



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4110401/2019 (V) Hearing by Cloud Video Platform (CVP) at Edinburgh  
on 4 December 2020

Employment Judge: M A Macleod

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John Brown

Claimant  
Represented by  
Mr A Kane  
Solicitor

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C S Robertson (Packaging) Ltd (In Liquidation)

Respondent  
Not Present and  
Not Represented

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the claimant was unfairly dismissed by the respondent and that the respondent is ordered to pay to the claimant the sum of **Thirty Three Thousand, Nine Hundred and Ninety Eight Pounds and Twelve Pence (£33,998.12)**; and that the claimant's claim that he was automatically unfairly dismissed under section 103A of the Employment Rights Act 1996 fails and is dismissed.

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### **REASONS**

1. The claimant presented a claim to the Employment Tribunal on 22 August 2019 in which he complained that he had been unfairly dismissed on the grounds that he had made protected disclosures to the respondent.

2. The respondent submitted an ET3 in which they resisted the claimant's claim.
3. The claimant's solicitor wrote to the Tribunal on 26 November 2019 to advise that the respondent had appointed a Provisional Liquidator on 26 November 2019.
4. On 2 March 2020, the claimant's solicitor sent to the Tribunal an interlocutor dated 27 February 2020 executed by Sheriff Small at Hamilton Sheriff Court in the following terms:

*'The Sheriff, having considered the foregoing note lodged by Freelands solicitors on behalf of their client John Brown seeking leave to bring proceedings against CS Robertson (Packaging) Limited, noting there have been no answers by any interested party thereto, grants same and in terms thereof,*

*(1) grants leave to the noters in terms of Section 130(2) of the Insolvency Act 1936 to bring proceedings against the Company; and*

*(2) finds the noter entitled to the expenses of the application and directs same to be expenses in the liquidation."*

5. On 19 August 2020, Scott Milne, Managing Director, Quantuma Advisors Limited, wrote to the Tribunal to confirm that he was the respondent's liquidator, and that while the respondent made no admission of liability, the respondent would not be present nor be represented at the Tribunal hearing.
6. A hearing was listed to take place on 4 December 2020 by Cloud Video Platform (CVP), owing to the ongoing restrictions in place as a result of the coronavirus pandemic. The claimant attended and was represented by Mr Kane, his solicitor.
7. The claimant provided a bundle of productions, some of which were available in hard copy to the Tribunal, and the remainder provided in electronic form. Some difficulties arose owing to confusion with the

numbering of some of the documents, but it proved possible, with patience, to identify the appropriate documents being referred to. Where numbers are noted herein, they refer to the electronic bundle rather than the hard copy. In addition the claimant gave evidence on his own behalf.

- 5 8. The hearing proceeded without difficulty, and all those who participated were able to see and hear all of the evidence and submissions being presented.
9. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

io **Findings in Fact**

10. The claimant, whose date of birth is 13 August 1964, commenced employment with the respondent in June 1982, and worked as a Sales Director of the business until his employment was terminated with effect from 16 August 2019. The claimant was not only employed as a Sales Director but also owned a 20% shareholding in the business.
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11. The respondent is a family-run business providing food packaging, printed goods and machinery to a number of customers throughout the United Kingdom. Colin Robertson was the Managing Director during the majority of the claimant's employment, and was responsible for starting the business.
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12. The claimant was not provided with a written statement of terms and conditions of employment until 5 July 2018 (140ff). The claimant did not sign this statement, and did not accept its terms as being accurate. He considered this statement to amount to an attempt to alter his terms and conditions unilaterally and restrict his involvement in the central running of the business.
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13. Stewart Robertson, the son of Colin Robertson, took over as Managing Director in late 2017, and shortly thereafter, his sister, Fiona Robertson, was hired as a Financial Manager, replacing the company's long-term accountant who resigned unexpectedly. The claimant regarded both
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Stewart and Fiona Robertson as inexperienced in senior management and finance, and "out of their depth" in running the company.

5 14. On 17 April 2019, the claimant sent an email to Fiona Robertson in which he observed that he believed that the respondent was seeking to alter his terms and conditions, and thereby force him out of the company's employment. He was being asked to attend informal meetings at that time, and considered that the questions put to him in those meetings suggested that the respondent wished to end his employment.

10 15. He wrote to the respondent on 4 June 2019 advising that an EGM had been cancelled and asking to reschedule on 7 or 10 June in order to discuss the serious state in which he believed the company to be. He attached a document setting out his concerns. He reiterated that the offer of a written statement of terms and conditions the previous year was rejected.

15 16. Attached to that email was a document setting out some concerns about his own position and treatment, and about the company. At the end of the document, he noted:

20 *"income from sale of assets at Bessemer Place, Please advise where this Income is shown in the Accounts, These assets Were bought for £25,000 from liquidator of Alba Plastics yet I see no revenue income for these transactions:*

*Racking £5,000; Shelving £2,000; Compressor £4,000; Pipework £5,000, Roller cutter £1,000; Forklift £7,950~£12,50'0; Pallet trucks" £500, Various Scrap £1 ,000/£2,000..*

25 *Where has money gone — show me this in our accounts income from disposal/sale of assets! Possible fraud if no transactionals in our accounts. \**

17. The claimant believed that Ms Robertson was responsible for the company losing suppliers, with whom they had long-standing relationships, and was critical of the directors for this.

18. On 31 December 2018, the claimant emailed the respondent expressing his concerns about the running of the business, particularly in relation to delayed payments to a supplier, Pakways (47). Ms Robertson replied to advise that the claimant was unaware of the situation, and that he should not be contacting suppliers direct to discuss payment.

19. The claimant became increasingly frustrated with the way in which the business was being run, and was concerned that Stewart Robertson and Fiona Robertson intended to reach the point where the company had to be liquidated. He was particularly concerned that assets had been sold by the business for cash, and had not been recorded in the company's accounts or followed the appropriate accounting procedures. He suspected that Mr Robertson had taken the money himself, which may amount to fraudulent activity.

20. On 26 June 2019, the claimant emailed the respondent (56):

*"Hi All*

*Trying to produce a production plan is becoming impossible due to lack of materials coming into our factory.*

*Andy and myself have now been told by all major<sup>1</sup> customers they cannot run with unreliable supplier and most are in process to moving business away from us.*

*We do not have materials coming into our factory to keep all machine Operators producing product next week.*

*If this business is not sold VERY quickly there will be no business. The alternative is we bring in an administrator as we may be trading insolvently.*

*John"*

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21. On 27 June 2019, the claimant emailed the respondent (55). He sought to impress upon the other directors the severity of the situation they were facing with regard to lack of stock, having experienced difficulties with customers as Sales Director. He warned that orders would dry up as

customers found other suppliers, and suggested that the company required to be placed into administration.

22. The claimant was extremely worried about the state of the business. Monthly management meetings had ceased, and he was unclear as to the financial position. He felt he had a legal responsibility as a director of the company to warn that the business may be trading insolvently, as he felt that may be illegal.

23. On 8 August 2019, the claimant was suspended. Prior to that date, he had had a meeting with the other directors in which he had expressed his concerns about assets not being properly accounted for by the business. He spoke directly to Colin Robertson about this, who told him he would discuss the matter with Stewart Robertson. The claimant told Colin Robertson that if anything else went missing he would report this to the Police.

24. On 8 August 2019, the claimant went into the main office, and saw a Mercedes Sprinter parked in a place where it should not have been. He was advised by one of the staff there that Stewart Robertson had sold the Sprinter to himself in the previous couple of weeks. He also saw tools lying about and asked the head setter why they were there, to be informed that Stewart Robertson had been removing tools and other equipment at night. He was unable to find Mr Robertson, but checked the computer in the office and found no reference to an invoice for the Sprinter's sale. He then went to Glasgow to attend an appointment with a customer, and on his return, he received a phone call from Stewart Robertson who told him he was suspended, and not to come back.

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25. The claimant then decided that he required to seek legal advice.

26. On 16 August 2019, the respondent replied to correspondence from the claimant's solicitor, Mr Santoni (not all of which has been referred to in evidence), inquiring as to the basis of allegations which appear to have been made by the respondent against the claimant, in these terms (139):

"Dear Paul,

*Further to your email below.*

5 We have addressed the concerns raised with John directly on numerous occasions which has been documented and therefore consider this statement to be erroneous and will not be drawn into further conversations regarding issues that have already been addressed.

io The point here is that we have invited John in to informally discuss the matters of concern that we have previously outlined. We had hoped to approach this situation amicably but it would appear that John is not willing to engage with us on this basis.

15 The turnover of his wife's business is an irrelevant point, the issue is that your client has been paid by C S Robertson Pkg Ltd to represent us, yet, acts as an agent for his wife's company at the same time, a company that lists and sells products we currently have in stock, he has passed her confidential information on numerous occasions belonging to the business, an act in itself that could be construed as corporate theft. His multiple and ongoing breaches of GDPR, confidentiality and privacy laws cause us serious concern, hence why the decision has been taken to remove him from the business as a means of safeguarding from this behaviour.

20 I attach for your consideration some of the evidence that we have gathered in his absence.

CS Robertson are deeply upset by the situation and have been forced to consider drastic action as to how best to resolve this.

25 The evidence points towards a case of Gross Misconduct, and even though John is a Shareholder in the business he is also an employee with obligations. Contrary to your statement below -john has been issued with a contract of employment (attached) to cover his time here, he has never come forward to dispute the terms within this, even when prompted, and has happily accepted the benefits included, therefore it would be deemed under custom and practice that he has accepted the terms therein.

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*With this is mind:*

*We have regrettably decided to dismiss John from his position with CS Robertson, the decision is made in line with the evidence that we have collected and Johns repeated refusal to attend a meeting to discuss these.*

5 *He has the right to appeal against the decision .*

*We would like the company car, mobile phone, all keys and C S Robertson documentation returned by your client or arranged to be collected by the company as soon as possible.*

*Regards*

io

*Stewart”*

27. The claimant was informed by this letter to his solicitor that his employment had been terminated. There was no disciplinary hearing nor any process followed to warn him that his employment would be terminated.

15 28. The claimant's wife set up a company operating a lifestyle business, which was incorporated on 17 April 2018 (148), named Verona Eco Ltd. The claimant told the respondent of this prior to its incorporation, with no objections being raised by the respondent. He was not a director in that business, but gave her certain advice about the packaging industry from his own experience. The claimant denied in evidence that the products which his wife's company was marketing were the same as those sold and produced by the respondent, which were largely plastics. His wife had developed an interest in eco-friendly packaging, not involving plastics. He became a person of significant control in his wife's company on 29 April 2020(157).

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29. The respondent's directors did "repeatedly raise" with the claimant the existence of his wife's company "as a backlash", though it was not clear from the claimant's evidence what this meant.



5 30. The claimant believes that he was dismissed because Stewart Robertson thought that he would report him to the Police for the unlawful removal of asserts from the company. When asked in evidence, he said that there were possibly "multiple reasons" for his dismissal. He said that the day he was dismissed was the same day as Stewart Robertson set up a new company, for which he would have needed a VAT registration number, something which he would have had to apply some 4 to 12 weeks before. He believed that Mr Robertson probably had to suspend him because he was asking questions, though he did not know about that at the time.

io 31. When asked why he was suspended, in evidence, the claimant said it was "to get me out of the way. I was still of the opinion that the business was viable and I was fighting to try and keep the business going... I was not part of the new plan. They wanted rid of me."

15 32. The new company set up by Mr Robertson was Recycled Formings Limited (120).

20 33. Following his dismissal, the claimant found difficulty in obtaining alternative employment. At the end of 2019, the plastics industry was suffering badly following adverse publicity about the effects of discarded plastic upon the environment (the claimant made reference to Sir David Attenborough's television series The Blue Planet It, which garnered considerable attention to the issue). He was able to secure consultancy work with Dragon Packaging Ltd, on a part time basis, but was otherwise unable to identify vacancies in the area in which he was searching for new employment. From January 2020, the claimant began to receive payment from his wife's  
25 company, in return for services to assist her in developing the business.

34. The claimant has not applied for any state benefits following his dismissal by the respondent.

Submission

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30 35. On behalf of the claimant, Mr Kane made a short submission. He submitted that the sole or principal reason for his dismissal was that protected

disclosures had been made by the claimant, and in any event, that the claimant was unfairly dismissed.

5 36. He referred to section 43B(1) of the Employment Rights Act 1996 (ERA), and submitted that the disclosures were made under sub-sections (a) and (c).

10 37. The disclosures were his repeated attempts to discuss and alert his fellow directors as to the financial mismanagement of the company, their inability to fulfil their obligations to suppliers and refunding a director's loan to a director when the company was insolvent. The disclosures were "plainly" made to the respondent as his employer.

38. Mr Kane submitted that the claimant was dismissed for the sole or principal reason that he had made protected disclosures.

15 39. With regard to his "ordinary" unfair dismissal claim, Mr Kane submitted that the legal test had been satisfied by the fundamental facts laid out by the claimant in this case. Those facts were, he said:

- That on or around 8 August 2019, the respondent was on the verge of insolvency;
  - That the claimant had repeatedly raised concerns of potential criminal actions as well as failures to meet their obligations to their suppliers, failures to pay the suppliers and return suppliers' calls, to the extent that the suppliers put them "on stop";
  - That Stewart Robertson was selling assets for low value, which was a criminal matter, in the belief of the claimant:
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- 25 • That Stewart Robertson was fraudulently trading the respondent in November 2019;
  - That the claimant was suspended, allegedly due to breaches of confidentiality and conflict of interest, which were fabricated by the

respondent in order to remove him from the position where he could challenge them.

5 40. The real reason for dismissal, argued Mr Kane, was that the claimant had become a thorn in the side of the respondent, an obstacle preventing them from running the company into insolvency. He made protected disclosures and was dismissed as a result.

41. He referred to pages 43 to 58 of the bundle of productions as demonstrating the disclosures made.

10 42. With regard to the ordinary unfair dismissal claim, the claimant was suspended and dismissed without any procedure having been followed. He raised concerns about the attitudes and conduct of the directors, and if he were not dismissed for having raised protected disclosures, that was the reason for his dismissal. The reasons for dismissal were fabricated, and there was no reasonable belief on the part of the respondent that the claimant had committed gross misconduct. It was impossible that the claimant's dismissal could be fair.

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43. With regard to compensation, the claimant relies upon the schedule of loss and his evidence of the attempts made to obtain alternative employment.

### **The Relevant Law**

20 44. Section 43A of the Employment Rights Act 1996 ("ERA") provides:

*"In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."*

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45. A qualifying disclosure is defined in section 43B as *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:*

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- a. *That a criminal offence has been committed, is being committed or is likely to be committed;*
- b. *That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;*
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- c. *That a miscarriage of justice has occurred, is occurring or is likely to occur;*
- d. *That the health or safety of any individual has been, is being or is likely to be endangered;*
- e. *That the environment has been, is being or is likely to be damaged;*
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- or
- f. *That information tending to show any matter failing within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.”*

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46. Helpful guidance is provided in the decision of **Blapkbay Ventures Ltd (t/a Chemistree) v Gahir [2014] IRLR 416** at paragraph 98:

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*“It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.*

*1. Each disclosure should be identified by reference to date and content.*

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*2.. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.*

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*3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.*

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*4. Each failure or likely failure should be separately identified.*

*5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by*

reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations.

5 Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to

10 identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and It will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to

15 have regard to the cumulative effect of a no of complaints providing always have been identified as protected disclosures.

6. The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in s43B(1) and under the 'old law' whether each disclosure was made in good faith and under the 'new' law whether it was made in the public interest.

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7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

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8. The employment tribunal under the 'old law; should then determine whether or not the claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest."

47. Section 103A of ERA provides:

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

5 48. In an unfair dismissal case, where the reason for dismissal is said to be  
conduct, it is necessary for the Tribunal to have regard to the statutory  
provisions of section 98 of ERA. The Tribunal considered the requirements  
of section 98(1) of the Employment Rights Act 1996 ("ERA"), which sets out  
the need to establish the reason for the dismissal; section 98(2) of ERA,  
10 which sets out the potentially fair reasons for dismissal; and section 98(4) of  
ERA, which sets out the general test of fairness as expressed as follows:

"Where the employer has fulfilled the requirements of sub-section  
(1), the determination of the question whether the dismissal was fair  
15 or unfair (having regard to the reason shown by the employer) -

(a) depends on whether in the circumstances (including the  
size and administrative resources of the employers  
undertaking), the employer acted reasonably or unreasonably  
in treating it as a sufficient reason for dismissing the employee  
and  
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(b) shall be determined in accordance with the equity and  
substantial merits of the case."

49. Further, in determining the issues before it the Tribunal had regard to, in  
particular, the cases of British Home Stores Ltd v Burchell [1978] IRLR  
25 379 and Iceland Frozen Foods v Jones [1982] IRLR 439, to which we  
were referred by the solicitors in submission. These well known cases set  
out the tests to be applied by Tribunals in considering cases of alleged  
misconduct.

50. Burchell reminds Tribunals that they should approach the requirements of  
30 section 98(4) by considering whether there was evidence before it about

three distinct matters. Firstly was it established, as a fact, that the employer had a belief in the claimant's conduct? Secondly, was it established that the employer had in its mind reasonable grounds upon which to sustain that belief? Finally, that at the stage at which that belief was formed on those grounds, was it established that the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

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51. The case of Quadrant Catering Ltd v Ms B Smith UKEAT/0362/1Q/RN reminds us that it is for the employer to satisfy the Tribunal as to the potentially fair reason for dismissal, and he does that by satisfying the Tribunal that he has a genuine belief in the misconduct alleged. Peter Clark J goes on to state that “the further questions as to whether he had reasonable grounds for that belief based on a reasonable investigation, going to the fairness question under section 98(4) of the Employment Rights Act 1996, are to be answered by the Tribunal in circumstances where there is no burden of proof placed on either party.”

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52. The Tribunal reminded itself, therefore, that in establishing whether the Respondents had reasonable grounds for their genuine belief, following a reasonable investigation, the burden of proof is neutral.

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53. Reference having been made to the Iceland Frozen Foods Ltd decision, it is appropriate to refer to the well-known passage from that case in the judgment of Browne-Wilkinson J:

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*\*S/nce the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by S.57(3) of the 1978 Act is as follows:*

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*(1) the starting point should always be the words of S.57(3) themselves;*

(2) *in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;*

5 (3) *in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*

10 (4) *in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*

15 (5) *the function of the Industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'*

#### Discussion and Decision

20 54.No formal List of Issues has been produced in this case, and accordingly, the Tribunal requires to set out the issues for determination. It is appropriate simply to approach this decision by asking, and answering, a series of questions raised by the claimants claims.

25 55.Essentially, there are two claims before the Tribunal, of automatically unfair dismissal under section 103A of ERA, and of unfair dismissal under section 98 of ERA. I take these in turn.

#### *Automatically Unfair Dismissal*

**1. Did the claimant make a protected disclosure, or protected disclosures, under section 43B of ERA?**



- 2. If so, was the claimant's dismissal for the sole or, if more than one, the principal reason that he had made a protected disclosure or protected disclosure?**

***Unfair Dismissal***

- 5 **3. What was the reason for the claimant's dismissal?**
- 4. Did the respondent have a genuine belief that the claimant had been guilty of gross misconduct, and if so, was that belief founded on reasonable grounds?**
- 10 **5. Did the respondent conduct such investigation as was reasonable in the circumstances, and did the respondent follow a fair procedure in dismissing the claimant?**
- 6. Was dismissal within the range of reasonable responses open to a reasonable employer?**
- 15 **7. If either or both of the claimant's claims are successful, what remedy should be awarded to the claimant?**
- 8. If compensation is to be awarded, should that be reduced for any reason?**

56. The first issue for determination, then, is whether the claimant made any protected disclosures on the evidence before me.

20 57. It is necessary to establish what the claimant alleges was, or were, the disclosure or disclosures relied upon.

25 56.1 found it difficult to discern precisely what disclosures were being relied upon in this case. The claimant, in the ET1, states that he had "repeatedly raised concerns<sup>0</sup> about the statutory accounts and what he considered to be inaccurate representations in relation to the account over reserves and other ostensible assets which did not exist in the business at all. He objected, he asserted, to the sale of equipment and at least one vehicle

whose proceeds were not then recorded properly through the accounts of the respondent.

5 59. In his witness statement, which comprised the claimant's evidence before me, together with the oral evidence he provided, the claimant made reference to having drawn concerns about the financial viability of the business to the other directors' attention (43 to 58).

10 60. It is important to note that the concerns raised must amount to more than allegations, but must comprise the disclosure of information by the claimant to the respondent. It is also important to note that while it is plain that the claimant was complaining, in his evidence, at some length about the competence of those running the business and about the way in which they were doing so, those concerns do not appear to me to amount to disclosures that either the respondent was failing to meet its legal obligations or was guilty of unlawful conduct.

15 61. It appears to me that the specific disclosures which the claimant points to are:

- That there was potential criminal activity ongoing within the business;
- That the respondent was failing to pay suppliers or return their calls, to the point where they were put on stop with those suppliers (that is, 20 that those suppliers refused to supply any further products to them until they were paid);
- That Stewart Robertson was selling assets for low prices, and
- That Stewart Robertson and Fiona Robertson knowingly traded while insolvent

25 62. There was considerable evidence led to the effect that the claimant had "raised concerns" about these matters. However, what the Tribunal must determine is whether the claimant made disclosures under section 43B(1)(a) or (c) of ERA.

63. It appears to me that the claimant's email of 4 June 2019, to which he attached a document setting out his concerns, provides information to the respondent which suggests, in the claimant's belief, that a number of assets had been sold for cash, to unknown buyers, which cash was not then recorded in the company accounts. He went on to suggest that may amount to fraudulent activity.

64. His allegations about "potential criminal activity" do not appear to me to go beyond these suggestions.

66. The claimant's allegation that he made disclosures about Fiona Robertson's failures to deal with suppliers and pay their bills appears to me to be no more than an allegation at this stage. The claimant may have believed this to be the case, but I am not persuaded that he had direct knowledge that there was a failure to pay suppliers to the point where the company was failing to meet its legal obligations. The claimant's knowledge of some of the financial aspects of the running of the business appeared to me to be limited, though for the very good reason that he was being excluded from discussions and meetings at which he would have obtained that information. I do not consider that the evidence proves that he had a reasonable belief that the respondent was failing to meet its legal obligations.

66. However, the specific information set out in the appendix to his email of 4 June 2019, which listed a number of assets which the claimant believed had been sold and for which there was no evidence in the company accounts, appears to me to amount to the disclosure of information which, in the claimant's reasonable belief, could be fraudulent activity. Such disclosure would be in the public interest, in my judgment: it is clearly in the public interest that a company, which owes a duty both to shareholders and tax authorities, may have acted in such a way as to defraud either. This was not a personal matter involving only the claimant, but one with potentially serious, and public, consequences for the respondent.

67. Accordingly, it is my judgment that the claimant's email of 4 June 2019 amounted to a qualifying disclosure under section 43B(1)(a) of ERA.

68. It is then necessary to determine the reason for the claimant's dismissal, and in particular whether it was the sole or, if more than one, the principal reason for his dismissal that he made protected disclosures.

5 69. Although the respondent has not attended this hearing nor placed any contrary evidence before the Tribunal, this matter is still live and must be addressed by the Tribunal.

io 70. We have not heard any evidence from the respondent, but the claimant placed before the Tribunal the email in which it was made clear to him that he was being dismissed, on 16 August 2019 (139). It should be observed that this email made reference to the enclosure of further documentation which provided evidence of the claimant's wrongdoing, but that further documentation was not presented to the Tribunal.

is On the face of it, the reason for the claimant's dismissal was that he had acted in conflict of interest and contrary to the interests of the respondent, and it was said that the claimant *"acts as an agent for his wife's company at the same time, a company that lists and sells products we currently have in stock, he has passed her confidential information on numerous occasions belonging to the business, an act in itself that could be construed as corporate theft. His multiple and ongoing breaches of GDPR, confidentiality and privacy laws cause us serious concern, hence why the decision has been taken to remove him from the business as a means of safeguarding from this behaviour."*

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25 71. The email continued: *"The evidence points towards a case of Gross Misconduct"*, though did not set out further precisely what that gross misconduct was, or what part, if any, of the respondent's disciplinary rules the claimant was said to have breached, other than the statement set out in the foregoing paragraph.

30 72. No reference is made to the claimant's alleged disclosures or his allegations of wrongdoing, nor indeed any of his actions other than those relating to his wife's company and the concern to which this gave rise in the view of the respondent

73. It is well established that direct, express evidence that an employee is dismissed on the grounds of having made protected disclosures is very unlikely to be found, and therefore the Tribunal must inquire as to whether or not any inferences may be drawn from the primary evidence, towards the conclusion that the reason stated by the respondent was not the true reason for dismissal.

74. In the absence of any evidence from the respondent, it is necessary to examine the claimant's own evidence about the reason for his dismissal.

75. At paragraph 7 of the claimant's witness statement, he said: *The Respondent never raised any issues about my involvement with my wife's Company until they sought to suspend and dismiss me post-disclosure of the various concerns I had about the Respondent's management, financial misconduct and potential criminal trading.*"

76. At paragraph 8, he said that the respondent "falsified" the reason for his dismissal. He continued:

*The sole purpose of my suspension was to allow the Respondent, and Stewart Robertson in particular, to strip the Respondent of any assets and leave the Respondent valueless [see pages 61—70, 93-105, 106-114 & 115-119], Over the 3 or 4 months preceding my suspension, I had been very vocal in my concerns regarding Stewart's behaviour and how the Respondent was being mismanaged, in particular financially [see pages 43-5 8]. Stewart had to get me away from the Respondent or at least a position where I had any control in the Respondent so that he had a free run at running the Respondent into insolvency. As such, he fabricated reasons to suspend me knowing that by the time it was resolved, the Respondent would no longer be financially viable."*

77. Finally, from the claimant's witness statement, it is important to note what the claimant said at paragraphs 12 and 13:

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*"12. I am firmly of the view that I was unfairly dismissed. I was suspended purely in order to remove me from a position whereby I could question and*

try to stop Stewart Robertson from fraudulently trading with the Respondent and stripping the Respondent of any assets for his sole benefit. The allegations against me were fabricated and exaggerated [see pages 44 & 138-139] . They only came about after I had repeatedly voiced my concerns about the Respondent's management, solvency and Stewart's sale of the Respondent's assets whilst not declaring the sale price or? otherwise [see pages 43-58]. There was never any investigation into my alleged wrongdoing nor did the Respondent ever hold any formal disciplinary hearing [see pages 138-139]. The reason for this is that there was never any intention to actually deal with my suspension properly. It was only ever a device and strategy used to afford Stewart Robertson sufficient time to run the Respondent into insolvency. As such, I was unfairly dismissed as there was no justification for my dismissal, no reasonable evidence to justify the Respondent's decision and in any event, given the allegations, dismissal would have been entirely disproportionate considering my position with the Respondent.

13. Separately, given the disclosure made by me to both Stewart and Colin Robertson, which were of a protected nature given (1) the criminal elements of them and (2) the civil liability element of them, I am of the View that I was dismissed for making a protected disclosure. "

78. When giving evidence orally before this Tribunal, the claimant said, when asked why he believed he was dismissed, "Because Stewart Robertson thought I would have got the police involved. I would have. I was severely of the opinion that the asserts were getting removed from the company, not to the benefit of the shareholders. I had said as much to his father that I would report him to the police."

79. When he was asked if those were the reasons he was dismissed, the claimant replied "There have possibly been multiple reasons. The day I was suspended was the day Stewart Robertson started a new company. He would need to get a VAT registration number, which can take 4 to 12 weeks to come through. He had been moving assets. It had probably got to the

point where he had to suspend me because I was asking questions. I did not know about that at the time?

80. When asked why he believed he had been suspended, that it was to “get me out of the way. I was still of the opinion that the business was viable and I was fighting to try and keep the business going. I was not part of the newco when Stewart Robertson and Fiona Robertson had had the pre-liquidation meeting. I was not part of the new plan. They wanted rid of me.”

81. From this evidence, it is my view that there are a number of possible reasons for the claimants dismissal:

- 10                   • The respondents declared reason for dismissal, namely that the claimant had committed gross misconduct by breaching confidentiality and acting contrary to the interests of the respondent by favouring the company set up by his wife with information gained from his work with the respondent;
- 15                   • That the claimant had made a protected disclosure to the effect that criminal activity was taking place, namely that Stewart Robertson was selling assets of the business for cash which was not recorded in the company accounts, a potentially fraudulent act;
- 20                   • That the claimant had threatened to call the police to report Mr Robertson for such activity, and
- That the respondent wished to remove the claimant from the business owing to a fundamental disagreement about how the business was being handled, and about its direction.

82. In order to succeed in his claim for automatically unfair dismissal, the claimant must prove that the sole, or if more than one the principal, reason for his dismissal was that he had made a protected disclosure to the respondent.

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83. In my judgment, it is impossible to disentangle the different reasons for which he may have been dismissed. The claimant himself did not accept

that he was dismissed due to gross misconduct, and considered that this was a reason which was concocted by the respondent as a pretext for his dismissal, but was not genuine. He maintained that he was not guilty of gross misconduct, and that he had told the respondent that his wife had set up a business, to which they had not taken objection. The difficulty for the Tribunal is that the evidence on this matter is incomplete.

84. The respondent's email of 16 August directly contradicts the claimant's assertion that he was dismissed for having made a protected disclosure.

85. However, it is the claimant's own evidence which makes the matter less clear. He does consider, it is clear, that the making of the protected disclosure contributed to his dismissal, but also suggests that his threat to report Mr Robertson to the police and his constant disagreement with the other directors about their management of the business and its direction were reasons why they wanted "rid of him".

86. On the evidence, it is not possible, in my judgment, to conclude that the reason for the claimant's dismissal was only that he had made a protected disclosure, nor that it was the principal reason among those set out above. I am not persuaded that the claimant's disclosure was the principal reason for his dismissal. He had made that disclosure on 4 June 2019, but was not dismissed until 16 August 2019. It is plain that in the meantime many things were happening in relation to the company, but it stands out from the evidence that the respondent was seeking to set up a new company, in which they had no intention of involving the claimant. That may be, in a general sense, unfair and unwise, but it does not follow that they did so because the claimant had made a protected disclosure. The claimant himself thought there may be multiple reasons for his dismissal, including that he had threatened to call the police to report the respondent for criminal activity. There was clearly a rupture in the working relationship between the respondent and the claimant, and in my judgment, the evidence is not sufficient to demonstrate that the claimant's dismissal was for the principal reason that he made protected disclosure.



87. As a result, it is my judgment that the claimant's claim of automatically unfair dismissal does not succeed.

***Unfair Dismissal***

**3. What was the reason for the claimant's dismissal?**

5       **4. Did the respondent have a genuine belief that the claimant had been guilty of gross misconduct, and if so, was that belief founded on reasonable grounds?**

10       **5. Did the respondent conduct such investigation as was reasonable in the circumstances, and did the respondent follow a fair procedure in dismissing the claimant?**

**6. Was dismissal within the range of reasonable responses open to a reasonable employer?**

15       88. Determining the reason for the claimant's dismissal is a difficult matter but for the purposes of the unfair dismissal claim, it is my judgment that the reason given by the respondent was that of gross misconduct, and it is against that reason that the dismissal must be judged.

20       89. It is not possible to conclude that the respondent had a genuine belief that the claimant had committed gross misconduct. The claimant says that he told them about his wife's business, and that they did not take objection. In any event, they provided no warning to the claimant that they intended to take such action, nor did they give him the opportunity to respond to the allegations made, and accordingly there is no basis upon which I can form any view that the respondent had a genuine belief in the claimant's guilt.

25       90. Whether the respondent had reasonable grounds upon which to hold such a belief is impossible for me to conclude, given the evidence before me. I have read the email confirming dismissal, whose terms are disputed by the claimant, but have not been shown the "evidence" upon which the respondent says they relied at the time.

91. However, it is plain that the respondent did not carry out a reasonable investigation, and more importantly failed to follow a fair procedure. The investigation was plainly incomplete as they did not seek the claimant's response to any evidence prior to condemning him to dismissal, and therefore only reviewed any information they had from one perspective, namely their own,

92. As to the procedure followed, the respondent entirely failed to warn the claimant that an allegation of misconduct was being considered against him; they failed to invite him to a disciplinary or even an investigatory meeting at which to present him with the allegation and hear his response; they failed to give him any opportunity to defend himself against an allegation of which he knew nothing; they took the decision to dismiss him without any meeting, and without following any procedure at all; and they offered him no opportunity to be represented nor to put forward any significant representations on his own behalf in order to dissuade them from such a drastic course of action.

93. There is no doubt that the respondent decided to dismiss the claimant without offering him any opportunity to prevent that outcome by explaining his position, which he maintained, and continues to maintain, is one of innocence in relation to the allegation. It is difficult to conceive of a process which could have been more unfair to the claimant.

94. In these circumstances it cannot be found, in my judgment, that the claimant's dismissal fell within the range of reasonable responses open to a reasonable employer.

95. Accordingly, it is my judgment that the respondent did unfairly dismiss the claimant, in all of the circumstances.

**7. If either or both of the claimant's claims are successful, what remedy should be awarded to the claimant?**

**8. If compensation is to be awarded, should that be reduced for any reason?**

96. Given that the claimant's claim of unfair dismissal succeeds, it is just and equitable to award the claimant compensation in respect of his losses suffered in consequence of that dismissal.

5 97. Taking the second point first, I have concluded that the claimant's compensation should not be reduced for any reason. Firstly, I require to consider whether, had a fair procedure been followed, the claimant would have been dismissed, or would have been likely to some extent to have been dismissed, in any event.

10 98. The evidence does not allow me to reach such a conclusion. There is no basis upon which the Tribunal can find that the claimant would have been likely to have been dismissed even had a fair procedure been followed. The claimant denies that he acted in conflict of interest or that he breached confidentiality in relation to his wife's business; and asserts that the respondent knew about that business and took no objection to it. There is  
15 too much uncertainty about what conclusions the respondent would fairly have reached had a fair procedure been followed and the claimant been allowed to respond to the allegation of gross misconduct made against him.

20 99. Secondly, I require to consider whether the claimant may be said to have contributed, by his culpable and blameworthy conduct, to his own dismissal. In my judgment, it would not be just and equitable to attribute the claimant's dismissal, on the evidence before me, to the claimant's conduct prior to dismissal. It would be unjust to deduct any sum from the claimant's compensation on this basis, and accordingly I am not prepared to do so.

25 100. The claimant is entitled to a basic award. The claimant's schedule of loss asserts that the claimant is entitled to a weekly pay of £538, but as at 16 August 2019, the capped week's pay was £525. In addition, the claimant claims 27.5 years' completed service, but the correct number of years is 27.  $27 \times £525 = £14,175$ .

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30 101. With regard to the compensatory award, the claimant's schedule of loss set out his net weekly wage as £631.

102. The approach taken in the schedule of loss was to calculate the losses suffered by the claimant for the entirety of the period between 16 August 2019 and 4 December 2020, the date of the hearing, and then to deduct the earnings made in that period. I consider this to be a reasonable approach, given that it is clear that the claimant did make reasonable efforts to secure alternative employment but recognised that the industry within which he worked was one in which it was very difficult to find employment; accordingly, he took up employment with his wife's nascent business, and during the period of loss received the sum of £30,300.
103. The total losses for the period to 4 December 2020 are established, firstly, by calculating 68 weeks at £631 per week, which brings out a figure of £42,908.
104. In addition, the claimant claims 10 days' untaken annual leave. However, there is no evidence about this in either his witness statement or in his evidence before the Tribunal, and accordingly I am unable to make any award in this regard.
105. The claimant received a contribution from his former employer to his pension of £371 per month, and accordingly he is entitled to receive compensation in relation to the period of loss of £5,750.50.
106. The claimant also made reference to losses as a result of having had the use of a company car and a mobile phone from the company, and assessed the value of these two benefits as £610 per month. It is not at all clear what proportion of the allowances relating to these two items related to business use and private use, and I have no evidence upon which to determine this matter. Accordingly on the evidence I have, I make no award in respect of the loss of any allowances associated with mobile phone or car.
107. In addition, the claimant is entitled to receive a payment in respect of loss of statutory rights. I award him £500 under this heading.

108. The claimant did not apply for nor receive state benefits during the period following his dismissal by the respondent, but received a one-off payment of £2,000 in April 2020 from a Government Hardship Fund payable to self-employed persons.

5 109. Accordingly, I calculate that the claimant is entitled to a compensatory award as follows. His total losses over the relevant period were £42,908, to which must be added £5,750.50 and £500, bringing out a total of £49,158.50.

10 110. From that figure must be deducted the sum of £33,300, bringing out the sum of £15,858.50.

15 111. The claimant also seeks a 25% uplift in respect of the respondent's failure to provide him with a written statement of terms and conditions of employment. In my Judgment, the respondent did provide him with a statement of terms and conditions of employment, albeit belatedly and with which he did not agree. It would not be appropriate for an uplift to the compensation to be applied for this reason.

20 112. However, the respondent plainly failed to follow the ACAS Code of Practice, and in my Judgment, there is no good reason available for the respondent's failure. Accordingly, I find that the claimant's compensatory award should be increased by 25% because of the particularly egregious failure to follow any form of proper procedure on the part of the respondent. That increase amounts to £3,964.62.

113. The compensatory award payable to the claimant is therefore £19,823.12.

25 114. The respondent is therefore ordered to pay to the claimant the total sum of £33,998.12.

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115. The claimant's claim of unfair dismissal therefore succeeds.

5      **Employment Judge:      M Macleod**  
**Date of Judgment:      11 January 2021**  
**Entered in register:      16 March 2021**  
**and copied to parties**