



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000109/2024

Held at Aberdeen on 25, 26, 27 & 28 November 2024

**Employment Judge N M Hosie
Members K Culloch
A Atkinson**

Mr M Kelly

**Claimant
Represented by,
Ms L Beedie,
Solicitor**

Sureclean Group Ltd

**Respondent
Represented by,
Ms A Neukirch,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the claim is dismissed.

E.T. Z4 (WR)

REASONS

Introduction

- 5 1. The claimant, Mark Kelly, brought complaints of “standard” unfair dismissal and automatic unfair dismissal, by reason of making a protected disclosure(s). The respondent, Sureclean Group Ltd (“Sureclean”), admitted the dismissal but claimed that the reason was conduct and that it was fair.
- 10 2. Mr Kelly is a Co-Director of Sureclean along with Simon Gibb. Mr Kelly was the Managing Director. Mr Gibb remains the CEO. From April 2023 Mr Kelly was signed off work for several months due to ill-health. When he returned he discovered what he considered to be financial and other irregularities in the business. He expressed his concerns to Mr Gibb and also a number of
- 15 employees in the business in a forthright manner. The manner in which he spoke to the employees and the serious allegations he made about wrongdoings in the business during his absence led to disciplinary procedures which resulted in Mr Kelly’s dismissal, allegedly for “gross misconduct”. Mr Kelly’s solicitor had written to Mr Gibb expressing Mr Kelly’s
- 20 concerns and making a number of allegations. It was maintained by the claimant that this letter was a disclosure qualifying for protection and that was the true reason why he was dismissed.

The evidence

- 25 3. On behalf of the respondent we heard evidence from:-
- Steven Murray, Business Development Manager, who carried out the investigation.
 - Jack Davidson, Non-Executive Director of Sureclean, who took the decision to dismiss.
 - 30 • Simon Cowie, Chartered Accountant of the Infinity Partnership and Sureclean’s Accountant, who heard Mr Kelly’s appeal against his dismissal.

We heard evidence from Mr Kelly and on his behalf from:-

- James Hunter, Financial Controller at Sureclean.
- Gary Fraser, a business associate of Mr Kelly, who accompanied him at the Disciplinary and Appeal Hearings.
- Monica Barreiros, Mr Kelly's wife, who was employed by Sureclean, at one time, as its HR/Administration Manager.

4. A Joint Inventory of Documentary Productions was also submitted ("D") along with an "Agreed Joint Chronology".

The facts

5. The parties produced a "Joint Statement of Agreed Facts". We were satisfied that it was accurate and on the basis of which, we make the following findings in fact:

History of the business

1. The respondent was previously NRC Environmental Services (UK) Limited, a Company specialising in oil spill response. In 2017, the respondent acquired Sureclean Limited, an industrial cleaning entity. The respondent was renamed in 2023.
2. On 27 January 2023, the claimant and Simon Gibb completed a management buyout of the respondent. The claimant and Mr Gibb became 50/50 shareholders of the respondent's holding Company, KSG International Ltd ("KSG"). The respondent is a wholly owned subsidiary of KSG. At the time of the management buyout, they were the only statutory Directors of KSG and of the respondent.
3. The claimant, Simon Gibb, and KSG entered into a Shareholders' Agreement dated 20 January 2023 (D.7). Clause 16 of that Agreement

contains restrictions on the shareholders for the duration of their shareholding and for one year after ceasing to be a shareholder. The respondent is not a party to the Shareholders' Agreement.

5

Roles and dates of employment of key individuals

4. The claimant was previously VP Operations–International for the respondent when it was known as NRC Environmental Services (UK) Limited and prior to the management buyout, between 5 October 2015 and January 2023. Thereafter, the claimant was the Managing Director of the respondent until the termination of his employment on 8 November 2023.
- 10
5. Simon Gibb was, the Executive Chairman of the respondent from the time of the management buyout in January 2023 until his title changed to Chief Executive on or around mid-June 2023. He is also a Director and shareholder of Stratov8 Limited, a strategy and innovation management consultancy Company. Stratov8 Limited provided services to the respondent in the course of the management buyout and has continued to provide services thereafter.
- 15
- 20
6. Jack Davidson is a Non-Executive Director of both KSG and the respondent. He was appointed on 13 June 2023. The Board Minute appointing Mr Davidson is document D12.
- 25
7. Monica Barreiros is the claimant's wife. From January 2023 to 31 July 2023 she was employed by the respondent as HR Manager.
8. Steven Murray was the Business Development Manager of the respondent and has been employed by the respondent since March 2023. In February 2024, he became the respondent's General Manager
- 30

Operation and Sales, and in October 2024 became Head of Sales and Sustainability.

5 9. Fiona McKenzie of McKenzie Associates (Aberdeen) Limited is an independent HR consultant who provided ad hoc HR advice to the respondent after Monica Barreiros's employment ended.

10 10. Simon Cowie of the Infinity Partnership Limited is the respondent's Accountant.

15 11. Mark Shepherd is the respondent's Environmental Response Director. Prior to Mr Gibb's involvement in the respondent, it had been anticipated that the claimant and Mr Shepherd would complete the management buyout together, but Mr Shepherd was unable to raise the necessary capital.

20 12. Gary Broadley, is the respondent's Head of Projects. He has been employed since 27 March 2023.

25 13. James Hunter is the respondent's Financial Controller. He has been employed since 1 March 2023.

30 14. James Whipp is the respondent's IT Manager. He has been employed since May 2019.

15. Bruce Pillar carries out ad hoc oil spill response work for the respondent. He lives and works in Madrid. He has provided services to the respondent since 14 February 2023

Events of early 2023

16. The claimant's father became unwell in early February 2023 and died on 8 February 2023. The claimant was absent from work for one week during this time.

17. On 21 March 2023, the respondent began a job in Equatorial Guinea. Eighteen employees of the respondent were required to attend at client premises in Equatorial Guinea. The claimant managed the job remotely from Scotland. One employee contracted malaria during the job. The employee died on the return journey in Charles du Gaulle airport. The claimant and his wife advised the deceased employee's family of his death.

Claimant's absence

18. The claimant was absent from work from 24 April 2023, by reason of illness. He did not attend at work again until 4 September 2023.

6. Having heard the evidence and considered the documentary productions, we were able to make the following additional findings in fact.

Observations on the evidence

7. We wish to record our unanimous view that the respondent's witnesses who conducted the investigation and disciplinary process each gave their evidence in a considered, consistent and convincing manner and presented as credible and reliable. A material aspect of the process was Mr Kelly's choice not to engage and not to address the specific allegations of misconduct. Mr Kelly was involved, at the same time, in a shareholders' dispute with his fellow Director, Simon Gibb, and there were

contemporaneous proceedings in the civil court. However, our function was to consider whether the respondent had acted reasonably, in all the circumstances, based on the evidence it had at the time, whether there had been a reasonable investigation and whether dismissal was a reasonable sanction. The claimant's solicitor was critical of the respondent for not calling Mr Gibb to give evidence but there was no need to do so. He was only a witness who gave a statement as part of the investigation. He did not carry out the investigation and he was not a decision maker.

Investigation

8. Mr Kelly returned to work on a phased basis on 4 September 2023. He then returned to his normal working days and hours from 18 September.
9. On or about 12 October 2023, Simon Gibb, Mr Kelly's fellow Director advised Steven Murray, Business Development Manager, that he had concerns about Mr Kelly's conduct since he returned to work, that he had received a number of complaints from employees and that Mr Kelly had failed to attend an occupational health appointment at ROC clinic. As a consequence, Mr Gibb had suspended Mr Kelly from work on 5 October. Mr Gibb had confirmed Mr Kelly's suspension in a letter to him dated 9 October 2023 (D.19).
10. Mr Gibb asked Mr Murray to carry out an investigation. Mr Murray was asked to do this as he was not one of the employees who had complained to Mr Gibb about Mr Kelly's behaviour.

Investigation report

11. As part of his investigation, Mr Murray obtained a number of statements from various employees and also from Mr Gibb. These were included in an Investigation Report dated 31 October 2023 which Mr Murray prepared (D.26). We were satisfied that the statements were given freely. There was no evidence to suggest otherwise. The statements make reference to Mr

Kelly alleging that Mr Gibb was guilty of “gross misconduct”, “fraud”, “criminality” and telling them that he had been to the Police. He also alleged that Mr Gibb was “a narcissist, a bully, a liar and a thief”.

5 12. The employees spoke of feeling “compromised” and “intimidated” and of Mr
Kelly being “a danger to the business going forward”. Mr Broadley said that
he “was left feeling rather deflated and bewildered. This is now a distraction,
not just at work but out of work by what may or may not be happening to the
business, you should never be put in a position where your work is negatively
10 affecting your home life. This is a stress me (sic) and all other staff member
do not need to be subjected to and the ongoing situation with Mark is a major
distraction and concern” (D.26, page 299).

13. Mr Gibb also said this in his statement (D.12 at pages 308 and 309):-

15 “Then all of sudden on Wed 4th of Oct, MK came down to my office, told me
that he had been out and about yesterday. Told me he had been to his
lawyers and that my suspension (Mr Kelly had endeavoured to suspend Mr
Gibb) was not for theft, more like criminal activity and fraud. He said that he
had been to the Police. I picked up my phone and recorded the conversation
20 as this was extremely weird behaviour. MK appeared to be very exact in what
he was saying, he took no consideration to what I was trying to say. This
made me feel extremely stressed.

25 MK then left my office and pulled James Hunter up to his office. After around
45 minutes, James Hunter came back down and was extremely agitated and
shaking. He was furious at the allegations, as if they were true, then as the
company FC, then he was also getting accused of fraud and that he was at
risk of losing his licence as a chartered accountant. James sent me a short
note of what had been said.

30 MK then took James Whipps, our IT and Digital Manager. Again, after a
period of around 40 mins James Whipps came downstairs again extremely
agitated and distressed. James Whipps also sent me a short note of what
had been going on. I told both to carry on as normal as much as possible but
35 James Whipps was too shaken up, so I sent him home to recover.

40 All the while I was trying to concentrate on moving the business forward. We
were on the cusp of landing a very large decommissioning cleaning contract
and all this was a real and severe distraction to the running of the business.

Gary Broadley was then taken upstairs and after an hour I had to leave as I had business in town. When I was driving into town Gary called me, I asked him how he felt, and he told me that in truth he was severely stressed, what the hell was going on, this is crazy behaviour from one Director about the other and he felt very uncomfortable especially given the large volume of work we were trying to do.

I told him not to worry and that I was going to get help for the business.

I had an emergency phone call with Jack Davidson that night, and we decided to suspend MK so that we could get a proper occupational health medical done for him which we got booked for the following Thursday.

To help the business and to help MK, I cut off MK's control over the server that night. I suspended MK in the morning of Thursday 5th of October, based on a majority directors vote. I also cut his company phone and any computer access.

The whole episode since MK's returned has been extremely odd and off putting for everyone in this business at a time of high growth and if this continues we could potentially harm the business irrevocably.

MK then never turned up for the new medical we had arranged for him. What more can we do to help this man.

I then ordered an investigation into what has happened. I have a duty to the employees and all stakeholders to ensure we continue to move forward as a business."

14. Mr Murray said this by way of conclusion to his Investigation Report (D.26, page 294):-

"CONCLUSION

Based on the information gathered, it is evident that since Mark Kelly has returned to the workplace his conduct and behaviour has been improper and unprofessional and has caused employees upset and stress along with causing disruption to the Business which is unacceptable and concerning and this is substantiated by the signed written statements submitted by the relevant employees that were interviewed. It is clear that Mark Kelly has shown a complete disregard to the employees and the Business.

My recommendation is that a formal disciplinary procedure is initiated."

Disciplinary procedure

15. Jack Davidson, a Non-Executive Director of the respondent Company, was appointed to conduct the Disciplinary Hearing. On 1 November 2023, he sent a letter to Mr Kelly to invite him to the Hearing (D.27). The following are excerpts from his letter:-

"I write following on from your suspension pending an Occupational Health Report and then subsequently an investigation which was conducted by Steve Murray, Business Development Manager.

The investigation is now concluded, and you are now required to attend a formal disciplinary hearing which will be held in accordance with the Company's Disciplinary Procedure and a copy of which is enclosed. The purpose of this hearing will be to discuss and consider the allegation(s) against you which is:-

- Your failure to attend the Occupational Health Consultation arranged for you, your conduct, and the behaviour you have displayed since you have returned to the workplace towards Simon Gibb and other employees which is improper and unprofessional and has caused a great deal of concern for employees and led to disruption in the Business.....*

At the hearing, my intention is to provide you with a full opportunity to explain your position and to put forward your version of events in respect of the matter raised above. Please note that no decision will be made prior to the meeting. During the meeting you will be given every opportunity to state your case with any mitigating circumstances and if necessary, produce any documentary evidence.

Depending on the facts established at the hearing, the outcome could be disciplinary action against you, but a decision on this will not be made until you have a full opportunity to put forward your version of events and the hearing has been concluded. I think that it is only fair to advise you that due to the gravity of the allegations against you, one possible outcome of the hearing could be the termination of your employment without notice or payment in lieu of notice on the grounds of gross misconduct. Other possible outcomes including a verbal or written warning or no disciplinary sanction at all."

16. Mr Davidson enclosed with his letter:

*"Company's Code of Conduct & Disciplinary Procedure
Investigation Report
Summary of Witness Statements*

*Supporting Documentation”***Disciplinary Hearing on 3 November 2023**

5 17. Minutes of the Disciplinary Hearing were produced (D.28). These were agreed. Mr Kelly was accompanied by a friend, Gary Fraser, from whom we heard evidence at the Tribunal Hearing. Fiona McKenzie, HR Consultant, was also in attendance as notetaker. Mr Kelly said at the start of the Hearing that he wished to read a prepared statement, a copy of which he provided.
10 The statement had been prepared by his solicitor. It was in the following terms:-

15 *“I object to the validity of this entire disciplinary process and always have done. This is no more than a sham and I am being used to exclude me from the business that I have been apart of for over 8 years, and that I have always been eager to grow and make a success, hence performing the MBO from the previous owners.*

20 *I have received a 56 page document and been given less than 48 hours to read through and prepare for this meeting. Fixing a disciplinary hearing on such short notice is indicative of the unfairness that pervades this entire process.*

25 *In any event, the allegations against me and my suspension letter and within the 56 page investigation are too vague and wholly lacking in specificity to allow me to properly consider and prepare for this meeting.*

30 *From the witness statements provided, the allegations all appear to relate to matters that I expressed to Simon, in my capacity as a fellow 50% shareholder of the entire business, not as an employee of Sureclean.*

35 *Simon has been given notice that this is a shareholder issue, and he is fully aware of this, due to him receiving the information via my legal representatives, and in addition through the repeated back and forth between myself and Steve Murray in his role as “Investigation Officer”, I would like to note that it was an inappropriate choice given that he is Simon’s cousin, which is an issue I raised but my concerns were ignored.*

40 *The complete unfairness and validity of this “employee discipline process” is evident from Simon’s decision to suspend my employment and to instigate and proceed with this investigation and hearing.*

In addition, Simon is fully aware that there is a significant question around the appointment of Mr Jack Davidson, and as he is aware of this question, it is highly inappropriate to have yourself participate in this call, and process.

Given all of this it is abundantly clear that this is an artificially constructed process that is being used to bulldoze me out of the company. This is demonstrated by the purported "board decision" by Simon and yourself to suspend me and instigate this process despite no notice to myself of this purported "board meeting". The failure to provide me with notice means that this so-called "board meeting" has no legal effect, but there are significant questions as to why you decided to suspend the Managing Director and one of the ultimate beneficiaries of the Company without seeking to speak to me directly?"

18. The Minutes record there were then the following exchanges between Mr Davidson and Mr Kelly by way of "Questions & Responses":-

"Jack Davidson stated that he appreciated the content and there were a few points in the statement that he wasn't going to respond to. However the content would be minuted, and re-iterated that his role was to look at the allegations presented and which was around the behaviours that Mark Kelly had demonstrated within the business and asked Mark Kelly if he was ok for Jack Davidson to start the conversation and he had a few questions and he was looking to understand was Mark Kellys side, he would like to ask questions and for Mark Kelly to reciprocate.

Mark Kelly asked if he could clarify from Jack Davidson that even though this was very clearly a shareholder issue, he was still wishing to proceed with an employee discipline even though the whole issue is centered around the shareholders and owners of the business and not an employee, and asked for clarification if that was what Jack Davidson intended to do.

Jack Davidson stated that he wanted to clarify two points, as far as he understood there were two elements to this. There is a dispute between yourself and Simon as the shareholders. There is also behaviour and actions being displayed in the business by yourself as the Managing Director and an employee of Sureclean which is the purpose of this investigation and the meeting and stated that he takes the notes and that Mark Kelly has said it is a shareholder dispute. However, for Jack Davidson's benefit and for the record it is noted that it is two separate aspects. There is a dispute between Mark Kelly and Simon Gibb as he rightly pointed out, the joint shareholders and the beneficiaries of the business, but there is the matter in hand, which is the behaviours and actions displayed and as rightly pointed out by Mark Kelly as the Managing Director within Sureclean and that the purpose of the meeting was to investigate the latter and asked Mark Kelly if it was ok to proceed?(sic)

Mark Kelly stated the whole point of Jack Davidson investigating the latter part, without the framing and context of the format, which is critical, the entire situation (sic).

5 Jack Davidson stated that he disputed that and explained that this was about the actions and it's clear that within the statements that were submitted that the actions and behaviours displayed within the business have caused disruption. There has been a feeling of intimidation, there's been a feeling of fear, there's been disruption and the disruption within the business goes against Mark Kelly's own statement of acting in the best interest of the company. Where some of the employees have stated that they actually felt exceptionally unsettled and in several occasions approached a senior member and said, should they be looking for alternative employment?

10 Jack Davidson stated that in his mind they had both held roles as Managing Directors and the first priority is the safety of the business and the sustainability of the business, creating a safe environment for the employees is equally as important and some of the sentiment within the statements does intimate that the feeling of a safe environment for the employees.(sic) Not physically safe, behaviorally safe was jeopardized and this is his (JD) purpose (sic).

20 Jack Davidson stated that if they could separate the two, he recognised and acknowledged and something that he was not involved in as a Non-Executive Director is the dispute between shareholders and that was absolutely not for him to get involved in and as Mark Kelly had rightly pointed out, as a Non-Executive Director and during his (MK) period of absence, he had been on regular calls with Simon Gibb. The (sic) had discussed operational, financial, contractual, and staff related matters and at times he had never actually directly challenged any of the actions that Simon Gibb has taken. They had discussed the actions and they had come to a resolution on what is the best way forward for the business at that time and therefore he (JD) had acted in accordance with his role as a Non-Executive Director and asked Mark Kelly was ok to proceed with questions."

19. Although Mr Kelly confirmed that, "it was ok to proceed with the questions", whenever Mr Davidson asked a question about the allegations Mr Kelly replied, "I can only but refer you back to my statement, because that's part of the shareholder dispute", or words to that effect, and notwithstanding the fact that Mr Davidson stated at once stage, "that it wasn't a criminal investigation, it was a discussion to get Mark Kelly's side of the statements that had been produced in the investigation about behaviour." As a consequence, Mr Kelly did not respond to the specific allegations of misconduct despite Mr Davidson's endeavours to get him to do so and to reflect on the impact of his behaviour.

20. Mr Kelly did not claim that the statements were untrue but he gave no explanation for his behaviour. Mr Davidson said that he *"had no option other than to accept the allegations"* which he concluded amounted to gross misconduct.

21. Mr Davidson also said this when he gave evidence at the Tribunal Hearing and, as we record above, he presented as credible and reliable:- *"I felt quite intimidated by Mark's responses to me. Also, it was so one sided: 'I'll let you ask questions but I'm a Director and I don't have to give you answers"*.

22. Mr Davidson said in evidence it was significant that there was such a small team at Sureclean. This meant that all the individuals played a key role in the delivery and success of the business and they were understandably concerned about their future employment. There was a danger, therefore, in his view, of the business being disrupted.

23. He went on to say that, *"any person in a senior management position should encourage an atmosphere of leadership and not one of fear. Also employees need to be treated with dignity. There was no acknowledgement of any underlying impact his behaviour may have had. That went a long way to my decision. There was no mitigation."*

24. On 8 November 2023, Mr Davidson wrote to Mr Kelly to advise him of his decision to dismiss him summarily for gross misconduct (D.31). The following are excerpts from his letter:-

"The Hearing

At the beginning of the hearing you read out a statement that you had prepared and I acknowledge that there was a dispute between Simon Gibb and yourself as Shareholders.

I was very clear and explained to you that it was also noted that there were two separate issues and the reason for the hearing was in relation to your failure to attend an Occupational Health appointment following your absence

from the Business, your behaviour and conduct towards Simon Gibb and other employees which had led to disruption within the Business. On the basis that you are the Managing Director of Sureclean Ltd it was an employment related matter.

5

Following on from my explanation, I specifically asked you if it was ok to proceed with my questions and you confirmed that it was ok for me to proceed.

10

I explained to you that the purpose of the hearing was to try to gain an understanding of why you did not attend the Occupational Health appointment and the behaviours and conduct that you had displayed within the Business following your absence.

15

I asked you several questions in an attempt to establish the facts from your prospective, however you chose not to answer any of these.

20

I am satisfied that I provided you with ample opportunity to participate in the hearing and to provide me with your version of events to enable me to gain an understanding from your prospective.

You did not provide me with an explanation relating to your conduct and behaviour.

25

Finding & Conclusion

30

In light of the above and having assessed the relevant evidence I am upholding the allegation(s) and I find that the appropriate sanction is that you be dismissed without notice or payment in lieu of notice. You are therefore dismissed from employment with Sureclean Ltd (the Company) with immediate effect.

35

I find that your actions contravene the professionalism and integrity required for an individual in a senior role which is the Managing Director of Sureclean Ltd.

40

Notwithstanding the prepared note that you provided me with and the fact that you did not disagree with any of the statements that were contained within the Investigation Report or to provide me with a response to any of the questions leads me to conclude that you are likely to continue to cause disruption within the Business through fear and intimidation.

45

The allegations, witness statements and investigation reports strongly suggest inappropriate behaviour and conduct in the workplace which may have presented fear and bullying to staff. With this and no evidence or dispute from your side I uphold the allegations and concerns pertaining to your behaviour and conduct causing disruption within the Business. These are not acceptable behaviours of any staff member or a Managing Director within the Business.

I consider your actions to be wholly unacceptably (sic) and consequently, my conclusion is that you committed gross misconduct.

Sanction

Having decided to uphold the allegation(s) I considered what sanction was appropriate to impose. As set out in my letter inviting you to the hearing on 3 November, I advised you that I may consider these matters to amount to gross misconduct

I considered whether a lesser sanction than summary dismissal would be more appropriate and given the position you held for the Company, the serious nature of your actions and disruption caused, my view is that no sanction short of summary dismissal is appropriate.

I will also note that there was no recognition from you that this type of behaviour and conduct within the workplace is unacceptable, as I have already mentioned above, you did not disagree with any of the witness statements and neither did you apologise.

I also took into account the fact that you had ample opportunity to provide me with an explanation, however you chose not to.

You offered nothing by way of mitigation.

In my view, these points demonstrate that there is a risk that you might conduct yourself in the same or similar manner in the future.

In view of all the circumstances, I considered that summary dismissal was the most appropriate sanction. I therefore confirm that you are dismissed summarily without notice or pay in lieu of notice as of the date of this letter 8 November 2023. Please note that your employment and all benefits under your Contract of Employment will therefore cease as of 8 November 2023."

25. Mr Davidson said in evidence at the Tribunal Hearing that the way Mr Kelly had treated the Sureclean employees was a more important factor than his failure to attend occupational health.

Appeal

26. On the advice of Fiona McKenzie, HR Consultant, Simon Cowie, a Chartered Accountant, a Director of the Infinity Partnership and Sureclean's Accountant, was appointed to hear Mr Kelly's appeal against his dismissal. Mr Cowie had been involved in setting up Stratov8, Mr Gibb's Company, which provided consultancy services to Sureclean. Mr Cowie also gave evidence at the

Tribunal Hearing and, as we record above, he also presented as credible and reliable. He was aware that Mr Kelly had been absent from work since 24 April 2023. He was provided with a copy of Mr Davidson's dismissal letter (D.31) but Mr Davidson did not discuss his decision with him. He was not provided with any other documents relating to the investigation and the disciplinary process until after the Appeal Hearing.

27. On 14 November 2023, Mr Kelly sent an e-mail to Mr Cowie to intimate that he wished to appeal against his dismissal (D.33, pages 372-373). He gave the following reasons for his appeal:-

"1. Disciplinary action should never have been taken in the first place. The matters raised me all relate to myself acting in my capacity as a shareholder, not an employee.

2. I am entitled to raise concerns of wrongdoing within the organisation, including those which relate to potential criminal activity.

3. It is abundantly clear that the disciplinary process is an artificially constructed process that is being used to bulldoze me out of the company.

4. The investigating officer appointed by Sureclean (Mr Steven Murray) was a wholly inappropriate and biased choice to carry out the investigation, given that he is related to Simon by marriage. This issue was repeatedly raised by myself, yet ignored.

As a result of the above key points, it is clearly wrong to have raised this process in the first place, yet alone conclude I should be terminated, especially given my length of service and recent sickness/absence."

"Appeal Meeting" on 20 November 2023

28. Agreed Minutes of the Appeal Meeting on 20 November 2023 were produced (D.34). Mr Kelly was accompanied again by his friend, Gary Fraser. Fiona McKenzie was also in attendance as a notetaker.

29. The following are excerpts from the Minutes:-

"SC asked MK why he thought that Steven Murray was inappropriate as the Investigating Officer.

5 MK stated that Steve Murray was the cousin of Simon Gibb's wife. The issue is between the shareholders, which is MK and Simon Gibb. Steve Murray is compromised because he is put in the position of leading an investigation, supposedly independent, yet going against his own family, if it were to be shown that way, so it is not an unbiased view as you have already said. People who have been involved in the process so far cannot sit at this level of this, yet they are allowed to do the investigation even though they've got the family link, which is obviously going to bias their view towards one argument.

10 SC advised that he had been involved internally with this kind of thing before, but I thought the role of the Investigating Officer was to fact gather rather than express opinions and ask FM to confirm.

15 FM confirmed that was correct.....

20 MK stated that the whole point is that we shouldn't be sat here. This is a shareholder problem. This has been done is (sic) to exclude me from the business and get me out through this mechanism by treating me as an employee. That's been clearly stated all the way through this and it's also in the solicitor's letter sent to Simon Gibb who initiated this, who fully knows this, yet it's all been carried out in his instruction.

25 SC stated that he understood it was an employee matter.

30 MK stated to SC that if he were to go back to what has all been going on and looked at the actual content of what has been happening, what's the case, all the facts, this action would not have been taken which is what MK has said all along. He (MK) was not an employee, he was not a guy in a boilersuit, he (MK) had responsibilities to the business above and beyond that of a standard employee, which is why we are here but he (MK) was being treated as an employee and their using a grievance procedure that the company established to get him (MK) physically out of the business.

35 SC stated that MK must be an employee?

40 MK stated that he was an employee, but he was also other things, and, because the nature of all this argument below it is a shareholder dispute, the shareholder dispute is the reason we're all here. Yes, it can be right. If you look at what's being alleged against me, are you completely clear of what's being alleged against me, Simon?

SC stated that he thought it's because of conduct effectively.

45 MK stated why would that conduct have occurred? What would've led to that conduct? If you were doing a proper investigation, you would have understood this. You would have found all this out, but because it doesn't want to be looked at correctly, I come back to the points I've said, this is not an employee thing, it's a shareholder issue. It's going to court and that Simon Gibb is more than aware of, yet he's still pursuing this. The only way he is

50

pursuing this, is to drum me out of the business, to bulldoze me out, and I've said that all the way through and I'm still saying it.....

5 *SC asked FM who made the allegations of the bullying?*

FM stated she had the information as she did the notes but not to hand and that the allegations were made by several employees.

10 *SC stated to MK, what I'm not understanding is why the employees would make that up if it never happened.*

15 *MK stated they didn't like what I was saying, about telling them the truth that there are problems underneath and we're going to have to take steps to deal with this. Why you decided to say this is bullying and intimidation, you're asking the wrong man. I do not agree that I've ever been a bully or intimidated anybody and I've got a couple of people saying, they're actually saying a lot more nasty things than that in some of their statements. Do I agree with bullying and intimidation? No.*

20 *SC asked how many people are we talking about, Fiona?*

FM stated not sure maybe seven or eight.

25 *MK stated no, three maybe, tops four. It's not even seven, eight people involved in the thing if you include me and Simon, those two, there, maybe three potentially a little bit of a fourth. The other people turned around and said, 'what are you talking about basically?' to understand it in its full context, you have to understand the entire dynamic of the business, which I'm sorry*
30 *unless you run the business you're not going to know.*

SC stated I'm struggling with why any employee would make up an allegation to that against you (sic) if wasn't true because you asked them a question, and I can't see what's in it for them, does that make sense?

35 *MK stated you'll have to go and ask them, Simon.*

SC stated I'm asking you because you're here, the three or four people, why would they make up an allegation of that, I'm just surprised that anyone would do that to a Director.

40 *MK stated as am I.....*

SC stated I'm struggling to understand what you are saying cos you're not giving any specifics.....

45 *MK stated no. I've made it very, very clear, Simon, that this meeting just shouldn't even be happening and I've made that clear throughout the whole thing, every step of this way, and I've explained to you here without going through 56 pages of information and probably another 30 pages of legal*
50 *documentation of every infraction and misdemeanour that has been occurred*

that I have come back to is, 'Wow', this is so wrong, it's ridiculous. Now, as I then take action to start correcting that wrong, this happens, and this is a waste of time because this should never be happening.

5 *SC stated to MK you're not giving me anything.*

10 *GF started to sum the situation up. Mark is accused of gross misconduct allegedly by bullying someone, right? Mark says he never bullied anybody, anyone. The only thing that he did was to ask that person a question, and when they didn't conform and give him the answers to the question, the information that he needed, he then requested it again, as he is empowered to do it, he was entitled to that information and therefore he was not bullying them, but they were obviously thereafter given direction by someone else not to give them that information, and that was the long and the short of the question. He was entitled to the information he was asking, and that's it.*

15 *SC stated the problem I've got with that is it's more than one individual, it's three or four.*

20 *GF stated yes.....*

25 *GF stated, he was in on that day as managing director or director, so he's asking them as managing director the information which is required to know the current status quo of the company.*

30 *MK stated because it is being withheld by the other shareholder.*

35 *GF stated the other shareholder, we are informed, directed employees not to give this information and the information is still being restricted to Mark as a director, managing director, to this day, which we will seek in recourse from the courts.*

40 *SC stated I think that's a different matter to this. To answer your question, it depends on how a question is asked whether it's appropriate or not, Gary.*

45 *GF stated yes and I totally agree with that.*

50 *SC stated the bit I'm struggling with is why three or four people would agree that it's bullying and intimidating if it wasn't.*

55 *GS stated that's down to them in a court to deal with that.*

60 *SC stated no, that's not. That is the subject matter of what we're here to talk about, it was my understanding. I'm perhaps missing it, but that's not a court matter, it's an employment matter."*

30. *After the Appeal Meeting, Mr Cowie read "the papers" which included Mr Murray's investigation report.*

Outcome of the Appeal

31. Mr Cowie decided not to uphold Mr Kelly's appeal. On 28 November 2023, he wrote to Mr Kelly to advise him of this and to give his reasons for his decision (D.36). He informed Mr Kelly that he had been provided with all the relevant documentation which he had reviewed and which he detailed (page 388).

32. The following are excerpts from his letter:-

"During the appeal meeting you told me that it was not an employment matter. It was in fact a shareholder issue and you had stated this from the beginning of the process and provided a statement to support this. During the meeting there was a lot of discussion in relation to this and confusion between what you described to me as wearing "three" hats which were Shareholder, Director and Employee.

You told me that there was an issue between the two shareholders which is yourself and Mr Gibb.

It was established during the meeting that you had acted in the capacity of a Director.

You also raised with me that Mr Murray was not an appropriate individual to be appointed as the Investigating Officer and was biased on the basis that he was the cousin of Mr Gibb's wife (by marriage). My understanding of the role of an investigating officer is to gather information including statements from other employees and witnesses as appropriate.

You also told me that the disciplinary process was an artificially constructed process that is being used to bulldoze you out of the Company.

Follow-up and Background

The investigation was initiated after several employees raised concerns relative to your conduct and behaviour after you returned to the workplace following your absence along with your behaviour and conduct towards Simon Gibb and not attending Occupational Health referrals which were made by the Company.

The Company has a Code of Conduct and Disciplinary Procedure in place which states that 'an investigation will usually be carried out by your line manager to establish the facts of the case. You must co-operate fully and promptly in any investigation'. I have established that this was simply not possible and therefore the Company took the decision to appoint Mr Murray

as the Investigating Officer on the basis that he holds a Management role within the Business, and he had not had any involvement in matters at that time. Mr Murray's role was to gather the facts and produce a report. In my experience, these are common problems that are faced by small and medium enterprises (**SMEs**).

I note that several attempts were made by Mr Murray providing you with the option to either meet with him or to arrange a phone call, you chose not to participate.

You were invited to attend a disciplinary hearing on 3 November 2023 which was chaired by Mr Davidson. I note from the minutes taken at the hearing, Mr Davidson clearly explained to you that it was in an employee-related matter and not a shareholder's issue. This is also documented in the disciplinary outcome letter which was issued to you.

I am also satisfied that you were provided with a full opportunity to respond to the allegations and present your case at the Disciplinary Hearing, and again you chose not to.

I have established that you did not attend the Occupational Health referrals which were made for you, all the witness statements are consistent describing your conduct and behaviour as improper and unprofessional and which caused upset and disruption to the Company.

Conclusion

I've considered the terms of your appeal e-mail, the explanation and points you raised during the appeal hearing.

The Company took reasonable steps under the circumstances to appoint the appropriate individuals to conduct the investigation and to chair the disciplinary hearing. Mr Murray's role was to basically investigate, fact-find and submit a report, he had no involvement in the disciplinary hearing. I understand that the Company faced the issue that the rest of the Management Team had been involved in some way (the majority as witnesses from the provision of their statements) and that on balance the involvement of Mr Murray was factually based. As such, there is limited, if any influence he could exert over the statements provided by the employees. I find the relationship between Mr Murray and Mr Gibb is remote enough that this would not have been, on balance, an undue influence on the investigation itself.

I am satisfied the correct procedure has been followed and I can find no evidence that the procedure was used to "bulldoze" you out of the Company, although it appears you chose not to participate in it.

During the appeal meeting, we discussed at great length the difference between an employee, a Director and a shareholder which are fundamentally different. As discussed and explained, a shareholder has very limited

information rights (conferred by the Companies Act 2006) and we agreed that you were therefore indeed acting in the capacity of a Director and therefore it is an employee related matter.

5 *I have reviewed the disciplinary outcome letter and the Minutes taken during the disciplinary hearing and I cannot fundamentally disagree with Mr Davidson's findings and conclusions.*

10 *I have considered the mitigating circumstances that you have put forward and these mitigating circumstances do not lead me to consider that sanction other than dismissal should be applied in the circumstances.*

I therefore do not uphold your appeal for the reasons I have explained above.

15 *You have now exercised your right to appeal, this decision is final and there is no further right of appeal."*

Alleged Protected Disclosure

20 33. After his suspension, Mr Kelly took legal advice and on 9 October 2023 his solicitor wrote to Simon Gibb (D.20). It was alleged that this letter was a disclosure which qualified for protection.

25 34. It was alleged, amongst other things, that Mr Gibb was in breach of his fiduciary duties to Sureclean; that he, *"acted in breach of his statutory duty to promote the success of Sureclean"*.

30 35. His solicitor further advised that Mr Kelly had, *"reported his suspicions to Police Scotland"*.

36. The solicitor also alleged that restricting Mr Kelly's access to the IT system of Sureclean without his consent and changing his password and deactivating his Company phone prevented him, *"carrying out his Corporate Governance role as a statutory Director of Sureclean."*

35 37. The solicitor also said this, *"In the meantime, our client reserves all employment rights he may have arising as a result of your actions, including*

but not limited to a constructive dismissal claim in the event that you failed to do so.”

38. Finally, the solicitor said this:-

5 **“Resolution**

10 *Our client considers that you have sought to improperly use your position as a Director of Sureclean to enrich yourself to the prejudice of Sureclean and our client whilst he was on sick leave by the misuse of the company assets in breach of your duties to the company. Our client also considers that you have shown complete disregard for the constitutional mechanisms of the company under its Articles and Company Law, including in the recent ‘suspension’ by resolution of a board meeting which our client received no prior notice of. In all the circumstances, our client does not consider that you are a fit and proper person to be a Director of a UK company. You certainly should not remain a director of Sureclean.*

20 *In absence of any early resolution, our client is minded to pursue legal proceedings. Such proceedings may seek an order that your shares in KSG be purchased compulsorily. Alternatively, it may be a just and equitable winding up of Sureclean. In any event, it is equitable that compensation be paid to Sureclean reflecting where appropriate the loss the company caused by your conduct, and where appropriate the profit you have derived from your breaches of duty.”*

25

39. Mr Gibb took legal advice and his solicitor responded on 13 October 2023 (D.24). Amongst other things, Mr Gibb denied that the appointment of Jack Davidson as a Non-Executive Director of Sureclean was invalid. The following are excerpts from the letter:-

30 **“Payments to Stratov8 Ltd**

35 *As you are aware your client was absent from work on sick leave from 24 April 2023. As the sole functioning director of Sureclean at that time our client had to take urgent action to call upon other resources to help him perform the services that had previously been provided by your client and he took the view reasonably and in good faith, that Stratov8 Ltd was best placed to fulfill that role given its familiarity (through our client) with the business of the company. The “rentals” represents interest on our clients additional £100,000 of capital which should have been repaid and were charged with a view to securing that the total payments to our client and Stratov8 Ltd matched the payments being made to your client and his wife in circumstances in which your client was providing no services to Sureclean over an extended period of time.....*

40

Restricted Access/Suspension

At an emergency meeting of our client and Jack Davidson on 4 October 2023 it was decided that in light of your client's conduct it was unfortunately necessary to suspend him. Your client was suspended from work with Sureclean on 5 October 2023. A letter confirming that suspension, pending an Occupational Health Report being obtained, was hand-delivered to your client's home address on 9 October 2023. The suspension is with pay and benefits until further notice.

As set out in that letter, the decision to suspend was taken based on your client's conduct and the behaviour he had displayed since his unexpected return to work on 4 September 2023 following his period of absence and sick leave, and in particular his conduct towards our client and other members of the management team in the office the previous week, all as more fully detailed in the letter.

Again as set out in the letter, our client is extremely concerned about your client's wellbeing. An occupational health appointment was arranged for your client with Dr. Christina Romete at ROC Clinic, Westhill on 12 October 2023 at 11am. We understand that your client failed to attend that appointment.

The letter also explains, as your client was aware, that the decision to suspend access to Sureclean's IT system was as a result of your client's conduct as without a reasonable understanding of your client's actions, our client had to safeguard both the business and your client's well-being.

In your letter dated 9 October 2023 you state that your client is being prevented from carrying out his corporate governance role as a statutory director of Sureclean. Our client is unclear as to the basis on which your client considers this to be the case. Nothing has been done to prevent your client fulfilling his duties in the office of director.

Concluding comment

Our client refutes entirely that he has sought to improperly use his position as a director of Sureclean to enrich himself to the prejudice of Sureclean and your client, whilst your client was on sick leave, by the misuse of Sureclean's assets in breach of his duties to Sureclean. Our client refutes also that he has shown complete disregard to the constitutional mechanisms of Sureclean under its Articles and Company law."

Respondent's submissions

40. The respondent's solicitor made written submissions with reference to the list of issues. These are referred to for their terms. The following is a summary.

5 **Unfair dismissal**

41. The respondent's solicitor submitted that the reason for Mr Kelly's dismissal was conduct and that it was fair.

10 42. She submitted that the respondent had followed the "three-stage test" set out in ***British Home Stores Ltd v. Burchell*** [1978] IRLR 379 and that dismissal fell within the range of reasonable responses open to a reasonable employer, in accordance with the test set out in ***Iceland Frozen Foods Ltd v. Jones*** [1982] IRLR 439.

15 **Investigation**

43. The respondent's solicitor submitted that at the start of his investigation Mr Murray had only been given the names of two individuals to speak to and he then determined himself who else should be spoken to. He was not a
20 decision maker. *"He carried out the investigation on his own and with no direction or instructions from Mr Gibb, or anyone else, on the manner it should be carried out, or the findings of the report".*

44. She further submitted that Mr Murray was an independent investigator.
25 Although he is the cousin of Mr Gibb's wife, *"this does not mean that the relationship is close on a personal level."*

45. The respondent's solicitor then detailed in her submissions the extent of Mr Murray's enquiries. In addition to speaking to and taking statements from a
30 number of employees, he obtained a statement from Mr Gibb, *"as well as a transcript of the recording of the meeting of 4 October between Mr Gibb and*

the claimant" (D26, page 315). She submitted that Mr Murray *"did not simply accept Mr Gibb's submissions but carried out further investigations. He obtained a statement from Fiona McKenzie (D.26, page 313) and reviewed the Occupational Health correspondence."* She submitted that Mr Murray's role was simply to take statements from those who had been involved. He was not the decision maker. He made a recommendation but this did not have to be followed. She submitted that Mr Murray's investigation was reasonable in all the circumstances.

10 Disciplinary hearing and outcome

46. The respondent's solicitor submitted that Mr Davidson, who took the decision to dismiss, was appointed Non-Executive Director by both Mr Kelly and Mr Gibb at a Board Meeting which was attended by the respondent's solicitor (D.12, page 213).

47. So far as the statement which Mr Kelly read out at the start of the Disciplinary Hearing was concerned, he confirmed, in cross-examination, that at no point during the Disciplinary Hearing did he advise Mr Davidson that it was on his solicitor's advice that he did not participate in the meeting, beyond referring back to the statement. Nor did he specify what his concerns against Mr Gibb were, or make reference to the Invoices from Stratov8 which concerned him. He did not suggest that his behaviour had been influenced by his previous illness and nor did he apologise for his actions or offer any mitigation.

48. Mr Davidson reached the decision on the basis of the evidence available to him. *"At the time he was concerned particularly by the bullying and harassment claims and the effect this had been reported to have had on the employees. Many of the employees had only recently joined the business and the respondent depended to a great extent on the loyalty and commitment of these individuals to be a success. He commented that if key individuals were to leave, the business would be at risk of collapse."*

49. The respondent's solicitor submitted that, on the basis of the evidence available, dismissal for gross misconduct was within the band of reasonable responses (*Iceland Frozen Foods Ltd*).

Appeal hearing and outcome

5

50. It was submitted that the claimant's position, (which he appeared to confirm in cross examination), was that *"the correct process for an MD had not been followed"*, apparently suggesting that there should be a different process given his status to that of an "ordinary" employee. This was a proposition with which Mr Cowie did not agree. *"His evidence was that no one is above disciplinary proceedings, not an MD, where they have acted in a manner warranting disciplinary action."*

10

51. Mr Cowie remained unclear whether Mr Kelly was actually denying having carried out the acts of bullying and intimidation as alleged. Mr Kelly was unable to give an explanation as to why a number of employees would make up the allegations.

15

52. During the Appeal Hearing, Mr Kelly stated that *"bullying and intimidation must be a sustained prolonged action. If I ask a question and somebody doesn't like the question that is not bullying and intimidation"* (D.34, page 377). Mr Cowie did not agree with that proposition. In his view, *"bullying and intimidation can be one-off acts"*.

20

53. Mr Kelly had refused to participate in the investigation and in the disciplinary process and even at the appeal he failed to answer specific questions about why he was asking the questions he had asked the employees, in the way alleged.

25

54. The respondent's solicitor submitted that Mr Cowie's decision to refuse the appeal fell within the band of reasonable responses.

30

55. Conduct was the reason for Mr Kelly's dismissal. *"Mr Davidson was required to reach his decision on the basis of the information available to him at the time. He formed a genuine belief, on reasonable grounds following a reasonable investigation, that the claimant was guilty of gross misconduct. The decision fell within the band of reasonable responses. Accordingly, the claim for unfair dismissal under s.98 of the Employment Rights Act should be refused."*

"Esto case"

56. In the alternative, the respondent's solicitor submitted that if dismissal without notice for gross misconduct fell outwith the band of reasonable responses, nevertheless the claimant could have been dismissed fairly with notice for some other substantial reason.

Automatic unfair dismissal under s.103A

57. The alleged protected disclosure(s) to be considered by the Tribunal was contained within the letter from the claimant's solicitor on 9 October 2023 (D.20).

58. The respondent's solicitor submitted that the alleged failure to legally appoint Mr Davidson to be a Director of KSG International Ltd was not pled and is not therefore one of the disclosures relied upon.

59. The respondent's solicitor *"anticipated"* that the protected disclosures relied upon were: *"payments to Stratov8 Ltd (pages 248-249) and alleged failures to comply with the Companies Act 2006"*.

60. It is alleged that the claimant had a reasonable belief that a criminal offence had been committed, is being committed, or is likely to be committed under s.43B(1)(a); and/or that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject under s.43B(1)(b).

61. With regard to the alleged *"fraudulent invoicing"* by Stratov8 Ltd, it was not disputed that it was agreed at the time of the management buyout that Mr Gibb would receive a salary and would also charge fees through his consultancy business, Stratov8 Ltd.
- 5
62. When the claimant was signed off work, Mr Gibb had to increase his time commitment to the Company substantially. He had to work full-time when previously he was only required to work two days per week. At the Board Meeting on 21 June (D.13) it was agreed that the fees which Mr Gibb could charge via Stratov8 Ltd would be increased from £8,000 per month plus VAT to £16,000 per month.
- 10
63. There were errors in the descriptions of the work done in the Stratov8 Ltd Invoices. These were corrected and re-issued. The respondent's solicitor submitted that, *"It was a simple administrative error. It was not an act of fraud. Mr Gibb had utilised existing template Invoices for other clients and had incorrectly described the basis for payment."*
- 15
64. When the claimant saw these Invoices he did not query them with Mr Gibb. If he had done so, it is likely that Mr Gibb would have explained the error.
- 20
65. The respondent's solicitor submitted that, *"this cannot be characterised as 'fraud'".* Accordingly, it was submitted that Mr Kelly could not have formed a "reasonable belief" that the Invoices tended to show that a criminal offence had been committed, was being committed, or was likely to be committed.
- 25
66. Mr Kelly did not speak to the alleged breaches of the Companies Act 2006 when he gave evidence and nor was it put to the respondent's witnesses. It was submitted that, *"the claimant has not established the basis upon which he reasonably held the belief that Mr Gibb was failing in respect of his fiduciary duties."*
- 30

67. So far as the Shareholder's Agreement was concerned (D.7), no particular breach of that Agreement was alleged in the solicitor's letter (D.20).

68. In any event, the Shareholder's Agreement is, "*a private document between the claimant, Mr Gibb and KSG International Ltd*". There were no other parties to the Agreement. With reference to **Chesterton Global Ltd (t/a Chestertons) v. Nurmohamed** [2017] EWCA Civ979, it was submitted that this alleged disclosure was not in the public interest. "*The alleged disclosure served only himself. It had no wider application beyond this.*"

69. The respondent's solicitor further submitted that even if there was a qualifying disclosure(s), "*it is protected only in respect of what was communicated to the respondent under s.43C and not in respect of what was communicated to Brodies (his solicitor) under s.43D.*"

"Reason or Principal Reason for Dismissal"

70. The respondent's solicitor further submitted, with reference to **Bolton School v. Evans** [2006] EWCA Civ1653, that even if the claimant established that a protected disclosure was made, the reason or principal reason for the termination of his employment was his conduct, rather than the making of that disclosure.

71. Also, the claimant alleged that Mr Gibb had been conspiring to remove him from the business since the summer of 2023 and, therefore that the reason or principal reason for his termination was not the alleged protected disclosure(s): "*the claimant cannot have it both ways. Either his position is that the protected disclosure was the reason or principal reason, or his position is that Mr Gibb had been conspiring since the summer to remove the claimant. It is noted the claimant did not put either position to Mr Murray, Mr Davidson, or Mr Cowie in the course of the Disciplinary process, or indeed in the hearing.*"

72. It was submitted, therefore, that there was no causal connection between the solicitor's letter (D.20) and the decision to terminate the claimant's employment. *"Further, in accordance with **Bolton**, even if the Tribunal were to find that there was a close connection between the dismissal and the disclosure, it is the respondent's position that the claimant's misconduct for which he was fairly dismissed, was separable from the disclosure."*

73. The respondent's solicitor submitted, therefore, that the claim for unfair dismissal, under s.103A of the 1996 Act, should also be dismissed.

Claimant's submissions

74. The claimant's solicitor also made written submissions which are referred to for their terms. The following is a summary.

'Ordinary' unfair dismissal

75. The claimant's solicitor also referred to **British Home Stores Ltd.**

76. She submitted that although there were allegations about the behaviour Mr Kelly displayed towards Simon Gibb and other employees which was *"improper and unprofessional, Mr Gibb was notably absent and did not speak to any of these matters."*

77. She further submitted that Mr Davidson, *"the Disciplinary Chair"*, *"had never experienced any of the aforementioned behaviours on the part of the claimant."* She alleged that after the Disciplinary Hearing he carried out, *"some investigations of his own and became aware of the exchanges between the respective solicitors (D.20 and D.24)."* She alleged that Mr Davidson then went to Mr Gibb and drew to his attention that the explanation by his solicitor *"as to rental/interest"* was not provided for within the contractual arrangements between Mr Gibb and Mr Kelly and had to be

addressed. Notwithstanding that, he proceeded to terminate Mr Kelly's employment.

- 5 78. She submitted that the decision to dismiss was not within the band of reasonable responses. She submitted that, *"Mr Davidson, having become aware of the detail of wrong-doing during his post-hearing investigation should have at that stage halted the process."*
- 10 79. The claimant's solicitor further submitted that Steven Murray, *"had not witnessed or been subject to any intimidating or bullying behaviour on the part of the claimant nor did he give any evidence of any improper/unprofessional behaviour."* She submitted that Mr Murray was not impartial, being related to Mr Gibb's wife. *"Although the investigation 'on paper' reflects a substantially fair process, the claimant's belief is that at no*
- 15 *time was there any question of the respondent having reasonable belief in the allegations"*.
- 20 80. So far as the Accountant, Mr Hunter, was concerned, *"his evidence was that he had not experienced intimidating or bullying behaviour by the claimant. This is very much at odds with this statement"*.
- 25 81. It was also submitted that Simon Cowie who heard the appeal *"was conflicted acting for Sureclean and therefore the joint Directors."* The claimant's solicitor also submitted that the fact that he had not seen any of the *"previous papers in the matter at all was wholly unbelievable"*.

Automatic unfair dismissal s.103A

- 30 82. It was submitted that *"all the relevant tests had been met"*
83. The claimant was not invited to the Board Meeting when it was agreed that the remuneration to Stratov8 Ltd would be increased (D.13). It was submitted

that, *“it was concealed”*. Nor did the claimant agree to Mr Davidson becoming a Non-Executive Director of KSG (D.11), only the respondent Company.

84. It was further submitted that, *“Mr Kelly’s evidence was that Mr Gibb attempted to keep him from taking up his role, looking through Company business to “catch up” on his return to work. He told him essentially to keep away from everything other than Emergency Response (D.16)”*.
85. In support of her submissions the claimant’s solicitor referred to **Chesterton** (*“Public Interest”*) and **TJOJwist DX Ltd v. Armes & Ors** UKEAT/0030/20/JOJ (*“Reasonable Belief and Public Interest”*).
86. Finally, the claimant’s solicitor submitted that, *“having regard to the bundle, the overwhelming evidence and submissions the Tribunal is invited to find for the claimant on all matters claimed.”*

Respondent’s response to the claimant’s submissions

87. The respondent’s solicitor also made written submissions in response to the submissions by the claimant’s solicitor. These are referred to for their terms.
88. So far as the allegation that Simon Gibb, CEO and Chairman of the respondent, being *“notably absent”* was concerned, Mr Gibb was someone from whom Mr Murray took a statement. Mr Gibb was not involved in the disciplinary procedure. It is not the Tribunal’s role to re-investigate the alleged misconduct. *“Rather it is to ascertain whether the decision of the dismissing Manager, Mr Davidson was reasonable, based on the evidence available at the time, and whether that evidence was a result of a reasonable investigation.”*
89. None of the individuals who carried out the disciplinary procedure had been involved in the matters under investigation. *“If they had been, they would not*

have been appropriate individuals to carry out the investigation, disciplinary and appeal processes.”

5 90. So far as the protected disclosure was concerned (D.20), *“It is noted that Mr Davidson specifically stated in his evidence that while Mr Gibb mentioned the letter to him around mid-October 2024 he did not see this until **after** he had taken the decision to terminate the claimant’s employment. In the course of re-examination, he confirmed he was not involved with Mr Gibb taking legal advice to respond to the letter from the claimant’s solicitor”*. Nor had he seen
10 the response from Mr Gibb’s solicitor (D.24). *“It did not form part of his decision to dismiss.”*

15 91. Mr Kelly was suspended a number of days before the alleged protected disclosure. This was confirmed by Mr Kelly himself when he gave evidence. Indeed, the letter from his solicitor makes reference to his suspension (D.20, page 249).

20 92. So far as the submission that Mr Cowie was conflicted by reason of acting for the respondent and therefore the joint Directors was concerned, this was not challenged either by the claimant or Mr Fraser at the Appeal Hearing.

25 93. The respondent’s solicitor also submitted that, *“the claimant has not specified which specific sections of the alleged protected disclosure (D.20) are the protected disclosures relied upon. It appears the claimant’s position is now that the only whistleblowing complaint made related to ‘theft’ rather than the other breaches that were pled.”*

30 94. Finally, it was submitted that the claimant had not addressed the question of causation, *“and has instead made reference to events preceding the making of the alleged disclosure(s) as the apparent reason for the dismissal. On the basis that the claimant has not set out his claim in respect of protected disclosures in full, the claim cannot succeed.”*

Claimant's response to the respondent's submission

95. The claimant also submitted a written response to the respondent's submissions. These are referred to for their terms.

5

96. She submitted that, *"Mr Davidson did state in evidence that he became aware of the wrongful payments charged by Stratov8 after the hearing during matters he investigated at that time prior to, a week later, terminating the claimant's employment."*

10

97. Nor was it accepted that Mr Gibb was not involved in the decision to dismiss. The claimant's solicitor submitted that *"the dismissal was driven only by Mr Gibb having been 'found out' in relation to wrongful practices identified by the claimant."*

15

98. So far as causation was concerned, it was submitted that, *"the papers and submissions clearly show that the reason for termination was not the claimant's behaviour at a time when everyone appeared to be terribly concerned about his health (despite being cleared by Assured OH) but because the claimant alleged wrong-doing immediately upon his return to work."* It was submitted that the reason for the dismissal was making a protected disclosure – *"the timeline supports this"*.

20

99. In the alternative, it was submitted that if Mr Kelly's dismissal was not automatically unfair, *"it was unfair under the ordinary **Burchell** test."* It was submitted that the process was *"a sham"*. The intention was to remove Mr Kelly, *"from the day-to-day operation of the business"* and *"was driven by Mr Gibb for his own reasons"*.

25

30

Discussion and Decision**Unfair Dismissal**

5 100. In every unfair dismissal case, where dismissal is admitted, s.98(1) of the Employment Rights Act 1996 ("the 1996 Act") requires the employer to show the reason for the dismissal and that it is an admissible reason, in terms of s.98(2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. An admissible reason is a reason for which an employee may be fairly dismissed and among them is conduct. That was the reason which the respondent claimed was the reason for Mr Kelly's dismissal. That was, of course, a pivotal issue in the case as the claimant alleged that was not the true reason, but rather that Mr Kelly was dismissed because he made a protected disclosure(s).

15 101. We were of the unanimous view that conduct was the true reason for Mr Kelly's dismissal. There were a number of reasons for this.

20 102. There was evidence of Mr Kelly's misconduct, about his behaviour, his manner and the serious, unsubstantiated, allegations he made about Mr Gibb, his fellow Director, Chairman and CEO, from a number of employees, in addition to Mr Gibb. Their statements were obtained by Mr Murray as part of his investigation and were included in his Report (D.26). The employees concerned spoke of the stress caused by Mr Kelly's conduct. that they felt intimidated, of how disruption to the business had been caused and how they feared for their continued employment.

25

30 103. We were satisfied that these statements were freely and honestly given. There was no evidence to suggest that Mr Gibb brought pressure to bear on these employees or that they were influenced by anyone to give their statements. The catalyst for the investigation was when, on 4 October 2024 two employees, James Whipps and Gary Broadley, complained voluntarily to Mr Gibb about Mr Kelly's conduct. They told him of their upset and concerns.

Both were distressed and Mr Whipps was so “*shaken up*” that Mr Gibb “*sent him home to recover*”.

- 5 104. The veracity of their evidence and the evidence Steven Murray obtained from other employees as part of his investigation was not challenged, in any meaningful way, by Mr Kelly during the disciplinary process. He chose not to address the allegations of misconduct. He offered no explanation for his behaviour. That, in our view, was seriously misguided.
- 10 105. Nor were we persuaded that the disciplinary procedure was a “*sham*” as the claimant alleged. As we record below, the investigation and disciplinary procedure which the respondent followed were reasonable in all the circumstances. They were within the band of reasonable responses which a reasonable employer might have adopted.
- 15 106. Finally, as we also record below, there was no evidence of any causal connection between Mr Kelly’s dismissal and his alleged protected disclosure(s).
- 20 107. It was established to our satisfaction, therefore, that conduct, an admissible reason, was the reason for Mr Kelly’s dismissal.
- 25 108. The remaining question which we had to determine, therefore, under s.98(4) of the 1996 Act was whether the respondent had acted reasonably in treating that reason for dismissing Mr Kelly as a sufficient reason and that question had to be determined in accordance with equity and the substantial merits of the case.
- 30 109. When determining this issue we were mindful that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a

person from his employment for a conduct reason (“**Sainsbury’s Supermarket’s Ltd v. Hitt** [2003] IRLR 23 CA).

110. To determine whether a dismissal for conduct was fair, valuable guidance was provided in the well-known case of **Burchell**, to which we were referred by both parties. Mr Justice Arnold gave the following guidelines in that case at page 308:-

“What the tribunal have to decide every time, is broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of that employee of that misconduct at that time. That is really stating shortly and compendiously what in fact is more than one element. First of all, there must be established by the employer the fact of that belief: that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief and thirdly, we think that the employer, at the stage at which he formed that belief, on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.”

111. This means that the employer need not have conclusive direct proof of the employee’s misconduct – only a genuine and reasonable belief, reasonably tested.

Investigation

112. The only basis for the contention by the respondent that Steven Murray’s appointment to carry out the investigation was inappropriate was because he was the cousin of Simon Gibb’s wife. However, there was no evidence to suggest that he was not impartial. Mr Murray was a credible and reliable witness. There was no evidence to suggest that any pressure was applied to him by Simon Gibb, or anyone else, to reach a particular conclusion. He was not a witness. In our unanimous view, his appointment was entirely appropriate. The statements he obtained were freely given. They were never challenged. Mr Murray tried his best to get a response from Mr Kelly but he refused to engage in the investigation. In our unanimous view, Mr Murray’s investigation and his report (D.26) were comprehensive. His role was that of

fact-finder. He took no part in the decision to dismiss Mr Kelly. His recommendation that a, "*formal disciplinary procedure*" be initiated was reasonable in all the circumstances.

5 **Dismissal**

113. We were also satisfied that Mr Davidson's appointment to conduct the disciplinary hearing was a reasonable one in all the circumstances. As with Mr Murray, there was no evidence to suggest that he had not been impartial.
10 There was no evidence of him being influenced to dismiss by Mr Gibb, or anyone else. Mr Davidson's evidence was credible and reliable and he conducted the disciplinary hearing in an eminently reasonable and fair manner. He made Mr Kelly aware of the specific allegations against him. Mr Kelly was afforded a reasonable opportunity to respond to the allegations but
15 he chose not to do so. That was wholly misguided in our view. He had been made aware that dismissal was a possible outcome. Mr Davidson explained that the disciplinary procedure related to his conduct as Managing Director and employee. Mr Kelly had an ongoing shareholders' dispute with Mr Gibb which had resulted in proceedings in the civil court. But shareholders' disputes are very different from employer/employee disputes. The law and
20 the relevant issues are completely different and the Courts that handle them operate under completely different rules from employment tribunals.

114. As a result of Mr Kelly's refusal to engage and address the specific
25 allegations, and in the absence of anything to suggest they had not been freely given, Mr Davidson accepted the validity of the statements from Mr Gibb and the employees. That decision was one which, in the circumstances, a reasonable employer might have adopted. He was left with no option other than to accept the allegations.

Occupational Health

115. When Mr Kelly was suspended, Mr Gibb arranged an appointment with Occupational Health ("OH") for him at the "ROC Clinic" (D.19). He had been
5 off work for several months due to ill health and shortly after his return his behaviour and demeanour, gave rise, in our view, to a genuine and understandable concern for his welfare, although the claimant's solicitor suggested otherwise in her submissions. However, Mr Kelly did not keep that appointment. He explained at the Hearing that he had not heard of ROC
10 before and they were not the respondent's *"approved medical provider"*. Instead, Mr Kelly arranged his own OH referral and obtained a Report from "Assured" which advised that he was, *"fit to return to work without restrictions or adjustments"* (D.17). However, the difficulty with that for the respondent was that they were unaware of the terms of referral and the questions
15 Assured were asked to address, as would be standard practice when an employer refers an employee to OH.
116. In any event, Mr Davidson accepted that this was but a minor factor in his decision to dismiss Mr Kelly and clearly it was.
20
117. In our unanimous view, the procedure adopted by the respondent was not a *"sham"*, which was a fundamental aspect of the claimant's case. There was a genuine, legitimate, investigation and disciplinary procedure as a result of
25 Mr Kelly's conduct. As the Managing Director he was entitled to *"raise concerns of wrongdoing within the organisation"*, a point he raised at the Appeal. However, it was the confrontational manner in which he went about doing so which was the issue. As Mr Cowie who heard the Appeal put it when he gave evidence at the Tribunal Hearing: *"just because you're the Managing
30 Director doesn't mean your immune from dealing with staff in an appropriate way"*.

118. With reference to the test in **Burchell**, in our unanimous view Mr Davidson believed that Mr Kelly was guilty of misconduct, primarily in respect of his conduct on his return to work; he had reasonable grounds for that belief; and he formed that belief having carried out as much investigation into the matter as was reasonable in all the circumstances. He had a genuine and reasonable belief, reasonably tested.

119. We then went on to consider whether, in all the circumstances, dismissal was a reasonable sanction.

120. In this regard, we were mindful of the guidance in such well-known cases as **Iceland Frozen Foods Ltd**, to which we were referred, that there is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep him on. It depends entirely on the circumstances of the case whether dismissal is one of the penalties which a reasonable employer would impose. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, then dismissal is fair.

121. When it came to the decision to dismiss, we accepted Mr Davidson's evidence that Mr Kelly's conduct towards the other employees, the impact upon them and the potential damage to the business was far more important than his failure to attend OH meeting which had been arranged. In our view, that failure was of little significance. We considered whether dismissal was a reasonable sanction on the basis of Mr Kelly's conduct in the workplace on his return to the work.

122. On the basis of the evidence which Mr Davidson had before him, it was reasonable in our view for him to conclude that Mr Kelly was guilty of gross misconduct. In addition to the distress he had caused, there was a risk that what was still a fledgling business had been damaged and an understandable

concern on the part of Mr Gibb and the employees that further damage would be caused should Mr Kelly return to the workplace again.

- 5 123. James Hunter, the respondent's Financial Controller, expressed such a concern in his statement (D.26, page 296). He said that, "*Mark Kelly is currently a danger to the business going forward.....I believe he has become paranoid on the running of the business due to the number of positive changes to both the business processes and profile of the business*". Mr Hunter is still employed by the respondent. He was called as a witness by the
- 10 claimant. He did not do so willingly and was only prepared to give evidence for the claimant after a direction by the Tribunal. His evidence supported the respondent. He presented as credible and reliable. He did not assist the claimant. He explained that it was entirely reasonable for Mr Gibb to be paid more as he was doing much more work than he had been contracted to do
- 15 when Mr Kelly was absent for many months due to his ill health. He confirmed that this increase was invoiced through the vehicle of Mr Gibb's Company, Stratov8. As the Financial Controller he saw nothing wrong with that. It was a normal procedure which had been agreed and had operated from when Mr Kelly and Mr Gibb took over the business. Although at one stage he referred
- 20 to his discussion with Mr Kelly as having been "*convivial*", it became clear in his evidence that was the wrong choice of word as he confirmed, in evidence, the accuracy of his statement and explained his understandable concern and upset when Mr Kelly spoke to him on 4 October, as Mr Kelly was alleging that a fraud had occurred, "*under his watch*". Of course it was, Mr Hunter's
- 25 statement which the dismissing officer, Mr Davidson, had to consider (D.26, page 296)). It was in clear, unequivocal, terms and detailed clearly Mr Kelly's misconduct. Mr Davidson reached his decision on the basis of the evidence available to him.
- 30 124. Further, there was no acceptance by Mr Kelly or recognition that he had done anything wrong, that his conduct was unacceptable, of the distress and uncertainty he had caused and of the disruption to the business. The employees were understandably concerned about their future employment in what was a relatively new business, but there was no apology from Mr Kelly.

He seemed to believe that as Managing Director he was entitled to act in the way he did.

125. We had no difficulty, therefore, in arriving at the unanimous view that the dismissal fell within the band of reasonable employers which a reasonable employer might have adopted.

Appeal

126. The final procedure was the Appeal. We were also satisfied that Mr Cowie, who conducted the Appeal, was impartial. He did speak with Mr Gibb after the Appeal Hearing, but only to clarify the terms of the Stratov8 Invoices and Mr Murray's "family link". He discovered that there had been an administrative error in the Invoices which were not for "Interest on Rentals" (an old template had been used), but rather for Mr Gibb's increased salary, an error which would be corrected. He established that Steven Murray was indeed Mr Gibb's wife's cousin but his role as investigator was solely that of fact-finder. There was no evidence of his decision to reject Mr Kelly's Appeal being pre-judged or of Mr Cowie's decision being influenced by Mr Gibb.

127. It was not a re-hearing, but we were concerned that he was not provided with all the relevant documentation, only Mr Davidson's dismissal letter (D.31), before the Appeal Hearing. We did not consider this to be best practice. However, Mr Cowie did read all the relevant documentation after the Appeal Hearing and before he reached his decision. In our view, Mr Cowie conducted the Appeal in a reasonable manner. Mr Kelly was accompanied. He was afforded ample opportunity to respond to the specific allegations, but he chose not to do so. In the circumstances, it did not make any difference that Mr Cowie did not receive all the papers before the Hearing. Mr Kelly's position remained steadfastly the same as it had been throughout the entire process: a refusal to engage and address the allegations because there was a "shareholder dispute". He did not challenge the allegations of misconduct or

the statements Mr Murray obtained as part of his investigation. He offered no explanation. He did not apologise.

128. So far as the reasons for his appeal were concerned (D.33, page 373):

5

1. Disciplinary proceedings against Mr Kelly, as an employee, were justified and reasonable. His shareholder dispute with Mr Gibb was a separate matter.

10

2. As Managing Director he was entitled, of course, to raise concerns of “*wrong-doing within the organisation, including those which relate to potential criminality*”. However, the manner in which he went about doing so amounted to misconduct.

15

3. As we record above, in our unanimous view the disciplinary process was not “*an artificially constructed process*”. It was not a “*sham*”. It was the consequence of genuine complaints which were raised by employees about Mr Kelly’s conduct.

20

4. As we record above, the appointment of Steven Murray to carry out the investigation was not “*wholly inappropriate*”. He was impartial and his investigation was comprehensive.

25

129. Mr Cowie’s decision to refuse the Appeal, therefore, was within the band of reasonable responses which a reasonable employer might have adopted.

130. We arrived at the unanimous view, therefore, that Mr Kelly’s dismissal fell within the band of reasonable responses open to a reasonable employer.

30

131. The respondent satisfied the **Burchell** test, followed a reasonable procedure and imposed a sanction, dismissal, which fell within the range of reasonable responses. Mr Kelly's dismissal, therefore, was fair.

5 **Automatic unfair dismissal the reason of making a protected disclosure**

132. It follows from our finding that conduct was the reason for Mr Kelly's dismissal, that he was not automatically unfairly dismissed, by reason of making a protected disclosure. However, for the sake of completeness, we
10 record a summary of our views on the issue.

133. The relevant statutory provisions are s.47B ("Disclosures qualifying for protection) and s.103A (automatic unfair dismissal by reason of making a protected disclosure) in the 1996 Act.

15 134. The specific parts of the letter dated 9 October 2023, from Mr Kelly's solicitor which it was alleged qualified for protection were not clear (D.20). Some specification was provided in the claimant's Further and Better Particulars where there is reference to "*fraud*" and a failure by Mr Gibb "*to comply with his legal obligations at large*" but the relevant parts in the letter relied upon
20 are not specified (D3, page 42). The picture was further confused by the reference to "*theft*" in the claimant's submissions.

135. It also appeared to us, as the respondent's solicitor submitted, that the
25 protected disclosures relied upon were "*Payments to Stratov8 Ltd*" and "*alleged failures to comply with the Companies Act 2006*".

136. Mr Kelly did not speak to alleged breaches of the Companies Act 2006 and
30 this was not put to the respondent's witnesses; there is no allegation of a breach of the Shareholders' Agreement in the solicitor's letter and in any event that was a private matter between Mr Kelly and Mr Gibb and was not, therefore "*made in the public interest*". This left the allegation of wrongdoing

in relation to the Stratov8 Invoices and the increased monthly payments to Mr Gibb by means of his Company.

137. These Invoices revealed that an additional £8,000 per month had been
5 invoiced. This had been decided at a Board Meeting on 21 June 20223 (D.13)
after Mr Kelly had agreed, at a meeting on 12 June, to Mr Gibb *“having my
full authority on business matters for a period not exceeding 3 months....”*
(D.10). However, Mr Kelly was unaware of the agreed salary increase for Mr
Gibb, to be processed by way of the Stratov8 Invoices, as he did not attend
10 the Board Meeting (D.13). In our view, the salary increase did not seem at all
unreasonable as Mr Gibb was carrying out a great deal more extra work
during Mr Kelly’s lengthy absence due to ill health than originally he had been
contracted to do. However, we accepted that Mr Kelly was unaware of this
increase. Also, the subject matter of the Invoices was incorrect. Due to an
15 administrative error they stated that they were for “Interest on Rentals” rather
than for Mr Gibb’s increased salary but Mr Kelly was also that this was an
error.
138. We are bound to say that we were surprised that Mr Kelly did not raise his
20 concerns in a reasonable manner with Mr Gibb and the other employees,
rather than jumping to conclusions and confronting them in the way he did.
Had he done so, Mr Gibb would have been able to explain that the increase
in the monthly payments to Stratov8 Limited had been agreed to reflect the
additional work he had been required to do in Mr Kelly’s absence and that the
25 incorrect narrative in the Invoices was no more than an administrative error.
139. Nevertheless, we were of the unanimous view that Mr Kelly had a reasonable
belief that a criminal offence had been committed, was being committed or
was likely to be committed; and/or Mr Gibb had failed to comply with any legal
30 obligation. That is not to say that a criminal offence had actually been
committed or that there was a failure to comply with any legal obligation, only
that in the circumstances and given his state of knowledge or rather lack of
knowledge and the error in the Invoices, Mr Kelly had a reasonable belief.

The EAT in ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** [2012] IRLR 4 stated that the focus on ‘belief’ in s.43B establishes a low threshold.

5

140. We were also satisfied that the disclosure of information about the Stratov8 Invoices in the solicitor’s letter was in the public interest. The allegation of a criminal offence is by its very nature a matter of public interest.

10 141. We were of the view, therefore, that the letter from Mr Kelly’s solicitor (D.20) satisfied the definition of a disclosure qualifying for protection, in terms of ss.43B(1)(a) of the 1996 Act.

15 142. However, apart from perhaps the timing of the disciplinary procedure in relation to the solicitor’s letter, there was no other evidence to even suggest a causal connection between the disclosure and Mr Kelly’s dismissal. Mr Kelly had already been suspended on 5 October 2023, *before* the solicitor’s letter was issued on 9 October. The catalyst for the investigation and the disciplinary action was the complaints from the employees about Mr Kelly’s conduct. Further, and in any event, when he took the decision to dismiss Mr
20 Kelly, Mr Davidson was unaware of the solicitor’s letter and he was not involved when Mr Gibb took legal advice to respond.

25 143. Nor was it put to Mr Davidson in cross examination that the true reason for the dismissal was the solicitor’s letter, the protected disclosure. Further, there was no support, on the evidence, for the claimant’s submission that, *“the dismissal was driven wholly by Mr Gibb having been ‘found out’ in relation to wrongful practices identified by the claimant”*.

30 144. Had we been required to do so, therefore, we would not have found that Mr Kelly’s dismissal was automatically unfair because he made a protected disclosure.

Conclusion

145. In our unanimous view, the respondent followed a reasonable procedure; the reason for Mr Kelly's dismissal was his conduct and it was fair. The claim is dismissed.

5

Employment Judge: N M Hosie

Date of Judgment: 17 December 2024

10

Date Sent to Parties: 17 December 2024