detailed at paragraph 4 of these Reasons, an apology has already been given by the Tribunal for the delay in finalising this Judgment.

212. This unanimous Judgment represents the final product from our private deliberations and reflects our unanimous views as the specialist judicial panel brought together as an industrial jury from our disparate experiences.

Issues before the Tribunal

213. The case called before the full Tribunal for full disposal, including remedy if appropriate. The finalised issues for determination was, as per the List of Issues, as set by the Judge, as narrated earlier in these Reasons at paragraph **190** above, and reading as follows:

The issues for the tribunal are as follows:

(A) Who was the claimant's employer – R1 (JOA Leisure Ltd) or R2 (Flip Out Ltd)?

(B) If R1 was the employer, should R2 be removed from the proceedings under Rule 34 of the Employment Tribunals Rules of Procedure 2013?

(1) What was the reason for the claimant's dismissal?

(2) If redundancy, was the dismissal fair or unfair in accordance with Section 98(4) of ERA?

(3) If unfair, what compensation, if any, should be awarded?

(3.1) Should any basic award or compensatory award for unfair dismissal be reduced on account of any of the grounds in Sections 122 and / or 123 of the Employment Rights Act 1996

("ERA") – in particular, should any basic award be reduced on account of the claimant's receipt of a redundancy payment?

(3.2) Should any award of compensation for unfair dismissal be adjusted under Section 124A, including any reduction / increase under Section 207A of TULRA 992 for unreasonable failure to comply with an applicable ACAS Code of Practice?

(3.3) If so, for what reason, and to what extent?

(4) Did the claimant make a qualifying protected disclosure to his employer in making the collective grievance on 21 April 2022 to Matthew Melling, or otherwise?

(5) In answering question (4), the tribunal will consider the following questions:

(a) Was there a disclosure of information by the claimant regarding alleged non-compliance with TUPE, or alleged breach of a legal obligation, namely the claimant's contractual entitlement (if any) to a quarterly bonus payment in terms of clause 5 of his contract of employment with JOA Leisure Ltd, in or around April 2022, ?

(b) Did the alleged disclosure or disclosures fall within the terms of Section 47B(1)?

(c) Did the claimant have a reasonable belief that the information disclosed tended to show a relevant failure in terms of Section 47B(1)?

(d) Did the claimant reasonably believe the disclosures to be in the public interest?

(e) Do the disclosures show that the employer had failed, is failing, or likely to fail to comply with any legal obligation?

(f) Was the disclosure a qualifying disclosure within the terms of Section 43C?

(6) If the claimant satisfies the tribunal that he made a protected disclosure, was that the principal reason for his dismissal? If so, is that an automatically unfair dismissal for having made a protected disclosure, as per Section 103A of ERA ?

(7) If so, what compensation, if any, should be awarded under Sections 118 to 124A of ERA?

(7.1) Should any basic award or compensatory award for unfair dismissal be reduced on account of any of the grounds in Sections 122 and / or 123 of the Employment Rights Act 1996 ("ERA") – in particular, the claimant's receipt of a redundancy payment?

(7.2) Should any award of compensation for unfair dismissal be adjusted under Section 124A, including any reduction / increase under Section 207A of TULRA 1992 for unreasonable failure to comply with an applicable ACAS Code of Practice?

(7.3) If so, for what reason, and to what extent ?

(8) Again, on the assumption that the claimant made a protected disclosure, was he subjected to any of the following detriments:

(a) Being subjected to a sham redundancy process;

(b) Having a grievance and grievance appeal rejected;

(c) Having contractual entitlements withheld, altered, or unilaterally removed?

(9) In the event that any or all of the detriments are found to have been done on the ground that the claimant made a protected disclosure, what remedy, if any, is appropriate under Section 49 of ERA? What amounts of compensation (if any) should be

awarded to the claimant for any financial loss, and any non-financial loss, e.g., injury to feelings?

(10) In the event that the Tribunal concludes that the employer has breached any of the claimant's rights, do any of those breaches have one or more aggravating features, so that the Tribunal may consider ordering the employer to pay a financial penalty to the Secretary of State, as per Section 12A of the Employment Tribunals Act 1996 (whether or not it also makes any financial award against the employer on the claim)?

214. In our discussion and deliberation section later in these Reasons, we have had regard to the ten paragraphs of that finalised List of Issues, which we discuss later, taking account of the written and oral submissions from Mr McCracken for the claimant, and Mr Melling for the first respondents.

Relevant Law

215. While the Tribunal received written closing submissions from each of Mr McCracken for the claimant, and Mr Melling for the first respondents, with some statutory provisions recited, and with many case law references, the Judge has required to give the full Tribunal a self-direction on the relevant law to cover all aspects of the case before this Tribunal.

216. The claim proceeds as a complaint to the Tribunal brought under **Section 48 of the Employment Rights Act 1996,** in respect of a complaint of whistleblowing detriment for the claimant having made a protected disclosure, contrary to **Section 47B of the Employment Rights Act 1996,** as also a complaint of unfair dismissal brought under **Section 111 of the Employment Rights Act 1996,** on the basis of the claimant having been "***ordinarily***" unfairly dismissed, contrary to **Sections 94 and 98 of the Employment Rights Act 1996,** and / or "***automatically"*** unfairly dismissed, contrary to **Section 103A of the Employment Rights Act 1996,** for the claimant having made a protected disclosure. Both compearing parties made submissions to us on these matters, and we deal with them later in these Reasons under our section on **Discussion and Deliberation**.

217. Further, in respect of the claimant's complaint of whistleblowing detriment, in the event of success for the claimant, if that complaint is found to be well-founded by the Tribunal, then the Tribunal shall make a declaration to that effect, and may make an award of compensation, as per the Tribunal's remedies powers under **Section 49 of the Employment Rights Act 1996.** Surprisingly, not cited to us by either party's representative, we note and record that, in **Virgo Fidelis Senior School v Boyle [2004] ICR 1120; [2004] IRLR 268,** the Employment Appeal Tribunal, under His Honour Judge Ansell, held that a protected disclosure detriment is a form of discrimination and it is appropriate to apply **Vento** guidelines when making an award for injury to feelings. That EAT judgment in **Virgo Fidelis** was followed in a later EAT judgment, by the then EAT President, Mr Justice Underhill, in **Commissioner of Police of the Metropolis v Shaw [2012] ICR 464; [2012] IRLR 291**, holding that compensation for whistleblower claims should be assessed on the same basis as awards in discrimination cases. Both compearing parties made submissions to us on this matter of injury to feelings, and we deal with them later in these Reasons under our section on **Discussion and Deliberation**.

218. In respect of the claimant's complaints of unfair dismissal, in the event of success for the claimant, if either of those two separate heads of complaint is found to be well-founded by the Tribunal, then the Tribunal shall make a declaration to that effect, and it may make an appropriate order for re-instatement, re-engagement, or award of compensation, as per the Tribunal's remedies powers under **Sections 112 to 124A of the Employment Rights Act 1996.** The claimant does not seek to be re-instated, nor re-engaged by the first respondents, seeking only an award of compensation from the first respondents. Both compearing parties made submissions to us on this matter, and we deal with them later in these Reasons under our section on **Discussion and Deliberation**.

219. **Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992** provides that if, in the case of proceedings to which the statutory provision applies, which includes dismissal and detriment complaints under

the **Employment Rights Act 1996,** it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice, such as the **ACAS Code of Practice on Disciplinary and Grievance Procedures**, applies, and the employer and / or employee has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase, or decrease as the case may be, the compensatory award it makes to the employee by no more than a 25% uplift, or downlift.

220. In the present case, the claimant's Schedule of Loss seek a 25% uplift in the compensatory award for failure to comply with the ACAS Code, while the first respondents' Counter Schedule suggests there should be a downlift, as the claimant did not appeal against his dismissal. Both compearing parties made submissions to us on this matter, and we deal with them later in these Reasons under our section on **Discussion and Deliberation**. As it was not cited to us, by either party, the Judge referred us to a relevant case law authority. In **Slade & Hamilton v Biggs and others EA-2019-000687-VP/EA-2019-000722-VP**, the Employment Appeal Tribunal suggested that Tribunals apply the following four-stage test when assessing whether an ACAS uplift is appropriate:

a. ***Is the case such as to make it just and equitable to award any ACAS uplift?***

b. ***If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?***

c. ***Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?***

d. ***Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?"***

221. Additionally, if the Tribunal determines that the first respondents have breached any of the claimant's rights, and that breach has one or more aggravating features, the Tribunal may order the first respondents to pay a financial penalty to the Secretary of State, in terms of **Section 12A of the Employment Tribunals Act 1996.** A financial penalty can be one half of the award made by the Tribunal. Both compearing parties made submissions to us on this matter, and we deal with them later in these Reasons under our section on **Discussion and Deliberation**.

222. While we would normally try to set out all applicable legal principles in a single section of our Reasons, under **Relevant Law**, we consider that, in this case, with the above high-level concise summary of the law, it would be better and clearer to weave the applicable legal principles into our reasoning when discussing and deliberating on the specific, identified issues before us, in our following section on **Discussion and Deliberation**.

Discussion and Deliberation: Liability

223. In coming to our final decision in this case, the Tribunal has carefully reviewed and analysed the whole evidence led before it, both orally in sworn evidence from Mr Melling, then the claimant, and his witness, Mr Bruce, as also within the various documents spoken to in evidence at the Final Hearing, and produced to us in the Joint Bundle, and additional documents.

224. We have carefully considered both parties' submissions, on credibility and reliability of the witnesses from whom we heard, and we have made our own observations on the evidence, earlier in these Reasons (at paragraphs **92 to 182** above) when giving our own Tribunal's assessment of the evidence led at this Final Hearing. In the course of our private deliberations, we have read both parties' written closing submissions several times and discussed amongst ourselves the issues arising for our judicial determination.

225. On the evidence before us, we have to take the evidence as parties chose to present it to us, for this is an adversarial process, not inquisitorial, and that therefore involves us taking into account, *quantum valeat,* that is for as much as it is worth, the evidence led from each of Mr Melling, as the first

respondents' one and only witness, on the one hand, and the claimant and Mr Bruce on the other hand.

226. The first respondents have sought, by leading evidence only from Mr Melling, to show that the reason for the claimant's dismissal from their employment was redundancy, and that redundancy was a fair reason, and that the claimant was dismissed fairly, rather than unfairly, by them, and for that stated reason.

227. We have not, however, heard directly from the identified dismissal decision maker, Mr Perry. As Mr McCracken put it, at paragraph (6) of his response of 10 March 2023 to the first respondents' skeleton submissions of 22 February 2023: "***The Respondent did not call Mr Perry as a witness therefore the Tribunal has heard no oral evidence from the key decision maker."***

228. We have seen the paper trail from April 2022 leading up to and including the letter of termination from Mr Perry, and while, in evidence, this correspondence was looked at, and questions asked as to its terms, at best, the Tribunal has been presented, from the first respondents, with an incomplete picture of what happened, and no clear and cogent evidence in answer to each of Kipling's six honest serving men – what and why, when and how, where and who ? While Mr Perry was not led as a witness, the Tribunal has had regard to the totality of the evidence made available to us by both parties at this Final Hearing.

229. We have decided that it is not appropriate for us to draw an adverse inference from the mere fact that Mr Perry was not led as a witness for the first respondents, but, looking at the whole evidence led before us, we have decided the matter upon the basis that the first respondents have not satisfied the Tribunal that the reason for the claimant's dismissal was redundancy. Indeed, the first respondents did not argue that the reason for dismissal was anything other than redundancy. In particular, they did not argue that the reason for dismissal was "***some other substantial reason***" in terms of **Section 98(1)(b) of the Employment Rights Act 1996**. While, in his submissions on redundancy being the reason for dismissal, Mr Melling relied upon the EAT judgment by His Honour Judge Serota QC, in **Barot v London**

Borough of Brent [2013] UKEAT/0539/11, he made no application to this Tribunal, as happened in **Barot** on day 3 of 4, to amend the grounds of resistance to run an alternative reason for dismissal based on "***SOSR***".

230. In carefully reviewing the evidence led in this case, and making our findings in fact, and then applying the relevant law to those facts, we have had to consider the each of the claimants' various heads of claim against these respondents.

231. Accordingly, we move onwards now to look at each of the issues before us for judicial determination, looking, in turn, at each of them, as they were set forth in the finalised List of Issues (reproduced in full, earlier in these Reasons, at paragraph **213** above) having regard to each party's position, and then our own determination on the issue.

232. We have looked carefully at each of issues in the finalised List of Issues, and now address them individually, but in a revised order, that seems to us more chronological and logical, as follows:

(A) Who was the claimant's employer – R1 (JOA Leisure Ltd) or R2 (Flip Out Ltd)?

233. In his closing submissions for the claimant, Mr McCracken stated that:

"The Claimant's employer was Respondent 1, JOA Leisure Limited t/a Flip Out Glasgow. The claim was brought against Respondent 1 and Respondent 2 because it was unclear whether the Claimant was employed by Respondent 1 or Respondent 2 until during the final hearing when the Respondent produced a copy of the Claimant's payslips and P45."

234. In his closing submissions for the respondents, Mr Melling stated that:

"The Claimant's employer was JOA Leisure Ltd. Beginning at page 69 in the document bundle is a copy of the Claimant's Contract of Employment with JOA Leisure Ltd, and as issued to the Claimant by JOA Leisure Ltd in November 2021.

As part of the Final Hearing proceedings in February, a copy of the Claimant's Payslips & P45 certificate were provided. These documents confirm that the Claimant was employed by JOA Leisure Ltd.

During the Final Hearing proceedings in February, the claimant accepted that JOA Leisure Ltd was the employer."

235. The Tribunal finds that 29 June 2022 was the effective date of termination of the claimant's employment with his then employers, the first respondents, JOA Leisure Limited, as vouched by that date being given as his effective date of termination of employment by reason of redundancy, in the redundancy notification letter of 28 June 2022 addressed to the claimant from Colin Perry, Regional Operations Manager, Flip Out UK (copy produced as document 81, at pages 244-246 in the Joint Bundle), and at stated as his leaving date in the P45 issued to the claimant by the first respondents, on 2 July 2022, a copy of which was produced to the Tribunal, as an additional document at pages 308 – 310 in the Joint Bundle. We have so found at paragraph 1 of our reserved Judgment.

(B) If R1 was the employer, should R2 be removed from the proceedings under Rule 34 of the Employment Tribunals Rules of Procedure 2013?

236. In his closing submissions for the claimant, Mr McCracken stated that:

"As agreed by both parties during the final hearing, Respondent 2 should be removed from the proceedings under Rule 34 of the Employment Tribunals Rules of Procedure 2013."

237. In his closing submissions for the respondents, Mr Melling stated that:

"During the Final Hearing proceedings in February, the claimant accepted that R1 was the employer & therefore R2 should never have been brought into the proceedings. The claimant stated that they were happy for R2 to be removed from proceedings.

R2 (Flip Out Ltd) should be removed from the proceedings under Rule 34 of the Employment Tribunals Rules of Procedure 2013."

238. Of consent of both compearing parties at this Final Hearing, the Tribunal agrees that it is appropriate to dismiss the second respondents, Flip Out Limited, from these Tribunal proceedings, in terms of **Rule 34,** on the basis that they were wrongly included by the claimant, and there are no issues between that respondent and the claimant which it is in the interests of Justice to have determined in these proceedings. We have so ordered at paragraph 1 of our reserved Judgment.

(1) What was the reason for the claimant's dismissal?

239. In his closing submissions for the claimant, Mr McCracken stated that:

> *58. Dismissal is admitted by the Respondent however, the reason for the dismissal is disputed. The Respondent has pled the potentially fair reason of redundancy in accordance with s.98 (2)(c) ERA. The Claimant denies this was the reason for dismissal. The Claimant maintains that a true redundancy situation was not established.*
>
> *62. In summary the Claimant submits that the requirements of the Respondent's business for employees to carry out work of the particular kind that the Claimant carried out had not ceased or diminished or were not expected to cease or diminish.*
>
> *64. If the tribunal accepts that the requirements of the employer's business for employees to carry out work of a particular kind had ceased or diminished, or were expected to cease or diminish, which is denied, the Claimant asserts that the dismissal was not caused wholly or mainly by the cessation or diminution. Rather, the Respondent used the redundancy exercise as a means to remove the Claimant from his employment, or, alternatively, force him into a role where he would be stripped of his contractual entitlements which were more favourable than the General Managers at Flip Out UK.*
>
> *65. The Respondent states in the at-risk letter dated 25 April 2022 (page 101 of the bundle) "we recognise that in the short period since the acquisition we have not been able to gain a comprehensive knowledge*

about the actual content of the three job roles currently in place at Flip Out Glasgow." The Claimant submits that the Respondent has admitted that it did not have comprehensive knowledge about the actual content of the three jobs that it put at-risk and was not concerned by the actual content of the three jobs because the real reason for the dismissal was to force the Claimant out of his role or force him into a role with significantly less favourable contractual terms. This is supported by the Claimant and Mr Bruce evidence as they have told us that the job descriptions for the alternative General Manager role was the same as the role that the Claimant performed.

66. The Claimant advised during his evidence that the real reason for the redundancy was that his package as General Manager at JOA Leisure was more generous than what Flip Out UK were willing to offer. We also heard from Mr Bruce who supports the Claimant's evidence as he advised that the redundancy exercise was a sham process put in place to demoralise and remove the JOA Leisure Limited senior management team. Mr Bruce also advised that he believed that the Respondent realistically wanted to lower their salaries because the Respondent did not like how much the senior management team earned in comparison to the Flip Out UK managers.

67. Furthermore, Mr Bruce advised that the rationale provided by the Respondent was that it wanted to reduce the number of senior managers at JOA Leisure from three to two. Mr Bruce advised that following receipt of the updated at-risk letter dated 17 June 2022 (pages 211 – 213 of the joint bundle) he accepted voluntary redundancy in an attempt to protect The Claimant and Fraser Watt's jobs. However, the Respondent continued with the redundancy exercise despite Mr Bruce's decision to take voluntary redundancy. The Claimant submits that this is further evidence to support the Claimant's position that the Respondent's focus and real reason for the redundancy exercise was simply to reduce the Claimant's terms and conditions of employment such as salary because they were more

favourable than the terms of conditions of employment of the Flip Out UK general managers.

240. In his closing submissions for the respondents, Mr Melling stated that:

(1) (a) As provided for by Section 139 of the ERA, the dismissal was wholly attributable to the fact that the requirement of the business for the Claimant to carry out work of a particular kind had ceased. This redundancy position applied to each of the three existing management team roles at Flip Out Glasgow.

(b) Following the acquisition of JOA Leisure Ltd, I led the Flip Out UK team involved in assessing the acquired business. This work had already begun during the pre-acquisition due diligence, but then continued in February 2022 post-acquisition. Towards the end of March 2022 I had learnt enough about the three different roles that comprised the senior management team at Glasgow. In particular, this included my knowledge about the extended range of the senior management team's responsibilities, including full P&L control, budgeting, payroll and pension, business development, and marketing.

(c) It was clear to me that whatever the merits of the existing arrangements in place at Glasgow when it was a standalone business, they were significantly different from the management team arrangements and associated managerial responsibilities operated at every other Flip Out UK park. As part of my assessment, I was also clear that the core responsibility of the Glasgow management team needed to be re-focussed on effective and more visible operational management, and that the broad range of specialist management functions should more effectively and efficiently be vested with the central Flip Out UK team.

(d) Page 100 in the document bundle highlights the key points of change between the existing General Manager job role and the new General Manager job role. These changes were –

- *the new role was focussed on the operational management of the park, including a more visible and active operational presence*
- *the new role would not include the extended range of professional management functions performed by the existing General Manager role*
- *the portfolio of professional management functions would be re-allocated to the appropriate departments within the central Flip Out UK team*
- *the new operational General Manager role would report to the Regional Operations Manager, in contrast to the line of reporting of the existing General Manager to the business owner, underlining the changed seniority of the new job role*
- *the salary level of the new General Manager role was significantly less than the existing General Manager role salary level*
- *the terms and conditions applicable to the new General Manager job role would not include the Company car and free meal arrangements that had applied to the existing General Manager role*

A similar range of changes between an existing job role and a new job role is illustrated in the case of ***Hardy v F.O Four Ltd (2021).*** *At paragraphs 5.2 and 5.3 of his judgment, Employment Judge Drake sets out the types of changes in the job role that applied in a case that subsequently led to the dismissal of the employee by reason of redundancy. Paragraph 12 of Judge Drake's judgment is also relevant, stating (quote) '… I have found as fact that this Claimant was told his position was at risk but then he could apply for other posts, so from this I conclude that the Respondent did not jump to an immediate conclusion about the Claimant's future employment until they had given him a chance to consider applying. I regard this as a sound basis for concluding that the Respondent did what I would expect another reasonable employer to do'. An important distinction between the*

two cases is that Mr Gallacher had the opportunity to express interest in either of the two new job roles and to be automatically slotted-in to either job without the need for any form of selection process. This approach therefore further attests to the reasonableness of Company's approach in relation to the provisions set out in Section 98(4) of the ERA.

(e) The changed job roles were described in new job descriptions that were provided to the Claimant. The new job descriptions are included in the document bundle on pages 104 to 106, and pages 107 to 109.

(f) The changes were substantive and significant. The content of each of the new job roles was very different from the existing job roles. Associated with the changed job content, the terms and conditions of employment applicable to the new job roles were markedly different from the existing terms and conditions.

(g) The ERA section 139 sets out that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

- *(section 139, part b) the fact that the requirements of that business …*
- *(section 139, part b, point i) for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish*

(h) As outlined in the re-set programme, there was no requirement for the type of senior level General Manager role occupied by the Claimant at Flip Out Glasgow. The requirement for this type of job role had ceased. Within the meaning of the ERA, the job was redundant.

*The case of **Barot v London Borough of Brent (2013) EAT** illustrates the circumstances in which a management restructuring can meet the requirements of the ERA section 139 and lead to a dismissal by reason of redundancy. Paragraph 83 of the judgment sets out that (quote) 'It is plain from that case (Johnson v Nottinghamshire Combined Police Authority,*

1974) and from Safeway Stores Plc v Burrell and Murray and Foyle Meats Ltd (1999) that it is not an automatic consequence of there being a business reorganisation that there is a redundancy, nor is there a need for a business reorganisation in order that there should be a redundancy situation. The two are entirely self-standing concepts. But if a business reorganisation leads to a diminution in the requirement for employees carrying out the relevant work, then that business reorganisation leads to a redundancy situation and if not, not.'

Similarly, in the same judgment at paragraph 81 there is commentary about the decision in Safeway Stores v Burrell (1987) as follows (quote) – 'there are three questions to answer in relation to this third kind of redundancy situation: Has the claimant employee been dismissed as defined? Was there, within the business, a reduced need for employees to do a particular kind of work? Was the claimant employee dismissed wholly or mainly because of that reduced need?

Each of the three tests illustrated in the Safeway Stores v Burrell case are satisfied by the re-set programme at Glasgow in fulfilment of the definition set out in ERA Section 139.

241. The Tribunal has had to address two conflicting views on this matter. The first respondents plead a genuine redundancy situation, and the claimant challenges that as being a sham redundancy, "***put in place to demoralise and remove the JOA Leisure Limited senior management team".*** Having carefully reflected on the whole evidence available, the Tribunal finds that the claimant was unfairly dismissed by the first respondents, as they have failed to show that the claimant was redundant, and that they fairly dismissed him for that reason.

242. In particular, the Tribunal notes that in the evidence given by Mr Melling, the first respondents did not clarify, specify, or quantify, with any meaningful precision, for the assistance of the Tribunal, what exactly the claimant and the senior management team at Flip Out Glasgow did on a day to day basis, nor explain what work done by him, or them, would reduce or cease going forward

with the new management structure, except that the site's profit and loss account would be done centrally, and that certain other specialist management functions could be done, more effectively and efficiently, by a central Flip Out UK team, rather than on site.

243. On the evidence before us, it was clear that the Glasgow management structure was at odds with that in place at Flip Out UK's other parks, where there were 2 managers, and not 3. It seemed to us, on the very limited information made available to us at the Final Hearing, that Mr Melling and some others had maybe done some form of business analysis, or comparison, with other parks, rather than making a detailed assessment of the Glasgow site, having regard to its actual operations, and size of its business, including profitability.

244. All we know, for certain, is that Flip Out UK wanted the Glasgow senior management team to reduce from 3 to 2. We were presented with no management information, management accounts, etc, to show us the size and resources of the Glasgow operation in relation to staffing, customer footfall, income and expenditure, etc, as compared to other parks in the Flip Out UK portfolio. It is disappointing that the first respondents did not provide us with supporting documentation, other than what was in the Bundle, nor a senior management witness from the operational business of Flip Out UK, to speak to us on the business reasons for the re-set process.

245. In his closing submissions, Mr Melling stated that the claimant's dismissal was ***"wholly attributable***" to the fact that the requirement of the business for the claimant to carry out work of a particular kind had "***ceased"***, and that this redundancy position applied to each of the three existing management team roles at Flip Out Glasgow.

246. As there were to be a General Manager and Assistant General Manager at Glasgow, under the new structure, there must have still been work there and job content for 2 out of 3 existing staff, but no evidence was led before us to show what parts of any particular postholders' jobs were to cease, nor,

dependent upon their specific work patterns, how the senior management team's work content may have diminished, rather than ceased altogether.

247. It is also significant, in our view, that the first respondents continued with the redundancy process despite Mr Bruce's decision to leave, and that leaving the claimant and Mr Watt. This lends weight to the claimant's view that the "***focus and real reason for the redundancy exercise"*** was to reduce the claimant's terms and conditions of employment, because they were more favourable to him than the terms and conditions of employment for other Flip Out UIK general managers at other parks.

(2) If redundancy, was the dismissal fair or unfair in accordance with Section 98(4) of ERA?

248. In his closing submissions for the claimant, Mr McCracken stated that:

> *70. The Claimant has highlighted the undoubted flaws in the Respondent's redundancy procedure. In particular, the Respondent did not genuinely consult with the Claimant, discuss diminution in work with him, adopt a fair basis on which to select for redundancy, consider suitable alternative employment or consider bumping the Claimant into another role. In this regard the task of the Employment Tribunal when deciding if the employer acted reasonably is to assess the fairness of the dismissal process as a whole. When one does that in this case, the Claimant submits that the process was clearly unfair.*

249. In his closing submissions for the respondents, Mr Melling stated that:

> *(2) (a) Because of the substantive changes to job content and associated terms and conditions of employment that applied with each of the two new job roles, the Company recognised from the outset that the new jobs could not reasonably or fairly be classified as suitable alternative employment. They did though represent alternative employment.*

(b) Page 102 of the document bundle explains the significance of this classification by the Company in relation to safeguarding the continuing entitlement to the applicable redundancy entitlements if an affected employee chose not to express interest in any of the new job roles.

(c) The re-set programme included the opportunity for the Claimant to express his interest in either of the two new available job roles. Page 101 of the document bundle explains that an expression of interest in either of the two new job roles could be expected to lead to the person being slotted-in to the new job without the need for any interview or selection process.

(d) The re-set programme also included the application of a 3-month trial period in the new job roles, operating on a mutual no-obligation basis. The trial period included the facility for the Claimant to discontinue the trial period at any point and still be eligible for any applicable redundancy payment, including calculation of the redundancy payment to the applicable revised termination date.

(e) In that the Claimant's existing job role was redundant and that this was the reason for the dismissal, this satisfies the requirements set out in Sections 98(1) and (2)(c) of the ERA. Following on from this, and in accordance with the provisions set out in Section 98(4) of the ERA, the Company acted reasonably with regard to the circumstances and merits of the case in treating the redundancy as a sufficient reason to dismiss the Claimant. The dismissal of the Claimant was therefore fair as set out in Section 98(4) of the ERA.

250. As the respondents have not established their stated reason for dismissal, namely redundancy, the dismissal is unfair.

(4) Did the claimant make a qualifying protected disclosure to his employer in making the collective grievance on 21 April 2022 to Matthew Melling, or otherwise?

(5) In answering question (4), the tribunal will consider the following questions:

(a) Was there a disclosure of information by the claimant regarding alleged non-compliance with TUPE, or alleged breach of a legal obligation, namely the claimant's contractual entitlement (if any) to a quarterly bonus payment in terms of clause 5 of his contract of employment with JOA Leisure Ltd, in or around April 2022, ?

(b) Did the alleged disclosure or disclosures fall within the terms of Section 47B(1)?

(c) Did the claimant have a reasonable belief that the information disclosed tended to show a relevant failure in terms of Section 47B(1)?

(d) Did the claimant reasonably believe the disclosures to be in the public interest?

(e) Do the disclosures show that the employer had failed, is failing, or likely to fail to comply with any legal obligation?

(f) Was the disclosure a qualifying disclosure within the terms of Section 43C?

(6) If the claimant satisfies the tribunal that he made a protected disclosure, was that the principal reason for his dismissal? If so, is that an automatically unfair dismissal for having made a protected disclosure, as per Section 103A of ERA?

251. We have grouped these three issues (4), (5) and (6) together, in our analysis, as Mr McCracken's finalised written submissions did not follow the flow of our listed questions, but he gave answers on a thematic basis, by subject matter. In his closing submissions for the claimant, Mr McCracken stated that:

9. We heard from the Claimant and Mr Bruce during their evidence that the Claimant and his senior management team at JOA Leisure Limited, raised a collective grievance on 21 April 2022 (page 90 of the joint bundle). The Claimant asserts that the information contained within the collective grievance amounts to a disclosure of information as it conveys facts and does not simply raise concerns or make allegations. The Claimant submits that the collective grievance provides factual examples of the Respondent's failures to comply with its' legal obligations, namely, the Respondent's legal obligation to comply with the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') and its' legal obligation to honour the Claimant and his senior management colleagues' contracts of employment.

10. The information provided at point (1) of the collective grievance identifies the legal obligation in which the Claimant and his senior management staff believed was being breached, namely, the obligation to comply with TUPE. The Claimant and his senior management staff go further and explain why they considered that the Respondent was breaching its' legal obligation to comply with TUPE and have provided examples of the Respondent's failures, at point (1) and (3).

11. The information provided at point (2) of the collective grievance also conveys facts because the proposed quarterly bonus figures that Mr Melling was proposing in his email on 20 April 2022 (pages 87 and 88 of the joint bundle) was, as quoted in the collective grievance, 'really different' to the quarterly bonus scheme that the Claimant and his senior management staff believed they were entitled to under their contract of employment and which they had been operating since JOA Leisure Limited opened its site in Glasgow in April 2017. Again, the Claimant and his senior management colleagues identified the legal obligation in which they considered the Respondent was breaching. Furthermore, the Claimant and his management colleagues have

provided examples of the Respondents' failure to comply with this legal obligation.

12. *In summary, the Claimant submits that the collective grievance submitted on 21 April 2022 (page 90 of the joint bundle) was a disclosure of information.*

16. *The Claimant submits that he reasonably believed that the disclosure of information tended to show one of the relevant failures listed in s.43B(1)(a)-(e) ERA, namely, the relevant failure listed at s.43B(1)(b) ERA, "that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject." The Claimant and his senior management colleagues provided specific examples in the collective grievance of the Respondent's failures to comply with its' legal obligations and submits that the information contained in the collective grievance contains sufficient factual content to tend to show that the Respondents were failing to comply with its' legal obligation, namely the Respondent's legal obligations to comply with the TUPE regulations and also the Respondent's legal obligation to honour its' contractual obligations. The Claimant submits that the collective grievance also identifies the legal obligations, which the Claimant asserted was being or had been breached. The detail provided by the Claimant identified more than a simple belief that the Respondents' conduct was wrong, it provided specific factual details of why he considered the Respondent's conduct to be a breach of its' legal obligations.*

18. *Both the Claimant and Mr Bruce provided during their evidence that their colleague, Ms Carol Hughes approached them with concerns that the Respondent was failing to comply with its legal obligations under the TUPE regulations (pages 81(b)-(c) of the joint bundle). It was clear from the Claimant's evidence that although he accepted that the Respondent's failure to comply with the TUPE regulations did not apply directly to him, he genuinely believed that the Respondent was*

failing or had failed to comply with the TUPE regulations in respect of his colleague Ms Hughes. This was the same with Mr Bruce's evidence.

19. Furthermore, we heard from the Claimant that Mr Melling disputed the bonus payments put forward by the Claimant and reduced the Claimant and his senior management colleagues' quarterly bonus for the period of December 2021 – February 2022, which he felt was a breach of its legal obligations because they had a contract in place, and he was calculating the quarterly bonus using the same method he had been using since April 2017. It was clear from the Claimant's evidence that he genuinely believed that the Respondent was breaching his contractual right to a quarterly bonus and that under custom and practice, he did not require to set KPI targets as this was not how the JOA Leisure Limited bonus scheme had operated in practice over the past 5 years.

20. In summary, the Claimant submits that the belief that the Respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it is subject, namely the legal obligation to honour its contractual obligations and comply with the TUPE regulations was reasonably held given the above.

23. The collective grievance was raised by the entire senior management team at JOA Leisure Limited however, it affected the entire management team at JOA Leisure Limited. We heard from the Claimant and Mr Bruce that the Respondents' conduct in respect of the quarterly bonus had a significant financial detriment on the entire management staff at JOA Leisure Limited, in particular Mr Melling proposed to pay Mr Bruce 50% of the bonus proposed by the Claimant. We also heard from the Claimant during his examination in chief that the morale of the management team at JOA Leisure Limited was affected by the Respondent's conduct. The email from Ms Hughes on 7 April 2022 (page 81b of the joint bundle) supports the Claimant's

evidence that the Respondent's conduct affected the morale of the entire management team at JOA Leisure Limited. The language used in the collective grievance related to the wider issues affecting the entire management team. The outcome that the collective grievance has requested is not an outcome specific to the Claimant but an outcome for all the management team. The words 'our' and "us" supports the Claimant's evidence that the disclosure of information was made in the public interest. The disclosure of information related to deliberate wrongdoing on the part of the Respondent as opposed to unintentional wrongdoing and directly affected very important interests of the Claimant and his colleagues.

24. The Claimant therefore submits that the disclosure of information on 21 April 2022, was made in the public interest.

26. We heard from the Claimant during his evidence that the Respondent's conduct in respect of the quarterly bonus was having an impact on the entire management team and that he believed if he was able to solve the problem for the senior management team it would solve the issue for the entire management team. The Claimant also advised when asked by Mr Melling to confirm that only points (ii) and (vii) of the collective agreement applied to him, he advised that if someone comes to him and says they are really upset because they have been promised one thing and it hasn't been followed, he is there to protect them. The Claimant submits that in respect of the disclosure of information relating to the non-compliance with TUPE, he believed that he was supporting his colleague, Ms Hughes by making the disclosure of information. Again, it was clear from the Claimant's evidence that he genuinely believed that the disclosure of information was made in the public interest.

27. In summary, the Claimant submits that the disclosure of information was in the public interest and that he had a reasonable belief that it was in the public interest.

30. The Claimant submits that the qualifying disclosure also qualifies as a protected disclosure because it was made to the category of people listed at s.43C(1)(a), ERA 1996, namely the Claimant's employer. The qualifying disclosure was made to Mr Melling on 21 April 2022. Mr Melling was an Operations Director of Flip Out UK and was in a more senior position than the Claimant. The qualifying disclosure was also made to the Director of JOA Leisure Limited, Mr Richard Beese on 25 April 2022.

252. In his closing submissions for the respondents, Mr Melling stated that:

(4) (a) Page 90 of the document bundle is the formal letter of grievance registered by the Claimant and four other team colleagues on 21 April 2022. In the opening sentence the Claimant specifically refers to it being a grievance. There are further explicit references to 'grievance' later in the letter.

The use of the term 'grievance' does not present as being accidental or general in nature. It presents as being intentional and purposeful. Indeed, as part of his witness evidence to the Employment Tribunal in February, Mr Bruce stated that the legal advice they had been given was to submit a grievance. Under cross-questioning, Mr Bruce confirmed that the specific advice they had received was to submit a grievance only.

(b) At page 137 in the document bundle is the grievance meeting caller letter to the Claimant on 16 May 2022. It specifically provided the opportunity for the Claimant to challenge if the identification of his two points of grievance was not accurate or complete. The Claimant did not challenge the identification of his two points of grievance.

(c) At no point from registering his grievance on 21 April 2022 to the termination of his employment by reason of redundancy on 29 June 2022 did the Claimant make any form of reference to 'whistleblowing' or any other or more formal reference to making a qualifying protected disclosure. Throughout this period the Claimant was receiving employment legal advice. It is also the case that none of the other four

signatories to the grievance letter received on 21 April made any reference at any point to whistleblowing or a qualifying protected disclosure.

(d) The Company recognises that an employee may raise a concern without mentioning whistleblowing at all, only for it later to become evident that their concern was protected. The Company also has to presume that real caution has to apply in the consideration of any such circumstance. Quite clearly in some circumstances it is an avenue that it open to mis-use, either by contrivance at the time or as a retrospective construct.

(e) The criteria applying to what can be defined as a qualifying protected disclosure are obviously important.

- *A qualifying disclosure relates to a reasonable belief of serious wrongdoing in the workplace, typically concerning some form of dangerous or illegal activity. Common examples include the commissioning of a criminal offence such as bribery or corruption, or where there is reason to believe that health and safety at work obligations are being dangerously breached.*
- *Section 43B(1) of the ERA sets out that the information provided by the employee must relate to one or more of six types of relevant failure. In brief summary these six criteria relate to criminal offences, failure to comply with a legal obligation, miscarriage of justice, endangering health and safety, damage to the environment, and concealment of any of the other five criteria.*
- *To fall within the scope of the ERA, the employee must also reasonably believe that they are acting in the public interest.*
- *Importantly, a complaint will not usually count as a qualifying disclosure where it can be characterised as a personal employment grievance.*

(f) On pages 272 and 273 of the document bundle the Claimant asserts that the letter of grievance presented on 21 April was a qualifying disclosure because it contained information relating to the TUPE Regulations. The claimant's employer remained unchanged throughout the period from acquisition to the claimant's employment ending with the company. There was never any reference from the company to the claimant that TUPE would apply. The Claimant would have had no credible reason to believe that a TUPE situation applied.

The Claimant submitted a late set of documents for inclusion into the document bundle. Pages 81a and 81b of the document bundle make it clear that as early as 8 April 2022 the Claimant was aware that no TUPE situation applied. Additionally, pages 91 and 92, sent to the Claimant on 21 April states very clearly that (quote) 'I can confirm that no employee from JOA Leisure has been TUPE'd to our FO UK Company'. So, by return message to the Claimant on the same day that he had raised a concern about TUPE, the company provided clear and unequivocal confirmation of what he already knew. TUPE did not apply to any of the Glasgow team, including the signatories to the letter received on 21 April.

(g) It is therefore not credible for the Claimant to assert on page 273 of the document bundle that he had a reasonable belief that the point he had lodged about TUPE in the letter of grievance presented on 21 April was substantially true.

(h) The complaints set out on page 90, received on 21 April, are properly characterised as being personal employment grievances. As part of his witness statement, Mr Bruce stated that this was the advice being received from their employment law advisors. For its' part, the Company can understand why such advice would have been given.

By mid-May it was apparent that the letter dated 20 April and received on 21 April was a collection of different individual grievances that should properly be progressed as individual grievances in accordance with the grievance procedure.

(i) The record demonstrates that the Company responded properly and promptly to the complaints received on 21 April. It immediately acknowledged receipt of the letter of grievance. It began its initial enquiries on the day the letter of grievance was received. It set out the timeline for the commencement of investigation into the grievances that had been registered. It conducted a thorough investigation into each of the grievances that had been registered.

(j) In marked contrast the Claimant did not co-operate with the Company's investigation into the grievances he had registered. Page 129 of the document bundle registers the Claimant's lack of co-operation with the investigation that was being conducted. At that time, the company stated (quote) 'It is beholden on the Company to make it clear to you that you should respond properly to the Company's questions. You should not continue to act in ways that obstruct or delay the Company's quite proper enquiries into the grievance you have raised'.

The record shows that despite the lack of co-operation from the Claimant, the Company thoroughly investigated the grievances registered by the Claimant on 21 April 2022. The record also shows at pages 157 to 159 inclusive and pages 198 to 203 inclusive that the Company provided a full account of its findings as the basis for the decisions taken to reject the Claimant's grievances at the first grievance meeting and the subsequent appeal hearing.

(k) There are therefore multiple reasons why the letter of grievance presented on 21 April cannot be classified or regarded as a qualifying disclosure.

o The important protections afforded to a qualifying disclosure relate to a reasonable belief of serious wrongdoing in the workplace, typically concerning some form of dangerous or illegal activity. The Company demonstrably took the complaints registered on 21 April seriously, acting promptly and purposefully. The Company would though be very

surprised if the complaints registered on 21 April meet the threshold to be classified into the category of serious wrongdoing in the workplace within the meaning of the ERA.

- *The Claimant's letter of grievance received on 21 April did not meet one or more of the six types of failure set out in Section 43B(1) of the ERA that are required for it to be classified as a qualifying disclosure.*
- *Neither did the Claimant's letter of grievance satisfy the prescribed test for a qualifying disclosure of being in the public interest.*
- *The important protections afforded to a qualifying disclosure do not apply to personal employment grievances. That is the proper classification to be attached to the letter of grievance received from the Claimant on 21 April.*
- *The evidence is compelling that the Claimant's intention and expectation, from 21 April onwards, was that his complaints must be dealt with as an employment grievance. The Claimant's expectations on this were clear.*

(5) (a) The letter of grievance received on 21 April 2022 set out a number of grievances variously held by the Claimant and the other four signatories to the letter. The letter included reference to what is referred to as (quote) 'a proposed TUPE transfer' for some of the signatories, the contractual bonus scheme, changed hours of work for some of the signatories, and a request for clarification about pension contributions because the signatories believed they were suffering a loss. The letter of grievance also included reference to a Subject Access Request (SAR).

On 15 February Mr Bruce, called as a witness by the Claimant, made reference to the (SAR). Page 116 of Document 22 addresses the Subject Access Request (SAR) set out in the Claimant's letter of grievance received on 21 April. The letter pointed the Claimant to the specific guidance provided by the Information Commissioner's Office (ICO) about how to submit a SAR.

The sign posting to the guidance published by the ICO was because the company regarded the ICO to be the competent authority to provide definitive guidance about SARs. The Claimant did not respond to, or follow, the guidance published by the ICO. Page 162 of Document 41 shows that the company again sign-posted the Claimant to the ICO's guidance on 27 May 2022.

The company was aware that the ICO guidance specifically sets out the exemption that applies to personal data used for management planning about a business activity. The ICO guidance goes further. It exemplifies the specific exemption by reference to what it describes as a reshuffle that is likely to involve redundancies. The ICO exemption therefore applied directly to the scope of the Claimant's SAR.

Notwithstanding the exemption specified by the ICO, the letter to the Complainant on 7 May focussed on the wholly unreasonable scope of the Claimant's SAR request. It did not hide behind the specific exemption set out by the ICO. Neither did it refuse to respond to a properly submitted SAR. It did though expect that a SAR submitted as part of a grievance letter should be appropriately scoped and relevant.

The SAR issue has already been determined by the Employment Tribunal. On 16 December 2022 Employment Judge P O'Donnell directed that the Claimant's application for an Order for Disclosure under Rule 31 be refused. Employment Judge O'Donnell commented that the Claimant's request was simply too wide and amounts to a fishing expedition.

(b) The alleged disclosure or disclosures did not fall within the terms of Section 47B(1) of the ERA. In the context of Section 47B(1), neither was the Claimant subjected to any detriment by the Company either on the ground that the Claimant had made the alleged disclosure or disclosures, or on the ground of the grievances he presented in the letter received on 21 April.

(c) As set out in paragraphs 4(f) and 4(g) above, it is not credible for the Claimant to assert on page 273 of the document bundle that he had a reasonable belief that the point he had lodged about TUPE in the letter of grievance presented on 21 April was substantially true.

The case of Chesterton Global Limited v Nurmohamed (2015) EAT provides important guidance about the ERA test that the employee must reasonably believe that they are acting in the public interest. Paragraph 30 of the EAT's judgement refers to the preceding judgment of the Employment Tribunal in the following terms (quote) – '81 … An employment tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the paragraphs in section 43(B)(1)(a) to (f) of the ERA 1996. The second is to decide, objectively, whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith' (Note – the term 'in good faith' was subsequently amended to become 'in the public interest'. The judgment continues '82 … In this context, in my judgment, the word 'belief' in section 43B(1) is plainly subjective. It is the particular belief held by the particular worker. Equally, however, the 'belief' must be 'reasonable'. That is an objective test.' This case before the Employment Appeal Tribunal was subsequently considered by the Court of Appeal, where there was no qualification registered in relation to the objective test that the 'belief' must be 'reasonable'.

So, in addition to determining whether the worker subjectively believed that the disclosure was in the public interest, the Employment Tribunal also has to determine whether that belief was objectively reasonable. Paragraph (4)(f) above demonstrates that irrespective of whether the Claimant believed that any disclosure he was making was in the public interest, it failed the objectively reasonable test.

(d) It follows from the content of paragraph (5)(c) above that because the Claimant would have known that the point he lodged about TUPE in

the letter dated 21 April was not true, it would be perverse to construe that any such disclosure could be in the public interest. It would not be in the public interest to be disclosing something that was known to be not true.

(e) The four points of grievance set out in the letter received on 21 April 2022 do not show that the Company had failed, was failing, or was likely to fail to comply with any legal obligation.

(f) As set out in paragraph (4)(j), (k), and (l), as above, the disclosure purportedly set out in the letter of grievance received on 21 April was not made in accordance with ERA Section 43B(1). Section 43B(1) requires that to become qualifying, a disclosure must be made in the public interest. This was not the case.

(6) As set out in paragraph (1) above, the principal and only reason for the dismissal of the Claimant was that his job role was redundant. Paragraph (2)(e) above sets out that the dismissal was fair as prescribed in Section 98(4) of the ERA.

253. In coming to our decision on these matters, we have preferred the arguments advanced by Mr McCracken, on behalf of the claimant, to those offered by Mr Melling on behalf of the first respondents. In our view, the claimant has established each of the necessary components of a qualifying disclosure as set out in the EAT's judgment in **Martin v (1) London Borough of Southwark and (2) The Governing Body of Evelina School EA-2020-000432-JOJ**, where, at paragraph 6, the EAT re-iterated the 5-stage test from a number of authorities for determining if there has been a protected disclosure: there must be a disclosure of information; the worker must believe the disclosure is made in the public interest; that belief must be reasonably held; the worker must believe that the disclosure tends to show one of the matters in s43B(1)(a)-(f) Employment Rights Act 1996; and that belief must be reasonably held.

254. The fact that, on 8 April 2022, Carol Hughes was told by Mr Melling that no TUPE situation applied to her is not disputed, but the Tribunal notes that she nonetheless signed the collective grievance on 21 April 2022, as , so it

appears to us, she and her senior management colleagues did not accept, or have confidence in Mr Melling's statement, and they still believed that the employer company was likely to fail in its legal obligations about TUPE. All signatories are clear that they believed the company was failing in its legal obligations about their terms and conditions of employment, relating to bonus payments and pension contributions. They had a commonality of interest in making a collective grievance. The fact that the word "***whistleblowing***" does not appear is irrelevant, and of no consequence, given the express terms of their collective grievance, and what it sets out as the employer's failings to comply with their legal obligations. Further, we are satisfied that the disclosures, whether to Mr Melling on 21 April 2022, or to Mr Beese on 23 April 2022, when it was copied to him, qualify as protected disclosures because they were made to the claimant's employer.

(8) Again, on the assumption that the claimant made a protected disclosure, was he subjected to any of the following detriments:

(a) Being subjected to a sham redundancy process;

255. In his closing submissions for the claimant, Mr McCracken stated that:

35. We heard from the Respondent's Mr Melling that the Respondent was allegedly planning to conduct the Glasgow Re-set programme before the Claimant submitted the collective grievance on 21 April 2022 and that the emails, produced at pages 76 and 77 of the joint bundle proves this. There was a significant period of time between these said emails and the commencement of the Glasgow re-set programme. The Glasgow re-set programme commenced 4 days after the collective grievance was submitted and placed the 3 most senior managers at JOA Leisure Limited at-risk. The Claimant submits that he was subjected to a sham redundancy because he made the protected disclosure. The Respondent has not called Mr Perry as a witness to counteract this suggestion. Furthermore, the said emails produced at pages 76 and 77 of the bundle suggests that Jon Thomas and Mike Randal would head up the initial dialogue and Mike Randall would lead

the actual Glasgow Re-set programme. The Glasgow re-set programme was eventually carried out by Mr Perry. The Respondent has failed to include any further emails to show the dialogue involved in appointing Mr Perry to deal with the Glasgow Re-set programme. The Claimant submits that had the decision for Mr Perry to commence and conduct the Glasgow Re-set programme been taken prior to the collective grievance being submitted and was entirely unrelated to the collective grievance, the Respondent would have produced the email correspondence confirming this.

36. In summary the Claimant asserts that the Respondent subjecting him to a sham redundancy was a detriment and that the protected disclosure materially influenced the Respondent's treatment of the Claimant in subjecting him to a sham redundancy.

256. In his closing submissions for the respondents, Mr Melling stated that:

(8) (a) Assuming the term 'sham' is being used by the Claimant as an adjective with the meaning of 'bogus' or 'false', the considerable volume of documentary evidence, including the documented actions of the programme, demonstrate that the re-set programme was what it purported to be. It was the required re-setting of the Glasgow park management team arrangements, that produced an at-risk position, and that subsequently led to the dismissal of the Claimant by reason of redundancy.

The approach adopted in the re-set programme was conventional and was based on a well-established model. It was not novel or exotic in any ways.

Page 76 of the document bundle shows that the company initiated preparation of the Glasgow management team re-set programme on 25 March 2022. Page 77 of the document bundle also shows that the go-live date for the start of the re-set programme was set on 3 April.

It is therefore evidentially the case that the planning and initiation of the re-set programme, which ultimately led to the dismissal of the Claimant by reason of redundancy, was undertaken and completed well before the letter of grievance was received from the Claimant on 21 April 2022. There was no connection between the re-set programme and the letter of grievance received from the Claimant.

(b) Having a grievance and grievance appeal rejected;

257. In his closing submissions for the claimant, Mr McCracken stated that:

37. Despite the fact that the Claimant and Mr Bruce had raised concerns about Mr Melling's ability to conduct a fair grievance, Mr Beese refused to deal with the Grievance or allocate it to another senior manager and Mr Melling continued to conduct the grievance hearing despite his lack of impartiality. We heard from Mr Bruce that he raised an objection during the Claimant's grievance hearing because he did not feel that Mr Melling was an appropriate person to conduct the grievance hearing. Despite this, Mr Melling continued with the grievance hearing. Mr Bruce also advised that Mr Melling was authoritative, wouldn't let the Claimant speak and never listened to what the Claimant had to say during the grievance hearing. The Claimant submits that Mr Beese and Mr Melling were aggrieved by the fact that the Claimant had raised a collective grievance and Mr Melling was determined to conduct the collective grievance because his decision to reject the Claimant's grievance was already pre-determined as a result of the Claimant blowing the whistle.

38. We also heard from the Claimant that Mr Beese accused him of having another agenda following the submission of his appeal (pages 174 – 175 of the joint bundle). The Claimant asks the tribunal to draw inference from this comment and find that the collective grievance had angered Mr Beese to the extent that his decision making during the collective grievance would have been materially affected. In respect of the Claimant's grievance appeal we heard from the Claimant and

Mr Bruce that the appeal hearing lasted merely 20 minutes which is confirmed by the appeal hearing notes at page 194 and 195 of the joint bundle. Mr Bruce also provided in his evidence that it was a steam rolled approached and that Mr Beese brushed through the appeal and did not consider the Claimant's points. The Claimant asks the tribunal to draw inference from this and find that Mr Beese's decision was clearly pre-determined as he had taken issue with the Claimant making a protected disclosure.

39. In summary the Claimant submits that the rejection of his grievance and grievance appeal was a detriment and that the protected disclosure materially influenced the Respondent's treatment of the Claimant in rejecting his grievance and grievance appeal.

258. In his closing submissions for the respondents, Mr Melling stated that:

(b) The Claimant's grievance and grievance appeal were rejected because the Company assessed that the points of grievance as registered by the Claimant variously lacked merit, either because they lacked foundation or because they were based on incorrect assertions. The exception to this was the action taken by the Company to promptly address and resolve the Claimant's point of grievance about pension scheme contributions that arose from an inadvertent error arising from miscommunications between the (then-) Glasgow finance team & the Flip Out UK finance & payroll team.

(c) Having contractual entitlements withheld, altered, or unilaterally removed?

259. In his closing submissions for the claimant, Mr McCracken stated that:

40. We have heard from the Claimant that Mr Melling refused to accept his explanation on how the quarterly bonus operated in practice. The Claimant advised during his examination in chief that Mr Melling focussed on the fact that the wording of clause 5 of the Claimant's contract of employment stated that the quarterly bonus was subject to

KPI targets despite the fact that he had explained to him that this was not how the quarterly bonus operated in practice and had not operated in practice for the past 5 years.

41. Furthermore, we heard from Mr Melling during his evidence that he issued the Claimant with the letter dated 9 June 2022 following Mr Beese's decision to reject the Claimant's grievance appeal. The letter withdrawing the Claimant's contractual bonus was backdated to 1 June 2022 and was issued 2.5 hours after Mr Beese issued his grievance appeal outcome. The Claimant asks the tribunal to infer from this that the withdrawal of the Claimant's contractual bonus was pre-planned and was another act done in response to the Claimant making the protected disclosure.

42. In summary the Claimant submits that withholding, altering and unilaterally removing his contractual bonus was a detriment and that the protected disclosure materially influenced the Respondent's treatment of the Claimant in withholding, altering and unilaterally removing his contractual bonus.

*43. On 13 June 2022, the Claimant received a 'grievance follow up letter' from Mr Beese in which he stated (quote) "I assess your actions and communications to have been vexatious….I will be consulting with Matthew Melling to make sure that the planned re-set programme gets underway again without further unwarranted delay" (pages 207 and 208). The Claimant submits that the language used by Mr Beese infers that he had taken issue with the fact that the Claimant had made a protected disclosure. The Claimant submits that Mr Bease **[sic]** is threatening to (quote) "make sure that the planned re-set programme gets underway again without further unwarranted delay" because he has raised the collective grievance. We have heard no evidence from Mr Beese to the contrary.*

44. Furthermore, we heard from the Claimant that on 17 June 2022, Mr Perry recommenced the Glasgow re-set programme and issued the

Claimant with an updated at-risk letter. On page 212 of the joint bundle, the at-risk letter outlines the consultation period and contained a deadline of 12.00 noon on Friday 24 June for the Claimant to express interest in the two alternative jobs otherwise he would be treated as redundant. This ultimatum was not included in the original at-risk letter dated 25 April 2022 (pages 100 – 103 of the joint bundle). The Claimant submits that the language used by Mr Beese in his letter dated 13 June 2022 followed by the ultimatum being inserted into the at-risk letter clearly shows that the protected disclosure materially influenced the Respondent's decision to dismiss the Claimant. The Respondent knew that the alternative roles they had offered were not financially suitable to the Claimant therefore, including such an ultimatum before the Claimant had the opportunity to be properly consulted with would ultimately lead to his dismissal. The Claimant therefore asks the tribunal to find that at the time of the dismissal, Mr Perry's state of mind at the time of the Claimant's dismissal was affected by the collective grievance submitted by the Claimant to such an extent that the protected disclosure materially affected his decision to dismiss the Claimant.

45. In summary the Claimant submits that termination of his employment was a detriment and that the protected disclosure materially influenced the Respondent's decision to terminate the Claimant's employment.

50. The redundancy exercise was commenced four days after the collective grievance was submitted.

51. We have heard from the Claimant and Mr Bruce that they made accusations throughout the grievance and grievance appeal that the Glasgow re-set process was a retaliatory action in response to their collective grievance and that at no time did the Respondent produce evidence to show that the Glasgow re-set process was being planned before the collective grievance was submitted on 21 April 2022. We also heard from both the Claimant and Mr Bruce that on 13 June 2022,

Mr Beese issued a 'grievance follow up letter' (page 208 of the joint bundle) to the Claimant and Mr Bruce in which he stated (quote) "I assess your actions and communications to have been vexatious…I will be consulting with Matthew Melling to make sure that the planned re-set programme gets underway again without further unwarranted delay" (pages 207 and 208). The Claimant submits that the language used by Mr Beese shows that he has taken issue with the fact that the Claimant has made a protected disclosure. We have heard no evidence from Mr Beese to the contrary.

52. *Furthermore, we heard from the Claimant that on 17 June 2022, Mr Perry recommenced the Glasgow re-set programme and issued the Claimant with an updated at-risk letter. On page 212 of the joint bundle, the at-risk letter outlines the consultation period and contained a deadline of 12.00 noon on Friday 24 June for the Claimant to express interest in the two alternative jobs otherwise he would be treated as redundant. This ultimatum was not included in the original at-risk letter dated 25 April 2022 (pages 100 – 103 of the joint bundle). The Claimant submits that the language used by Mr Beese in his letter dated 13 June 2022 followed by the ultimatum being inserted into the at-risk letter clearly shows that the protected disclosure materially influenced the Respondent's decision to dismiss the Claimant. The Respondent knew that the alternative roles they had offered were not financially suitable to the Claimant therefore, including such an ultimatum before the Claimant had the opportunity to be consulted with would ultimately lead to his dismissal. The Claimant therefore asks the tribunal to find that at the time of the dismissal, Mr Perry's state of mind was clearly affected by the collective grievance submitted by the Claimant to such an extent that the protected disclosure was the sole or principal reason for Claimant's dismissal.*

53. *The Claimant submits that the Respondent has failed to discharge their burden of proof in showing that there was a fair reason for dismissal. We have heard no evidence from the Respondent's Mr*

Perry who was responsible for implementing the Glasgow re-set programme. The Tribunal has therefore heard no evidence concerning the state of mind at the time of dismissal of the person responsible for the decision to dismiss the Claimant. The Tribunal are therefore entitled to infer that the protected disclosure is the true reason for dismissal.

260. In his closing submissions for the respondents, Mr Melling stated that:

(c) None of the Claimant's contractual entitlements were withheld, altered, or unilaterally removed.

It is notable that as part of the evidence he presented at the final hearing, the Claimant stated that it was the Managing Director of JOA Leisure Limited who determined the value of bonus payments, this following a review of the profit and loss position carried out in conjunction with the Claimant. This was a new explanation of how the bonus arrangements had been operating at Glasgow. It was yet another variant on the range of explanations that the Claimant had provided to the company over many months, and through a formal internal grievance and grievance appeal hearing.

The account provided by the Claimant as part of the final hearing also exposes the provocation of his totally unacceptable actions on 30 May 2022. On that date the company received an email from the Claimant, shown at pages 169 and 170 of the document bundle, concerning the forthcoming round of bonus payments. The Claimant refers to (quote) 'according to my figures we will hit closer to £166k' and also says 'this will give us an overbudget of around £30k'. The Claimant was stating he had used approximate and unvalidated figures for a period that had not yet ended to determine individual employee bonus amounts. On page 169 the Claimant states (quote) 'taking into account all of this I have decided to award the following …'. The Claimant was telling the company that he had decided bonus amounts without any prior reference to anybody else. Unbelievably, this included the Claimant showing that he had decided his own bonus amount. The Claimant went on to state he had already advised the managers

of the bonus figures he had himself decided. The Claimant made these decisions and took his actions without any reference to the relevant senior manager, or indeed anybody else.

It is also now apparent that the claimant's actions on 30 May 2022, and indeed the various accounts he had described to the company over the previous months, were not a true or accurate description of how the Glasgow bonus arrangements were actually operated historically.

The Claimant's JOA Leisure Ltd Contract of Employment states (quote, and retaining the grammatical errors in the text of the Contract) 'You will have be ***[sic]*** *able to achieve a quarterly bonus at the discretion of the general manager this will be subject to KPI targets as defined in the quarterly review process'. The Contract therefore sets out the ability to achieve a regular bonus, and it refers to a structured process. The Contract does not specify a bonus amount. The Claimant's evidence at the final hearing made it clear that a structured process was indeed operating, with bonus payment decisions being made by the Company's Managing Director.*

The changes to the bonus arrangements introduced from 1 June 2022 were consistent with the arrangements set out in the JOA Leisure Ltd Contract of Employment. The ability to achieve a regular bonus remained in place. The operation of a structured process remained in place.

261. The Tribunal has decided that the claimant has established detriment, and that his protected disclosures materially influenced the first respondents' treatment of him, up to and including his dismissal. The fact that the first respondents have not established their stated reason for the claimant's dismissal, namely redundancy, allows this Tribunal to infer that the detriments suffered by the claimant at the hands of the first respondents were on the grounds that he had made protected disclosures.

262. Further, we are satisfied that the reason for the claimant's dismissal was the making of the protected disclosure. While we have not heard any evidence from Mr Perry, we can accept Mr McCracken's invitation that we find that Mr Perry's state of mind was clearly affected by the collective grievance

submitted by the claimant to such an extent that the protected disclosure was the sole or principal reason for claimant's dismissal.

263. On the evidence before us, as per our findings in fact, at paragraph 90 (81) and (82), it is clear that Mr Perry was aware of the collective grievance, from the claimant's email to him, on 25 April 2022, complaining of victimisation, and Mr Perry's decision to pause the consultation arising from that first "at risk" letter, while awaiting the grievance outcome. Given the close working relationship between Flip Out UK senior management, and Mr Melling and Mr Beese, we find it difficult to believe that Mr Perry was not aware of the grievance and grievance appeal outcomes.

Discussion and Deliberation: Remedy

264. Having established the extent of the first respondents' liability, we turned next to consider the matter of remedy. In addition to a declaration of his rights, namely that he has been unfairly dismissed by the first respondents, he has been subjected to whistleblowing detriment by the first respondents, and automatically unfairly dismissed by them for having made a protected disclosure, the claimant is entitled to an award of compensation payable by the first respondents.

265. In considering this matter, we have had regard to the claimant's evidence before the Tribunal, both oral and documentary, and, in particular, the terms of his finalised Schedules of Loss, as reproduced earlier in these Reasons, at paragraph 90 (217) above. We have checked the arithmetic calculations used by Mr McCracken, and noted Mr Melling's confirmatory statement to the Tribunal that: *"**With the exception of the Claimant's reference to annual contractual bonus, the items of key information as shown in each of the Claimant's two Schedule of Loss documents are accepted by the Respondent to be correct."***

266. Notwithstanding Mr Melling's statement, we have noted some issues. The Schedules of Loss give the claimant a gross annual basic pay of **£56,000**, which it is stated computes as gross weekly basic pay of **£1,073.97**. That

figure is incorrect, as £56,000 pa, divided by 52, computes as gross weekly pay of **£1,076.92**.

267. As the maximum amount of a weeks' pay is set by **Section 227 of the Employment Rights Act 1996**, and as at the effective date of termination of employment, on 29 June 2022, it was **£571** per week, in terms of the **Employment Rights (Increase of Limits) Order 2022, SI 2022 No. 182,** in force from 6 April 2022, we note that that is the figure correctly used to calculate the claimant's basic award of compensation for unfair dismissal.

268. Mr McCracken has included both respondent and claimant contributions to pension benefits – we have excluded the claimant's contributions, in light of the Employment Appeal Tribunal judgment in **University of Sunderland v Drossou (Unfair Dismissal) [2017] UKEAT 0341/16; [2017] ICR D23**, which held that a week's pay includes employer pension contributions.

269. We also note that the asserted annual contractual bonus of **£15,000 pa** is disputed by the first respondents, but that figure was used by Mr McCracken in making his assessment of past and future losses at the rate of **£287.67** lost bonus per week. That figure is incorrect, as £15,000 pa, divided by 52, computes as a weekly amount of **£288.46**. As we have found the claimant's bonus situation to be that the claimant did not have a contractual entitlement to any specified bonus payment amount, we have regarded his bonus as being discretionary, and not guaranteed, and so assessed it at **nil.**

270. As per our findings in fact, at paragraph 90(55), Mr Melling had, on 29 March 2022, stated to the claimant that the maximum monthly bonus of a General Manager was £500, this producing a maximum £6,000 pa. Then, on 20 April 2022, as per our finding in fact, at paragraph 90(60), Mr Melling approved a quarterly bonus payment to the claimant of £1,500. Further, as per our findings in fact, at paragraph 90(78), Mr Perry's "at risk" letter to the claimant on 25 April 2022 stated that : ***"The Flip Out UK bonus scheme applicable to the new job roles operates on KPIs set by the relevant National and Regional Operations Managers, and can be expected yield significantly***

reduced individual bonus payments than are currently the case at Flip Out Glasgow."

271. In any event, the first respondents removed whatever was the claimant's JOA Leisure Ltd bonus entitlement as of 1 June 2022, per Mr Melling's letter of 9 June 2022 to the claimant, copy produced at pages 205 and 206 of the Joint Bundle, where he stated that: ***"… With effect from 1 June 2022 the Flip Out UK bonus scheme will apply at Glasgow."*** In the absence of any evidence before the Tribunal about how that new scheme was to operate, there is an evidential void, that neither party has sought to fill by providing relevant evidence to this Tribunal.

272. Accordingly, there is no weekly bonus figure expressly agreed by Mr Melling, nor has Mr McCracken produced any supporting vouching documentation to establish the claimant's asserted figures. In the absence of any agreed figure from the former employer, and in the absence of any supporting, documentary evidence proving this asserted loss of contractual bonus, the Tribunal has declined to make any such award.

273. While the agreed key information gives figures for weekly employer and employee pension contributions, at 8% and 5% respectively, and these agreed figures of **£85.92** and **£56.70** are used by Mr McCracken, in assessing past and future loss figures, the figures used for weekly loss of private health care at **£23.01**, company car at **£140.59**, company car insurance at **£23.01**, and company car fuel at **£69.04**, are not expressly agreed by Mr Melling, nor has Mr McCracken produced any supporting vouching documentation to establish the claimant's asserted figures.

274. In the absence of any agreed figure from the former employer, and in the absence of any supporting, documentary evidence proving these asserted losses of the claimant's employment benefits, the Tribunal has declined to make any awards for such amounts.

275. Finally, we have noted the grossed up figures given in both Schedules of Loss, and we have found them to be confused and confusing. While both state the applicable tax bands for Scotland in 2022/2023, the actual calculations

used show different amounts for 21% and 41% rates, and each of the calculations for tax at the four applicable rates is mathematically incorrect, and overstated. Later in this Judgment, we have grossed up, as explained at paragraphs **360 to 364** below.

276. So too have we carefully considered the first respondents' revised and updated Counter Schedule, provided on 22 March 2023, stating, so far as material for present purposes, at pages 2 and 3, as follows:

"d) The Claimant failed to minimise his loss in that he failed to take any of the mitigating actions that were readily available to him when he was still an employee of JOA Leisure Limited.

e) The Claimant did not express interest in either of the two available alternative job roles.

f) The Claimant did not use the opportunity to take up a no-obligation 3-month trial period in either of the two alternative job roles.

g) The Claimant did not avail himself of the opportunity to be slotted-in to either of the two alternative job roles without the need to undergo any form of selection process.

h) In marked and stark contrast, the Claimant's position at that time is made clear in his email dated 24 June 2022, shown at page 239 in the document bundle. The Claimant stated (quote)' ... I once more state that I want the company to honour my existing contract and do not accept any changes to it'. The Claimant was once more stating his steadfast position of being wholly set against any opportunities to mitigate the effects of his redundancy dismissal.

i) It should be noted that the Company's position in relation to the alternative job opportunities was unchanged throughout the two phases of the re-set programme. The Company's position from the recommencement of the re-set programme on 17 June was the same it had set out at the original start date on 25 April 2022. The opportunities described in paragraphs e), f), and g), as above, were

available to the Claimant on an unchanged basis in June. It is therefore evidentially the case that the Company's commitment to alternative job opportunities was unaffected by either the Claimant's grievance or his actions.

j) The Company's approach to provide slotting-in without the need to undergo any form of selection process, and also to provide a trial period, underline the Company's intention that any expression by the Claimant in either of the two alternative job roles would have led to on-going and indefinite continuity of employment for the Claimant with JOA Leisure Limited. The Claimant chose not to make use of any of the opportunities that were so readily available to him.

k) Additionally, the Respondent observes that the Claimant did not take any further steps to minimise his loss. The option was open to the Claimant to accept anyone of the two available trail periods, and to explain to the Company that given the significant change in the associated terms and conditions of employment, he would also be using the trial period to conduct job search activity.

l) Such an approach is not unusual in the real world. It is a very sensible and practical approach. It is an approach that was readily available to the Claimant. It is an approach that the Company would have supported.

m) The Respondent observes that, in its own experience of these things, it is probable that such an approach to the use of the available trial period would have strengthened the Claimant's applications for other jobs elsewhere. This is because he would have been able to present himself as a candidate who was in continuing and indefinite employment.

n) As well as assisting in securing a job offer, it is also the Respondent's experience that by being a candidate in current employment, the Claimant would also strengthen his negotiating position with a

prospective new employer in relation to the offered terms and conditions of employment.

o) As a follow-on to paragraph k) above, the Respondent also recognises that job search timelines can often extend over several months. It also recognises that job opportunities may have arisen for the Claimant towards the end of the initial 3-month trial period.

p) In any such circumstances, the Company would have been supportive of any sensible required extension of the trial period, whilst the Claimant's job search activity was running its course. Such an approach by the Company would have been entirely consistent with its intention and preference that the Claimant's employment with JOA Leisure Limited should be on-going."

277. Likewise, we have carefully considered the second part of that revised and updated Counter Schedule, which Mr Melling presented as a response to the claimant's two Schedule of Loss documents, stating, so far as material for present purposes, at pages 3 to 6, as follows:

1. Key information

With the exception of the Claimant's reference to annual contractual bonus, the items of key information as shown in each of the Claimant's two Schedule of Loss documents are accepted by the Respondent to be correct.

The Claimant did not have a contractual entitlement to a specified bonus payment amount. *The Claimant's Contract of Employment with JOA Leisure Limited states as follows (the quote includes the grammatical errors that are present in the document) –"You will have be* ***[sic]*** *able to achieve a quarterly bonus at the discretion of the general manager this will be subject to KPI targets as defined in the quarterly review process."*

The Contract of Employment does not provide for an automatic annual contractual bonus. Neither does the Contract of Employment specify a bonus amount.

2. Basic award

The Claimant's employment was terminated on 29 June 2022 by reason of compulsory redundancy. The Claimant qualified for a Statutory Redundancy Payment calculated to be £4,282.50. This redundancy payment was made payable to the Claimant.

3. Financial loss

Loss to date of continued final hearing 5 April 2023 (40 weeks)

As set out in the first part of this document, the Claimant took none of the actions that were readily available to him to challenge his dismissal or to mitigate the effects of his dismissal.

- *He did not appeal against his dismissal.*
- *He did not express interest in either of the two available alternative job roles.*
- *He did not avail himself of the opportunity to be slotted-in to either of the two alternative job roles without the need to undergo any form of selection process.*
- *He did not use the opportunity to take up a no-obligation 3-month trial period in either of the two alternative job roles.* ***Importantly, the Company's intention was that the trial period would lead to confirmation of the appointment to one of the new alternative job roles on an on-going and indefinite basis.***

The salary level applicable to the new General Manager role would have been £40k pa, providing a gross salary of £769.23 per week, compared with £1,073.97per week previously.

The loss of basic gross salary for the period to 5 April 2023 would therefore be 40 weeks x £304.74 = £12,189.60*.*

The continuity of the Claimant's pension position would also have been protected and on-going, albeit re-calculated on the reduced salary level.

As noted in section 1 above, the Claimant did not have and would not have a contractual entitlement to a specified bonus payment amount.

The private health care and company car benefits that previously applied to the Claimant would not apply in either of the two new alternative job roles.

Future loss

As noted above, the Claimant did not use the readily available opportunity to take up a no-obligation 3-month trial period in either of the two alternative job roles. The Respondent had the expectation that the initial trial period would have led to confirmation of an appointment in to one of the two alternative job roles on an on-going and indefinite basis.

The Respondent does not recognise or accept the premise on which the Claimant's Schedule of Future Loss (as included in each of the two Schedules) is based. The Claimant's decisions and actions directly led to the scale of his future loss.

4. ***Non-financial loss*** *(as set out in the Claimant's Schedule of Loss titled* ***automatic unfair dismissal and detriment****)*

The Respondent does not recognise or accept the premise on which the Claimant's injury to feelings seems to be based. In so far as the Claimant sets out the basis for the injury to feelings claim, the Respondent's response is clear, as follows –

- *The re-set programme was what it purported to be. There was nothing novel about the programme. Quite properly, the Company put in place the required elements of such a programme.*

- *The Claimant's grievance and grievance appeal were rejected because the Company determined that they variously lacked merit, either because they lacked foundation or because they were based on incorrect assertions.*

- *The Claimant's contractual entitlements were not withheld, altered, or unilaterally removed.*

- *The Claimant did not make a qualifying protected disclosure.*

- *There was no association, direct or indirect, between the activity undertaken by the Company to properly manage the grievances raised by the Claimant and the totally separate changes flowing from the re-set programme.*

The Claimant's injury to feelings claim seems to be set at the threshold between the middle Vento band (£9,900 to £29,600) and the upper Vento band (£29,600 to £49,300).

The Respondent is clear that there is no valid basis for any injury to feelings claim in this case. *The Claimant did not make a qualifying protected disclosure. Neither did the Claimant suffer any detriment due to whistleblowing. It follows that the Claimant cannot make an Injury to Feelings claim as part of an unfair dismissal case.*

5. Total *(based on the Claimant's Schedule of Loss titled automatic unfair dismissal and detriment, but shown in section 4 of the Claimant's Schedule of Loss titled ordinary unfair dismissal)*

Unfair dismissal basic award

The Claimant received the statutory redundancy payment to which he was entitled. All other contractual entitlements associated with his termination of employment were honoured.

Financial loss

The Respondent's response to the Claimant's Schedule of Loss is set out in section 3 above.

***Note** - the Respondent does not recognise or accept the automatic unfair dismissal classification asserted by the Claimant in the footnote to section 5 of his Schedule of Loss. Any finding of unfair dismissal should therefore be subject to the applicable statutory cap.*

Non-Financial loss

As set out in section 4 above, there is no valid basis for any injury to feelings claim in this case.

Uplift – reference ACAS Code

There has been no failure by the Respondent to comply with the ACAS Code. The Claimant's assertion is without foundation. The Claimant has provided no evidence of any failure by the Respondent to comply with the ACAS Code. There is no valid basis for any such uplift.

In contrast, it is evidentially the case that the Claimant did not make use of the internal appeal procedure to challenge the decision to dismiss by reason of redundancy. On this basis, the Employment Tribunal has a discretion to reduce any compensatory award by up to 25%."

278. The unfair dismissal only Schedule of Loss seeks past loss of 40 weeks, plus future loss of only 12 weeks, compared to the claim for 26 weeks' future loss in the Schedule of Loss for automatic unfair dismissal and detriment, because, in that latter situation, the statutory cap of 52 weeks' pay, in terms of **Section 124(1ZA) of the Employment Rights Act 1996,** does not apply.

279. We have looked carefully at each of the remedy issues in the revised List of Issues, and we now address them, as follows:

(3) If unfair, what compensation, if any, should be awarded?

(3.1) Should any basic award or compensatory award for unfair dismissal be reduced on account of any of the grounds in Sections 122 and / or 123 of the Employment Rights Act 1996 ("ERA") – in particular, should any basic award be reduced on account of the claimant's receipt of a redundancy payment?

(3.2) Should any award of compensation for unfair dismissal be adjusted under Section 124A, including any reduction / increase under Section 207A of TULRA 992 for unreasonable failure to comply with an applicable ACAS Code of Practice?

(3.3) If so, for what reason, and to what extent?

280. In the claimant's Schedule of Loss, it was accepted that, having been paid a statutory redundancy payment of **£4,282.50**, the claimant's entitlement to a basic award for unfair dismissal was reduced to nil. In his closing submissions for the claimant, therefore focussing on a compensatory award, and mitigation, Mr McCracken stated that:

85. The Claimant has set out his financial loss (past and future) in his schedules of loss. The key information has been agreed between the parties albeit with the exception of the Claimant's contractual bonus. It is submitted that the Claimant's financial losses are a direct consequence of being dismissed by the Respondent. The Claimant had 5 years' service with the Respondent and had a clean discipline record. The Claimant began employment before the Flip Out store in Glasgow opened and played a major role in the development of the business. The Claimant genuinely enjoyed his job and had the Claimant not been dismissed by the Respondent it is submitted that

he would have continued in his employment with the Respondent until his retirement age. It is therefore just and equitable to award the financial losses sought.

97. It is for the Respondent to show that the Claimant has unreasonably failed to mitigate his loss. The burden is on them. The Claimant submits that the Respondent has failed to show that the Claimant has failed to mitigate his loss.

98. The Claimant has produced a table of mitigation that shows his attempts made to mitigate his losses since his dismissal. We have heard from the Claimant that he has applied for a number of roles but has been unsuccessful because he feels that his age goes against him.

99. The Respondent seeks to rely on the fact that the Claimant did not accept one of the two alternative roles to show that he failed to mitigate his losses, the Claimant submits that it is not reasonable to have expected him to accept one of the two alternative roles offered given the comments made by Mr Beese in his 'grievance follow up letter' dated 13 June 2022 that he had broken the trust and confidence that needs to exist between the Claimant and the Respondent particularly when the alternative role included a right for the Respondent to terminate his employment within the first 3 months.

*100. Overall, it is submitted that the Claimant has complied with the duty to mitigate her **[sic]** loss and the Respondent has failed to show otherwise.*

281. We have noted Mr Melling's submissions on the claimant's alleged failure to mitigate his losses, as per our paragraphs **276 and 277** above, recording what he said in the first respondents' updated Counter Schedule. No other basis was suggested by Mr Melling for reducing the claimant's compensation, other than a suggested downlift for failure to appeal against dismissal, which we return to later in these Reasons, at paragraphs **342 to**

351 below. Further, in his closing submissions for the respondents, Mr Melling stated that:

3) As set out above, the dismissal by reason of redundancy was fair.

(3.1) Any basic or compensatory award for unfair dismissal should be reduced on account of the Claimant's receipt of a redundancy payment.

(3.2) Any award of compensation to the Claimant for unfair dismissal should be reduced under Section 207A of TULRCA 1992.

(3.3) The reason for the reduction set out in clause (3.2) is that the Claimant did not make use of the internal appeal procedure to challenge the decision to dismiss by reason of redundancy. Any compensatory award should be reduced by 25%.

282. The Tribunal awards no basic award of compensation for unfair dismissal to the claimant, in terms of **Section 118 of the Employment Rights Act 1996,** payable to him by the first respondents, because they paid to him a redundancy payment in the amount of **£4282.50** on 5 July 2022, and that payment reduces his basic award to **£ nil,** in terms of **Section 122(4) of the Employment Rights Act 1996**.

283. As shown in the Schedule of Loss, calculated at "**1.5 x 5 x £571**", that properly represents the statutory redundancy payment due to the claimant based on his age (61 years), years of service (5 years), and maximum weekly gross pay of £571 pw, being the equivalent of 7.5 weeks' gross pay. A basic award would be calculated in the same way.

284. The Tribunal has found that the claimant is entitled to a compensatory award, and we do not reduce it on grounds that the claimant has failed to mitigate his losses. We are satisfied that he has taken reasonable steps to try and secure new employment with another employer, although without any success, so far. Further, we do not reduce the compensatory award for unreasonable failure by the claimant to comply with the ACAS Code of Practice. We deal

with this aspect of the case later in our Reasons – see paragraphs **342 to 351** below.

(7) If so, what compensation, if any, should be awarded under Sections 118 to 124A of ERA?

(7.1) Should any basic award or compensatory award for unfair dismissal be reduced on account of any of the grounds in Sections 122 and / or 123 of the Employment Rights Act 1996 ("ERA") – in particular, the claimant's receipt of a redundancy payment?

(7.2) Should any award of compensation for unfair dismissal be adjusted under Section 124A, including any reduction / increase under Section 207A of TULRA 1992 for unreasonable failure to comply with an applicable ACAS Code of Practice?

(7.3) If so, for what reason, and to what extent?

285. In his closing submissions for the claimant, Mr McCracken stated that the claimant is due compensation for financial and non-financial losses, as shown in the Schedules of Loss provided to the Tribunal.

286. In his closing submissions for the respondents, Mr Melling stated that:

(7) In relation to this question, the notes provided in paragraphs (3.1), (3.2), and (3.3) also apply here.

(9) In the event that any or all of the detriments are found to have been done on the ground that the claimant made a protected disclosure, what remedy, if any, is appropriate under Section 49 of ERA? What amounts of compensation (if any) should be awarded to the claimant for any financial loss, and any non-financial loss, e.g., injury to feelings?

287. In his closing submissions for the claimant, Mr McCracken stated that the claimant is due compensation for financial and non-financial losses, as shown in the Schedules of Loss provided to the Tribunal.

288. In his closing submissions for the respondents, Mr Melling stated that:

> *(9) As stated in paragraph (8) as above, the Claimant was not subject to any of the detriments as listed in question (8), or otherwise. In the context of Section 47B(1) of the ERA, it follows that there was no detriment of any kind arising from any act by the Company on the ground that the Claimant made any form of disclosure, be it protected or otherwise, or on the ground of the grievance presented by the Claimant on 21 April 2022.*
>
> *Given that there was no detriment attributable to any form of disclosure made by the Claimant on 21 April 2022, the questions about remedy and/or compensation for any financial loss do not apply. Similarly, in relation to non-financial loss, there is no basis for any injury to feeling claim because there was no detriment to the Claimant arising from any form of disclosure made by the Claimant on 21 April 2022 or at any other time. For completeness, an injury to feeling claim cannot be brought in an unfair dismissal case.*

Financial Loss

289. We looked first at the claimant's claim for financial loss, being both past loss and future loss, and we are satisfied, having regard to the finalised Schedule of Loss, and our comments earlier in these Reasons (at paragraphs **265 to 275** above), as also being satisfied that 6 months' future loss, at a further 26 weeks from close of the Final Hearing, is a fair and reasonable period, that it is just and equitable to award the claimant the following amounts by way of a compensatory award for unfair dismissal.

290. We have not netted off the claimant's receipt of **£1,705** Jobseekers' Allowance, as shown in the claimant's Schedule of Loss, as it is subject to the usual recoupment provisions, as we have included at paragraph **(2)(f)** of our

reserved Judgment above, applicable to a monetary award in a successful unfair dismissal claim.

291. The figure claimed for loss of statutory rights at **£300** seems modest, as it is less than one week's pay for the claimant, but we have awarded it at the sum claimed as it falls within the broad range of such awards made by Tribunals, usually around £300 / £500. We have awarded compensation, for financial loss, as shown below:

Loss to date of continued final hearing 5 April 2023 (40 weeks)

Loss of basic salary (40 x £765.71):	£30,628.40
Loss of bonus	£ nil
Loss of pension benefit:	
Respondent's contribution (40 x £85.92):	£3,436.80
Loss of other employment benefits:	£ nil
Sub-total:	£34,065.20
Add Loss of statutory rights:	£300
Loss to hearing	**£34,365.20**
Less	
Sums obtained through mitigation (work as a consultant from 17-29 July 2022):	(£1,580.12)
Total loss to hearing	**£32,785.08**

Future loss (26 weeks)

Future loss of earnings (26 x £765.71):	£19,908.46
Loss of bonus	£ nil
Future loss of pension:	

Respondent's contribution (26 x £85.92)	£2,233.92
Future loss of other employment benefits:	£ nil
Future loss	**£22,142.38**
Total financial loss (past + future)	**£54,927.46**

Injury to Feelings

292. On the claimant's behalf, Mr McCracken has sought an award for injury to feelings. The principles to be determined when assessing awards for injury to feelings for unlawful discrimination are summarised in **Armitage & Others v Johnson [1997] IRLR 162.** Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the wrongdoer. Feelings of indignation at the wrongdoer's conduct should not be allowed to inflate the award.

293. Citing from **Vento v Chief Constable of West Yorkshire Police (No. 2) [2002] EWCA Civ 1871 / [2003] IRLR 102**, we remind ourselves that an award of injury to feelings is to compensate for "***subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression."***

294. Lord Justice Mummery said (when giving guidance in **Vento**) that *"**the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise…… tribunals have to do their best that they can on the available material to make a sensible assessment." In carrying out this exercise, they should have in mind the summary of general principles of compensation for non pecuniary loss by given by Smith J in Armitage v Johnson".***

295. In **Vento**, the Court of Appeal went on to observe there to be three broad bands of compensation for injury to feelings (as distinct from compensation for psychiatric or similar personal injury). The top band should be awarded in

the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race.

296. Only in the most exceptional case should an award of compensation for injury to feelings exceed the normal range of awards appropriate in the top band. The middle band should be used for serious cases which do not merit an award in the highest band. The lowest band is appropriate for less serious cases such as where the act of discrimination is an isolated or one-off occurrence.

297. The appropriate sum for each band has been up rated in cases subsequent to **Vento** to take account of inflation, see **Da'Bell v NSPCC [2010] IRLR 19 (EAT)**, and also to take account of the 10 per cent uplift for personal injury awards based on the Court of Appeal decision in **Simmons v Castle [2012] EWCA Civ 1039**. Therefore, until ET Presidential Guidance was issued, the amount appropriate for the lower band was then £660 to £6,600 and the amount appropriate to the middle band was then £6,600 to £19,800. The amount appropriate for the top band was then £19,800 to £33,000.

298. Thereafter, in **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879**, the Court of Appeal in England & Wales ruled that the 10% uplift provided for in **Simmons v Castle** should also apply to ET awards of compensation for injury to feelings, but it expressly recognised that it was not for it to consider the position as regards Scotland.

299. However, account was thereafter taken of the position in Scotland by Judge Shona Simon, the then Scottish ET President, when formulating Guidance published jointly with Judge Brian Doyle, then President of ET (England & Wales), issued on 5 September 2017, and updated by annual addenda, most recently, for the purposes of this Judgment, by the fifth addendum issued on 28 March 2022, in respect of claims presented on or after 6 April 2022.

300. The current, sixth addendum, issued jointly by current ET Presidents, Judge Barry Clarke (England & Wales) and Judge Susan Walker (Scotland), on 24 March 2023, in respect of all claims presented on or after 6 April 2023, is not relevant for the purposes of the present case.

301. For claims presented on or after 6 April 2022, the fifth addendum to the ET Presidential Guidance, issued on 28 March 2022, in respect of claims presented on or after 6 April 2022, being the appropriate addendum for the purposes of the present case, provides that the **Vento** bands are as follows: **a lower band of £990 to £9,900** (less serious cases); **a middle band of £9,900 to £29,600** (cases that do not merit an award in the upper band); and **an upper band of £29,600 to £49,300** (the most serious cases), with the most **exceptional cases capable of exceeding £49,300.**

302. In deciding upon an appropriate amount, we first of all have had to address the appropriate band as per **Vento.** It is our judgment this is a case that appropriately falls into the middle band, and around the middle of that band. We acknowledge that the detriment had continuing consequences for the claimant, and it would be easy to assume that all of this effect was subsumed in the claimant's dismissal, but we have had regard to our unanimous finding that the claimant's protected disclosure was a factor in his dismissal. In this context in our judgment dismissal reinforced and exacerbated the claimant's feelings of distress and anxiety consequent upon the detriment and it did not simply extinguish it. Put another way, his upset because of the earlier detrimental treatment was not simply rubbed out by the greater upset caused by the later treatment of his dismissal.

303. In this case, we are not satisfied that there was any concerted campaign against the claimant, although we recognise that that was his perception, but equally it was not an isolated incident, as there were various issues in the way the claimant was treated throughout the last 3 months or so of his employment with the first respondents, particularly in what we might refer to as the fierceness of Mr Richard Beese's grievance follow-up email of 13 June 2022 (at pages 207 and 208 of the Joint Bundle) describing the claimant's actions and communications to have been "***vexatious***", and not pursued in good faith, which put the onus on the claimant to reconcile by reflecting, and moving forward to rebuild trust and confidence.

304. Coming from the co-owner and director of the business, we can see how that was particularly hurtful to the claimant, and the Tribunal does not see how the claimant, and indeed the others in the Flip Out Glasgow senior management team, could have continued in the employment of the company in circumstances where it is important to have mutual trust and confidence between employer and employee.

305. The Tribunal gleaned the distinct impression from the evidence we heard that the Flip Out UK senior management, including Mr Melling with his central services remit, and Mr Beese as co-owner, worked together as a close-knit team, with HR input from Mr Bloor at CandoHR, and it came across that they were all in communication with each other, and knew what was going on with the claimant's grievance, grievance appeal, and the re-set process, albeit it was Mr Perry who was signatory to the claimant's letter of dismissal.

306. As we did not hear from Mr Perry, as he was not led as a witness, we do not know what his view was of the claimant, but we did hear from the claimant, in his own evidence to us, that he regarded Mr Perry very much as a "***hired gun***" for Flip Out UK. Taken together with Mr Beese's follow up to the grievance letter, it is not difficult to see why the claimant felt that the sham redundancy was his employer out to get him out of their employment, and reduce their costs given the level of his salary and contractual benefits at Flip Out Glasgow.

307. As per the EAT judgment in **Base Childrenswear Ltd v Miss N Lomana Otshudi [2019] UKEAT/0267/18,** by the then Her Honour Judge Eady QC, now Mrs Justice Eady, a High Court judge in England and Wales, and the current EAT President, we readily accept that our focus must be on the impact of the first respondents' acts on the claimant.

308. We have heard evidence from the claimant, and in considering this matter, we have reminded ourselves of the unreported EAT judgment of His Honour Judge David Richardson, in **Esporta Health Clubs & Anor v Roget [2013] UKEAT 0591/12,** which makes it clear that a Tribunal has to have some material evidence on the question of injury to feelings.

309. Here, we have the claimant's own evidence, but no partner, or friend's supporting testimony, nor any evidence from any other person outwith his workplace with knowledge of the precise nature and extent of the claimant's injured feelings, so it has been difficult for us to differentiate between any stressors caused by the first respondents, any other non-work related stressors, such as his lack of success in finding new employment, where he feels his age is perhaps a concern to prospective new employers, and any other or additional stressors caused by the claimant's decision to prosecute this claim before the Tribunal, a feature common to all litigants.

310. As per our finding in fact at paragraph 90 (129), we know from the copy of the GP sickness absence certificate dated 30 May 2022, received from the claimant, produced to the Tribunal as document 54, at page 185 of the Joint Bundle, that the claimant was not fit for work, for 28 days, because of stress at work. We have found credible and reliable the claimant's own account of the impact of the first respondents' conduct towards him in the last 3 months or so of his employment. The impact of that treatment on him was high, and it lasted the final 3 months of his employment. Further, we also have Mr Bruce's oral evidence to us, about his own similar experience, and that evidence from him validates for us the claimant's reaction as he reported it to us arising from the first respondents' treatment of him.

311. In deciding this matter, we have also borne in mind the judicial guidance given by Her Honour Judge Stacey (as she then was, now Mrs Justice Stacey, a High Court judge in England and Wales) in the Employment Appeal Tribunal, in **Komeng v Creative Support Ltd [2019] UKEAT/0275/18**, that the Tribunal's focus should be on the actual injury to feelings suffered by the claimant and not the gravity of the acts of the respondent employer.

312. The claimant provided credible and reliable first-hand evidence about his treatment by the first respondents, and the manner of it, and how that had affected him, and we found this oral testimony from him compelling and convincing. We have no doubt, having heard his evidence at this Final Hearing, that the claimant felt at the time, and indeed he still felt at the time of

giving evidence to this Tribunal, hurt about the first respondents' treatment of him while latterly employed by JOA Leisure Limited.

313. In his finalised Schedule of Loss for the claimant, Mr McCracken sought the sum of **£29,600** for injury to feelings, that amount being set by him at the threshold between middle and upper **Vento** bands. He relied upon the unreported ET judgment in **Zabelin v SPI Spirits (UK) Ltd ET/2207084/20.** As he acknowledged, at paragraph 87 of his finalised written submissions of 5 April 2023, **Zabelin** is not binding on this Tribunal. The facts and circumstances of that case are different from the facts and circumstances of the present case. An injury to feelings award of **£9,000** was made by Employment Judge Lewis's full Tribunal sitting in London Central in **Zabelin.** Mr McCracken has valued the claimant's injury to feelings in this case at a far higher amount than was awarded in **Zabelin.**

314. In the respondents' Counter Schedule, Mr Melling submitted that there is no valid basis for any injury to feelings award in this case, because, he submitted, the claimant did not make a qualifying protected disclosure, and there was no detriment due to whistleblowing, and so, he argued, it follows that the claimant cannot make an injury to feelings claim as part of his case.

315. Given our findings on liability, Mr Melling's submissions fall away. The remaining issue left for us now is the *quantum* of compensation to be awarded to the claimant for injury to his feelings.

316. Applying a broad brush, we assess the amount payable to the claimant for injury to feelings for the whistleblowing detriment that he suffered at the hands of the first respondents, as **£15,000** in today's money, and so that is the amount which we have ordered the first respondents to pay to the claimant, as per our reserved Judgment above.

317. A **£29,600** award of compensation for injury to feelings, as sought by Mr McCracken on the claimant's behalf, is, in our considered view, excessive, and so not appropriate, but we consider that a just and equitable amount is **£15,000,** which reflects our view that this is a middle **Vento** band case, and appropriately placed at around the middle of that middle band.

318. As this award of injury to feelings for whistleblowing detriment is not an award made in a discrimination case, the interest provisions of the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, SI 1996 No. 2803,** do not apply, as the claimant's complaints against the first respondents are not brought under any applicable provision of the **Equality Act 2010.**

Discussion and Deliberation: Statutory Uplift / Downlift on Compensation

319. In the finalised Schedules of Loss for the claimant, the one produced for ordinary unfair dismissal included no claim for a statutory uplift, while the one produced for automatically unfair dismissal and detriment did so, seeking a 25% uplift.

320. In his finalised written submissions for the claimant, provided on 5 April 2023, at paragraph 95, Mr McCracken stated as follows, as regards the ordinary unfair dismissal claim, namely:

> *"The ACAS Code of Practice on disciplinary and grievance Procedures explicitly states that it does not apply to redundancy dismissal therefore there should be no uplift or decrease in the amount of compensation, if any, awarded by the Tribunal."*

321. We accept that submission as correct. Paragraph 1 of the ACAS Code expressly says that it does not apply to redundancy dismissals or the non-renewal of fixed term contracts on their expiry.

322. Otherwise, Mr McCracken dealt with the ACAS uplift at his paragraphs 90 to 93, reading as follows:

> *"90. The Claimant believes that his compensation in respect of his claims for detriment should be increased by 25% to account for the Respondent's unreasonable failure to comply with the ACAS Code of Practice on disciplinary and grievance procedures.*
>
> *91. Section 207A(1) of TULCRA 1998 applies the uplift to jurisdictions listed in Schedule A2 of TULCRA 1992. That Schedule refers, inter*

alia, to section 48 of the Employment Rights Act 1996 (detriment in employment). In turn, the Claimant submits that section 48(1A) covers subjecting a worker to a detriment because he has made a protected disclosure.

92. The ACAS Code sets out the basic requirements of fairness that will be applicable in most cases. The ACAS Code states at paragraph 4 that: "whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly." Paragraph 33 states that "Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received'. The ACAS Code also states at paragraph 43 that: "The appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case."

*93. It is the Claimant's position that the Respondent breached the ACAS Code of Practice because the Respondent failed to appoint a person who was not unbiased and impartial to deal with the Claimant's grievance. Mr Melling was the subject of a number of the points raised in the collective grievance and despite the Claimant raising concerns regarding this, he continued to deal with the grievance. Mr **[sic]** The Claimant also asserts that the Respondent failed to deal with the collective grievance promptly without unreasonable delay. Furthermore, the Respondent failed to deal with the Claimant's grievance appeal impartially as Mr Beese grievance appeal decision was pre-determined."*

323. We do not see that the discipline section of the Code can have any application to a whistleblowing claim. In these circumstances, the claimant seems to be basing his claim for an uplift on the respondents' unreasonable failure to comply with the ACAS Code as regards the grievance procedure. A protected disclosure, which founds the successful claim of automatic unfair dismissal, constitutes a grievance within the Code's definition of "***concerns, problems or complaints that employees raise with their employers".***

324. We pause here to note and record that the ACAS Code of Practice, so far as material for present purposes, states as follows:

> ***Grievance: Keys to handling grievances in the workplace***
>
> ***Let the employer know the nature of the grievance***
>
> *32. If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.*
>
> ***Hold a meeting with the employee to discuss the grievance***
>
> *33. Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.*
>
> *34. Employers, employees and their companions should make every effort to attend the meeting. Employees should be allowed to explain their grievance and how they think it should be resolved. Consideration should be given to adjourning the meeting for any investigation that may be necessary.*
>
> ***Decide on appropriate action***
>
> *40. Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken.*
>
> ***Allow the employee to take the grievance further if not resolved***
>
> *41. Where an employee feels that their grievance has not been satisfactorily resolved they should appeal. They should let their*

employer know the grounds for their appeal without unreasonable delay and in writing.

42. Appeals should be heard without unreasonable delay and at a time and place which should be notified to the employee in advance.

43. The appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case.

44. Workers have a statutory right to be accompanied at any such appeal hearing.

45. The outcome of the appeal should be communicated to the employee in writing without unreasonable delay.

325. On the evidence available to the Tribunal, we are not satisfied that there was an unreasonable failure by the respondents to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Indeed, on many matters, there was compliance with the Code as regards grievances. It is clear on the evidence before us that the respondents did provide the claimant with a grievance hearing, and a grievance appeal hearing, without unreasonable delay.

326. The delay in Mr Melling dealing with the original grievance was due to his holiday and asking for additional information from the claimant to allow him to consider the claimant's grievance. Against that background, we do not see the resultant delay as an undue delay. Further, the claimant was allowed to be accompanied, at both stages, and he got a written outcome from both Mr Melling and later Mr Beese. Indeed, if anything, both matters were ***"fast-tracked"*,** compared to many such instances that this Tribunal sees in many other cases involving other employers.

327. Specifically, it is not unreasonable for the employer to decide who is best placed to deal with any specific grievance. Mr Melling had a central services remit within the Flip Out UK organisation, so he had a finance focus, which

seems to us to have been a relevant skill in understanding the bonus issue in particular. While Mr Melling dealt with the initial grievance, the fact that he did not uphold parts of it does not, of itself, establish that he was biased, particularly when viewed in context that he did uphold that part of the grievance related to pension contributions.

328. As regards the grievance appeal, it was dealt with by Mr Beese, a co-owner and director of the business, and thus a different person from the original grievance hearer, Mr Melling. He was clearly more senior in the business than Mr Melling, and it seems to us that it was not unreasonable for the employer to decide that he should deal with the grievance appeal. The mere fact that, after an appeal hearing, Mr Beese rejected the grievance appeal does not, of itself, establish that he was biased, nor that he had predetermined the matter.

329. In all the circumstances, we decline to make any uplift for the claimant. The ACAS Code requires that the outcome of the grievance appeal should be communicated to the employee in writing without unreasonable delay. That, of course, was done by Mr Beese, and his letter to the claimant gives his reasons, not just the outcome. As such, the employer's letter goes beyond the minimum standard required by the ACAS Code.

330. In his closing submissions for the claimant, Mr McCracken stated as follows:

> *80. It is the Claimant's understanding that the Respondent seeks to rely on the fact that the Claimant did not appeal against the decision to dismiss him. The Claimant submits that it is not reasonable to have expected him to appeal against the decision to dismiss him given that the two alternative roles were wholly unsuitable and given the comments made by Mr Beese in his 'grievance follow up letter' dated 13 June 2022 that he had broken the trust and confidence that needs to exist between the Claimant and the Respondent particularly when the alternative role included a right for the Respondent to terminate his employment within the first 3 months.*

331. Turning now to Mr Melling's submission that we should downlift any compensatory award to the claimant due to his failure to appeal against the

grievance outcome, we can deal with this in fairly short compass. What is required is not just a failure to comply with the ACAS Code, but an unreasonable failure to comply. Given the terms of Mr Beese's correspondence to the claimant, we can well see why the claimant did not appeal, given any appeal would likely have been futile on his part, given Mr Beese's trenchant comments to the claimant. As such, we decline to make any downlift to the claimant's compensation.

Discussion and Deliberation: Financial Penalty

(10) In the event that the Tribunal concludes that the employer has breached any of the claimant's rights, do any of those breaches have one or more aggravating features, so that the Tribunal may consider ordering the employer to pay a financial penalty to the Secretary of State, as per Section 12A of the Employment Tribunals Act 1996 (whether or not it also makes any financial award against the employer on the claim)?

332. At paragraph 101 of the claimant's final closing submissions, tendered to the Tribunal on 5 April 2023, Mr McCracken stated as follows:

"The Claimant considers that the Respondent's breach of the Claimant's rights is serious and would not demur the Tribunal ordering the Respondent to pay a financial penalty to the Secretary of State under section 12A of the Employment Tribunals Act 1996. We have no positive instructions to seek a financial penalty against the Respondent in favour of the Secretary of State."

333. Mr Melling's closing submissions, on 22 February 2023, which he adhered to at the hearing on submissions, on 5 April 2023, stated that we should not do so, as he stated that:

"*In response to the elements of the question as asked, the Company has not breached any of the Claimant's rights. Moreover, the Company is certainly not aware of any such breaches or any aggravating features".*

334. In light of our reserved judgment, we have found that the first respondents have breached the rights of the claimant and, in these circumstances, and as it may be that this case has one or more aggravating features, such that a

financial penalty might be imposed against the first respondents, under **Section 12A of the Employment Tribunals Act 1996**, we have pondered whether, before we considered whether to issue such a penalty and, if so, in what sum, we should have invited further representations from the first respondents. However, in the end, we have decided that it is not necessary for us to do so.

335. We have had cause to reflect, in private deliberation, in writing up this reserved judgment, whether or not this is an appropriate case to consider making a financial penalty order against the first respondents, in terms of **Section 12A of the Employment Tribunals Act 1996,** as amended by the **Enterprise and Regulatory Reform Act 2013, Section 16**, in circumstances where, in determining a claim involving an employer and a worker, the Tribunal concludes that the employer has breached any of the worker's rights, and the Tribunal is of the opinion that the breach has one or more "***aggravating features".***

336. Whilst the legislation itself does not define what "***aggravating features"*** are, the UK Government's explanatory notes suggest that some of the factors which a Tribunal may consider in deciding whether to impose a financial penalty could include the size of the employer, the duration of the breach of the employment rights and the behaviour of the employer and the employee.

337. Further, those explanatory notes also suggest that a Tribunal may be more likely to find an employer's behaviour in breaching the law had aggravating features where the action was deliberate or committed with malice, the employer was an organisation with a dedicated HR team, or the employer had repeatedly breached the employment right concerned.

338. Also, again as per those explanatory notes, it is suggested that a Tribunal may be less likely to find an employer's behaviour in breaching the law had aggravating features where the organisation has only been in operation for a short period of time, it is a micro-business, it has only a limited HR function, or the breach was a genuine mistake.

339. While the power to make financial penalty orders has been in place since 6 April 2014, it would seem that few, if any, have been made, and as such, so far as we can ascertain, there has been only one appellate judgment from the Employment Appeal Tribunal on such orders.

340. The Judge in the present case has identified the EAT judgment by Mr Justice Kerr in **First Greater Western Ltd & Anor v Waiyego [2018] UKEAT 0056/18; [2019] WLR(D) 290.** On the facts and circumstances of that case, the EAT held that the ET in that case had rightly rejected the claimant's invitation to impose a financial penalty on the employer for deliberate and repeated breaches of employment law.

341. Having received a self-direction from the Judge in the present case, the relevant law on this matter is fairly straightforward, and contained within the bounds of **Section 12A**. Further, we have reminded ourselves that the UK Government's explanatory notes are guidance, they are not the law, but an interpretation of the law. The absence of a statutory definition of "***aggravating features"*** is peculiar, but Parliament has so made the law, and we have to do our best to interpret its meaning, and the extent of its application.

342. As such, we have referred to the clear words of the statute, and there is no gloss, whether by appellate case law authority, or otherwise, upon the wording of **Section 12A**. As Mr Justice Kerr identified in **Waiyego,** there is a power to make such an order, but not a duty.

343. In the absence of any statutory definition of those two words, "***aggravating features"***, it seems to us that we need to have regard to the ordinary and natural meaning of those two words as they are used in the English language.

344. In that regard, we accept, as falling within the proper meaning and effect of those two words, the various examples cited by the UK Government's explanatory notes. However, we equally well recognise that, as in all cases before the Employment Tribunal, cases are all fact-sensitive, and everything depends on the particular circumstances of the specific case before the Tribunal.

345. In such circumstances, we turn to the facts and circumstances of the present case. We are of the opinion that the breach of those rights had one or more aggravating features. Specifically, we find, from the facts and circumstances of this case, as established in evidence at the Final Hearing, and as set forth in our findings in fact detailed above earlier in this reserved Judgment, that the acts and omissions of the first respondents, through their managers, and directors, were deliberate, although we do not go as far as to state that it is established that they were done with any malice towards the claimant.

346. It is not fully evident to us, on the limited information available to the Tribunal, whether at the material time, the first respondents had a dedicated HR team, or indeed any access to any legal or HR advice. As we understood matters from Mr Melling's evidence, FO Admin Ltd provided central services, and there was no in -house HR.

347. We do know from the evidence we heard, and as per our findings in fact, that the first respondents, through Flip Out UK, engaged Mr Steve Bloor, Director of Cando HR, an external HR consultancy, for the re-set / redundancy process, and for the grievance and grievance appeals, but we heard no evidence from the first respondents, from Mr Colin Perry or Mr Richard Beese, nor from Mr Steve Bloor from Cando HR, notwithstanding he was clearly there in the background advising / assisting Mr Melling, including in preparation of the closing submissions and Counter Schedule submitted to the Tribunal on behalf of the first respondents.

348. We are satisfied, from the available evidence before us at the Final Hearing, that the first respondents are not a micro-employer, and, from the extent of their breaches of the claimant's employment rights, we cannot regard the first respondents' established breaches of employment law as having occurred due to a genuine mistake. In our collective view, their acts and omissions are indicative of failures by deliberate design, rather than by inadvertent default of their obligations, or some pretended ignorance of their statutory and contractual responsibilities as an employer.

349. In these circumstances, in terms of **Section 12A (1),** we are satisfied that the first part of the statutory test is met, which takes us on next to the ability of the first respondents to pay, under **Section 12A (2).** It is provided that the Tribunal "***shall have regard to the employer's ability to pay.***" That is a mandatory requirement, as evidenced by the use of the word *"**shall**"*, but it is then provided that ability to pay is to be had regard to in deciding whether to make such an order, and in deciding the amount of a penalty.

350. We also bear in mind that the power under **Section 12A(1)** is discretionary, as evidenced by use of the words "***the Tribunal may order the employer to pay a penalty to the Secretary of State,"*** and in the exercise of our judicial powers, we bear in mind the Tribunal's overriding objective, under **Rule 2 of the Employment Tribunal Rules of Procedure 2013,** to deal with cases fairly and justly.

351. We must take into account the interests of all parties affected by these Tribunal proceedings, and not just the interests of the first respondent former employer as the potential paying party, where, if ordered, the ultimate recipient of any penalty to be paid by the first respondents to the Secretary of State is HM Exchequer, and not the claimant.

352. Mr Melling's closing submissions for the first respondents did not address us on the matter of the first respondents' ability to pay, if we were to decide to make a financial penalty order against them. In these circumstances, while we understood, at the close of the Final Hearing, on 5 April 2023, that the business at Flip Out Glasgow still to be running, we do not know the current position, nor the extent of their financial affairs / resources, then or now.

353. Having decided that the first respondents acted in a way that a financial penalty order might be made by the Tribunal, we have also asked ourselves whether we should exercise our judicial discretion by granting such an order against the first respondents.

354. After careful and anxious reflection, we have decided that it is not appropriate for us to make a financial penalty order against the first respondents, not because of any aspect of the first respondents' entirely unacceptable conduct,

but because, to do so, we genuinely believe would place in jeopardy the chances of the claimant receiving from the first respondents the various amounts that we have already ordered the first respondents to pay to the claimant, as per this our reserved Judgment.

355. If we were to make such an order now, the first respondents might well decide to give priority of payment to the Secretary of State, rather than the claimant. In these circumstances, we have decided not to make any order under **Section 12A** against the first respondents.

356. Accordingly, it is not required that we go on and decide upon an appropriate sum to award against the respondents. What we will say, at this point, is that under **Section 12A (2),** the Tribunal is obliged (rather than permitted) to take into account the employer's ability to pay, when considering whether or not to make an order or how much that order should be for.

357. We have no information from Mr Melling, as the first respondents' representative, before us to consider the first respondents' ability to pay, and we did not consider it appropriate to again seek further information from the first respondents' representative by further correspondence, as that would simply have further delayed issue of this our reserved Judgment.

358. Put simply, this Tribunal has no information as to the first respondents' current trading and financial status, nor any documented, or vouched information, about their current financial circumstances, and so their ability to pay, or not.

359. Having carefully considered the matter, we have decided not to make any financial penalty order in favour of the Secretary of State, considering it to be in the interests of justice to make only the monetary awards of compensation payable to the claimant, payable by the first respondents, as set forth in this our reserved Judgment.

Grossing Up

360. Mr McCracken, in his schedules of loss provided to the Tribunal, included grossing up calculations based on the amounts he was then seeking on behalf of the claimant, and based on Scottish taxation rates for 2022/23. As we

stated earlier in these Reasons, at paragraph **275** above, we found his calculations confused and confusing. Now, of course, we are in the new tax year 2023/24, and the sums this Tribunal has ordered the first respondents to pay to the claimant will thus fall due to be paid in the current tax year.

361. Compared to the information then provided by Mr McCracken, the Tribunal has noted that there are now new tax bands, in force from 6 April 2023, where the main change for both England & Wales and Scotland is that the highest tax rates (45% in E&W and 47% in Scotland) apply once earnings have reached £125,140 (previously £150,000). The other tax rates and thresholds have remained unchanged for England and Wales but have changed for Scotland (the new tax rates are now 42% and 47% as opposed to 41% and 46% and the thresholds have changed).

362. As the Tribunal understands the current position, in Scotland, for tax year 2023/24, the following tax bands now apply:

Tax bands for Scotland 2023/2024

£0 to £12,570 – 0% tax free personal allowance

Over £12,571 to £14,732 – 19%

Over £14,733 to £25,688 – 20%

Over £25,689 to £43,662 – 21%

Over £43,663 to £125,140 – 42%

Over £125,140 – 47%

363. For our purposes, we have proceeded on the basis that the claimant remains unemployed, and he will have had no other taxable earnings from employment. That being so, taking account of the sums that we have awarded to him, and grossing them up for tax purposes, we calculate that the grossed-up total is **£81,318.26.**

364. We have calculated that sum, as follows:

365. The amount to be grossed up is **£44,209.96**. This is the total of the compensation we have awarded (being **£54,927.46** compensatory award, and **£15,000** injury to feelings = **£69,927.46**, less **£25,717.50** tax free allowance of **£30,000**, less **£4,282.50** redundancy payment paid to the claimant).

366. Of this, £12,570 is tax free so the gross amount to be given to the claimant is £12,570. The next £2,162 (gross) is taxed at 19%, being £410.78, so therefore £1,751.22 net. The next £10,956 (gross) is taxed at 20%, being £2,191.20, so therefore £8,764.80 net. The next £17,974 (gross) is taxed at 21%, being £3,774.54, so therefore £14,199.46 net.

367. Pausing there and adding together the net amounts we get to **£37,285.48**, leaving **£6,924.48** (i.e. £44,209.96 - £37,285.48) to be grossed up at the higher rate of 42% which comes to £11,938.76.

368. So the gross amounts are now: £12,570 + £2,162 +£10,956 + £17,974 + £11,938.76 which comes to **£55,600.76**.

369. Adding back the **£25,717.50** which was left over out of the £30,000 tax free amount (having reduced it by the redundancy pay received) comes to **£81,318.26,** which is the grossed-up total.

Closing Remarks

370. While there is no doubt now that the claimant's former employer was JOA Leisure Limited, the first respondents, much of the copy correspondence produced to this Tribunal in the Joint Bundle was written by persons on behalf of Flip Out UK.

371. The Tribunal notes and records that it was troubled by the fact that the first respondents, although defending the claim, as per the ET3 response lodged by Mr Melling, chose not to have all relevant and necessary witnesses attend to give evidence and participate in this Final Hearing.

372. By that choice, Mr Perry and Mr Bleese, whose names featured often in the oral evidence and documents, missed their opportunity to give their own

evidence on behalf of the first respondents, to be cross-examined by the claimant's representative, and asked questions of clarification by the full Tribunal.

373. We did take into account the available information from them, being the terms of their respective correspondence with the claimant, as included in the Joint Bundle, as detailed earlier in these Reasons, and there was no dispute between the compearing parties at this Final Hearing that what was included in the Bundle was a true copy of that correspondence between the parties, as per the terms shown in those copy productions, many of which have been reproduced, as regards material parts, in our findings in fact.

374. Further, from the terms of that correspondence, and correspondence from Mr Melling too, as also included in the Joint Bundle, it was clear to us that the legal identity of the claimant's then employer, JOA Leisure Limited, was not regularly recognised and used in formal correspondence, where some correspondence wrongly referred to the claimant being an employee of Flip Out UK.

375. On such example was the letter of termination of employment issued by Mr Perry, on 28 June 2022, which refers to employment with Flip Out UK.

376. According to the evidence before us, the claimant was not so employed – he was, and only ever was, an employee of JOA Leisure Limited, trading as Flip Out Glasgow. There was no evidence led before us to show that the legal name of the claimant's employer had ever changed.

377. Indeed, on the available evidence before us, it seems that post acquisition of the JOA Leisure business by Flip Out Ltd, in February / March 2022, the Flip Out Glasgow operation was subsumed, as a result of the takeover, and lost its separate identity, as part of the multi-site Flip Out UK operation.

378. In his evidence in chief, on day 2, when Mr Melling was commenting on why it referred to Flip Out UK, he simply stated that it was just internal terminology that had been used, given it was part of a group of companies, and the trading name for the group.

379. The **Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015, Regulations 24 and 25,** require that every company shall disclose its registered name and certain further particulars (including its company's registered number, and address of the company's registered office) on its business letters, notices and all other forms of business correspondence and documentation, including its website.

380. Failure to comply, without reasonable excuse, is an offence committed by the company and every officer of the company who is in default, per **Regulation 28**.

381. The first respondents, JOA Leisure Limited, may wish to reflect upon these statutory provisions, and ensure that there is compliance going forward.

Employment Judge: **G. Ian McPherson**
Date of Judgment: **01 August 2023**
Entered in register: **02 August 2023**
and copied to parties