



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103645/2022 & 4103646/2022**

**Held in Edinburgh on 27, 28 February and 1, 2, 3, 21, 22, 23 March 2023**

**Employment Judge M Sutherland**

**Fedor Karpushko**

**First Claimant  
Represented by  
Ms A Bennie of Counsel  
Instructed by  
Jackson Boyd LLP**

**Anastasia Bombrys**

**Second Claimant  
Represented by  
Ms A Bennie of Counsel  
Instructed by  
Jackson Boyd LLP**

**Skylark Lasers Limited  
(formerly known as UniKLasers Limited)**

**Represented by  
Mr M Ramsbottom  
Consultant**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

1. The judgment of the Tribunal is that:-

a. the First Claimant

i. was not unfairly dismissed by the Respondent

ii. was not wrongfully dismissed by the Respondent and is not entitled to notice pay

iii. is entitled to a payment in lieu of 7 days holiday

b. the Second Claimant

E.T. Z4 (WR)

- i. was not unfairly dismissed by the Respondent
- ii. was not wrongfully dismissed by the Respondent and is not entitled to notice pay

## **REASONS**

### **Introduction**

1. The First Claimant presented complaints of unfair dismissal and for notice and holiday pay. The Second Claimant presented complaints of unfair dismissal and for notice pay. The complaints for arrears of pay were not pursued. The complaints are resisted by the Respondent.
2. Both Claimants were represented by Ms Bennie, Advocate. The Respondent was represented by Mr Ramsbottom, Consultant.
3. The hearing was held entirely in person with the exception of the last 3 days which were held remotely via CVP by agreement of the parties.
4. The final hearing was listed to determine all issues including remedy. Following discussion at the hearing regarding the implications of any determination of remedy on possible civil proceedings regarding the Claimant's shareholdings in the Respondent, it was agreed that this hearing would determine liability only. In the event of a finding of unfair dismissal and/or failure to pay notice, holidays and arrears, a final hearing on remedy would be arranged.
5. At the hearing the Respondent led evidence from Valery Hurst of Smart HR Solutions, Ewan McClelland (Director), David Morton (Director), and Jen Suttie of Peoplestance Consultancy. Both Claimants then gave evidence on their own behalf.
6. The parties lodged an agreed set of documents.
7. The parties made written and oral closing submissions.
8. The following issues fall to be determined in these claims -  
*Unfair dismissal*
  - a. What was the reason (or, if more than one reason, the principal reason) for the Claimant's dismissal?

- b. Was the reason for dismissal potentially fair within the meaning of Section 98 (1) or (2) of the Employment Rights Act 1996?
- c. Was the dismissal fair having regard to Section 98(4) of the Employment Rights Act 1996? In the circumstances (including the size and administrative resources of the undertaking) and determined in accordance with equity and the substantial merits of the case, did the Respondent act reasonably in treating the reason as a sufficient reason for dismissing the Claimant? Did the decision to dismiss (and the procedure adopted) fall within the 'range of reasonable responses' open to a reasonable employer? *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17
- d. If the reason for dismissal relates to the conduct of the Claimant - Did the Respondent have a genuine belief in the Claimant's guilt? Did the Respondent have reasonable grounds for that belief? Had the Respondent conducted a reasonable investigation into that conduct? *British Home Stores Ltd v Burchell* [1978] IRLR 379, [1980] ICR 303
- e. Did the Respondent adopt a reasonable procedure? Was there any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures? Did any procedural irregularities affect the overall fairness of the process having regard to the reason for dismissal?

*Notice pay*

- f. Was the Claimant in breach of contract such that the Respondent was entitled to terminate without notice?

*Holiday pay*

- g. Was the Claimant entitled under contract for a payment in respect of accrued but untaken holidays as at the termination date?

9. The following initials are used as abbreviations in the findings of fact-

<b>Initials</b>	<b>Name</b>	<b>Job Title</b>
AF	Alan Faichney	CEO/ Director
AB (CI)	Anastasia Bombrys	Chief Operating Officer / Director
BS	Ben Szutor	Engineer / Phd student
DM	David Morton (Solicitor)	Non-executive Director
DU	Dorian Urban	Ex-employee
EM	Ewan McLellan	Non-executive Director
FK (CI)	Fedor Karpushko	Chief Technology Officer & Director
GM	Gregor McDowall	Engineer
JS	Jennie Suttie	HR Peoplestance (Third Party)
MM	Mark Mackenzie	Senior Engineer
NM	Nicole McCann	Purchasing Manager
ND	Nikita Daga	Head of Process Engineering
RB	Roger Brueggemann	Sales Manager
RS	Rebecca Stuart	Ex-employee
RU	Robin Oren	Laser engineer
SE	Scott Early	Production Manager
SL	Stewart Leitch	Senior Engineer
TW	Thomas Walls	Interim/ CEO
VH	Valery Hurst	Smart Solutions HR (Third Party)

**Findings in fact in relation to claims for unfair dismissal**

10. The Tribunal makes the following findings in fact in relation to the claims for unfair dismissal:

*Background*

11. The Respondent is a photonics company specializing in the development and production of unique single frequency lasers. It has around 15 employees.
12. FK is a laser physicist. He is the inventor of the technology on which the Respondent business is based and in respect of which IP protection (including patents) was granted. The Respondent was incorporated in March 2013. FK was appointed as a Director and he commenced employment as the CEO (Chief Executive Officer) shortly thereafter.
13. In March 2014 AB was appointed as a Director and commenced employment as a Director of HR & Organisation. AB's background is in languages, she had past experience working in HR and a Postgraduate Diploma in Organisational Change.
14. In March 2015 FK and AB both entered Service Contracts with the Respondent which include provisions that: the Director shall conduct the business of the Company with the diligence of a prudent business person and exercise all duties imposed upon them by order of the Board; and that the company may terminate without notice if the CEO/ Director "is guilty of any gross misconduct, in the reasonable opinion of the Board, incompatible with the CEO/ Director's status and authority in the Company including without limitation physically or verbally abusive behaviour".
15. In 2017 the company benefited from a number of investment rounds including from Par Equity. In return the Claimants agreed to a reciprocal 12-month notice period, FK's retirement age was increased from age 75 to age 76 (his DOB is 22 April 1947), and AB's job title was changed to COO (Chief Operating Officer).

16. In early 2020, there were significant changes to the management structure of the company. AF was appointed as a Director and CEO. He had past experience and reputation in transforming businesses from research and development into profitable commercial outfits. FK's position and title changed from CEO to CTO (Chief Technical Officer). EM was appointed as a non-executive Director (having been nominated by Par Equity investors).
17. The rationale for the restructure was that: FK would concentrate on R&D and product developments, document and codify his IP and know-how, and have a succession plan in place for CTO; that AF would take up the commercial and corporate duties, separate the R&D and commercial function, implement professional production engineering/ manufacturing, sales and marketing functions which would provide the business with market ready products and revenue. The expectation was this would allow for a successful investor exit to a larger business in about 3 years and that FK would retire around that time.
18. EM is a trained engineer and has held various executive and non-executive roles. As a non-executive Director EM had limited involvement in the management of the business. Following his appointment he attended the business around 2 days a month which included his attendance at board meetings.

#### *Early 2021*

19. In January 2021 GM emailed to AF expressing detailed concerns regarding FK's designs. AF replied by stating "Do not fight with FK. Do not be disrespectful, however hard it may be. The authors of these records to be valued and reliable. He will attempt to discredit you as a malcontent if he can. Give him no cause to do so. I need time."
20. On 10 February 2021 GM emailed AF regarding what he described as "the harmful conduct of the CTO [FK]"; that engineers have repeatedly identified a problem with the 349 design, that it is normal to regularly update designs in response to feedback, that they had attempted to have scientific discussion with him, but that FK has repeatedly insisted that he will never change his design. He stated: "FK designs the laser equivalent of a bicycle with square

wheels, and then when everyone falls off he blames their lack of balance, instead of listening to suggestions that the wheel shape could be a factor.” AF replied stating “it may not look like it, but things are moving ‘under the waterline’. Thank you for keeping me independently informed (I already knew all of this from Scott). Keep the heid”.

21. On 18 February 2021 EM emailed AF regarding third party laser design KL266 stating “it does feel like we do need to confront this, especially if he is unable to produce something that looks like a coherent development plan that is convincing enough for us to believe that we are not being taken along for another 11 years of tinkering. There are clearly other products that we can build a respectable business around that would benefit from his focus. Broach the subject with AB first...?” AF replied to EM stating “FK pinched the design EI employed him to develop... I'm now worried at FK's constant blocking of changes to designs (significant suggestions by SE, SL, MM and now GM are all ignored) is not because he is pig headed but because he is sailing very close to this iMAT patent. I'll ask AB about that KL266...”.
22. On 23 March 2021 AF emailed GM in respect of the 349 project stating “As I am sure SE has shared with you, it is politically necessary for me to convince AB of this, which is why we are following this path. If the CTO claims that his engineers are not following his instructions (which he has to AB and I, though I know that to be false), then the board cannot act without proof”.

*May to September 2021 - AF (CEO)'s Resignations*

23. Laser 349-1 00 had been identified as the company's priority laser by the Board. In May 2021 Project 1041 was initiated by AF to assess whether the modifications proposed by the engineers to FK's original design of the 349 laser would produce a higher quality product. MM and SL worked on Project 1035 (the original design) under FK's supervision. GM and BS worked on Project 1041 (the modified design) under SE's supervision. The projects were to be progressed in parallel and were discussed at weekly technical meetings attended by AF, FK and the engineers. FK believed the changes to his original

design would not work. He expressed significant concerns about the 1041 project from its inception.

24. On 7 May 2021 AF emailed EM and AB intimating his resignation with immediate effect and citing the behaviour of FK as the reason for his resignation. He stated that at the weekly 349 progress meeting FK has “behaved appallingly” citing “His aggressive intransigence, disruptive arguing, blaming, backsliding on previous agreements and his shouted insistence that he must be respected as the technical leader of the company...In any other organisation, I would have fired someone for such repeated behaviour” but that option was not open to him and accordingly he had no alternative but to resign. He further stated: “I have absolutely no faith in him as CTO. I have no faith that he can be moved from the role of CTO to CSO as we discussed. I have no faith that he will ever agree to give up any technical decision making. I have lost faith that his designs work...I am less confident about the length of time it will take to launch the 349...”
25. AF was persuaded by the board to remain in post and to agree a way forward with FK. He considered that FK did not have the planning, estimation, team building or communication skills to perform the CTO function; that his strengths lay in fundamental design and primary research; that FKO should take up the role of CSO (Chief Scientific Officer) whilst fulfilling his promise to document and transfer his considerable experience, IP and know-how (‘the knowledge transfer’); that he, AF was willing to become interim CTO until a suitable person could be identified and meantime he would take control of the 349 and other projects.
26. Following discussion with FK in mid-May it was agreed in that FK would move from CTO to CSO, that AF would be responsible for product development which would include the 349 project, and FK would be responsible for research and development which would include the knowledge transfer to allow a move towards the appointment of a CTO and FK’s retirement. The changes were implemented at the end of May.



27. On 27 May MM sent a complaint to AF that FK had made a significant and false allegation against him, that he sought a retraction of the allegation, that he repeatedly lies to his face, and he sought his commitment not to lie outright in future and for management to take collective responsibility for "allowing such lying, incompetence and bullying to continue for years on end".
28. On 14 June GM emailed AF referencing a critical design flaw raised by BS and SE in March 2020, and by him in February 2021 regarding the 349 laser stating "all of us wish to be able to speak more plainly about this in our meetings, and be truly honest about both the problems and solutions in order to aid you and move things along quicker. However this is impossible with FK present. We are constantly treading water for the sake of wasting time on useless unwinnable arguments. Constantly having to redo tests, re-take data and reexplain the same things because he doesn't understand or pay attention. ... If he continues to be present at these 349 meetings, we will continue to be stifled, and there will continue to be little headway. We want this laser to ship and this company to be a success. FK wants to be right. These goals are irreconcilable." On 14 June 2021 AF replied stating "I entirely agree, and that is why, just under 3 weeks ago, I finally got board approval to remove FK from the technical decision making process and replace his guidance with my judgement. That process has taken since February, firstly to get shareholder backing, then AB's support and finally FK's acquiescence - change takes time. As I have been getting up to speed with the technicalities in these last two weeks, it has been necessary for him to be in these meetings."
29. From mid-June onwards FK raised issues with data manipulation on the 1041 project at the weekly technical meetings. FK recognised that AF was in charge of the project and it was up to him to decide whether or not there was an issue.
30. On 14 July AB emailed AF to provide "feedback with a great desire to improve our working relationships and moral", she noted a lack of open communication regarding the investment round and questioned "why such conspiracy?". AF responded that he would welcome her involvement in the investment round, noting that FK was disrespectful, noting that "I also raised my voice when FK repeatedly ignored my requests to focus on the customer rather than scoring

meaningless technical points against SE and MM. As we discussed at great length in May, I cannot work with FK when he applies his belligerent interrogative style to our engineers - he's invited to these meetings to advise me, not question the engineers' competence. If he cannot do so, then one of us must go. Regarding our working relationship, I have taken great pains for a very long time to involve you in every meeting and every decision, and greatly appreciate your wisdom and influence".

31. On 10 August AF emailed EM stating "I am rapidly coming to the conclusion that FK needs to retire in the immediate future, perhaps as a condition subsequent of the funding round...He is still both confounding efforts to introduce engineering control discipline ... and engendering mutinous animosity in the engineers, despite me being technically in charge - he (and Anastasia) insist that he attends any and all technical meetings, yet the engineers think he provides nothing but obfuscation, nonsense and frustration. We lost a quarter of our staff last month. ..."
32. On 13 August GM submitted his annual appraisal to SE in which he references: "Being forced to pander to the ego of the CSO instead of making logical, evidence based decision"; that they should "Remove the CSO from any interaction with R & D or Production with immediate effect" with a view to "transitioning the company from research into a manufacturing facility".
33. On 31 August AF advised GM and SE that of the two projects, 1041 represents the system that will satisfy their current orders and noting that at the meeting on 2 September "FK is *still* going to be insisting that the design 'will not work' and EM has asked for proof that it is already working".
34. On 2 September, after a presentation of the 1035 and 1041 projects, AF noted to the engineers and FK and AB "it looks like we have two successful candidates for shipping." By separate email to BS, GM and SE only he noted: "I do understand that JN 1049 is way ahead in terms of performance, but I do hope that JN 1035 can be shipped too, as we need to ship two systems very soon indeed. It would have been 'unproductive' of me to say that either in the meeting or in my congratulatory e-mail".

35. On 3 September AF emailed EM stating “if we cannot get some commitment that he will step back / retire, then I cannot in good conscience tell investors that I can make this work...”

36. On 7 September AF resigned with immediate effect noting:

*“For the last 18 months you [EM] and I have struggled to bring FK under some kind of control, initially through the traditional methods of consensus, agreed strategies and objectives. On the anniversary of my joining in February I wrote to you [EM], ‘... on the key strategic issues of Design for Manufacture; IP Capture and knowledge transfer; New Product Development process and Succession Planning I have made little progress. I have failed entirely to move FK - he still provides no project plans, won't give up any control of the designs, nor of the sub contractual relationships, yet doesn't update designs with feedback from Production or the R&D staff. Three months later I resigned... you (and the shareholders) convinced me to stay on, on the condition that he gave technical control to me... Within 6 weeks, he was gain insisting that he was the technical leader, and I was writing to say to you ‘FK needs to retire in the immediate future...He is still both confounding efforts to introduce engineering control discipline...and engendering mutinous animosity in the engineers...We lost a quarter of our staff last month...’On Friday I reaffirmed that I cannot in good conscience stand in front of investors and say I can make things work with FK. You replied that you were ‘on the same page’, however after your chat with AB yesterday, you asked me to draw up a ‘transition plan’, and AB, who called me in the evening, indicated her time scale for change was ‘1 1/2 to 2 years’. I am afraid that does not work for me. I have no confidence that he will keep to any agreement, and my patience and health has run out. I cannot take the company forward, as I am seriously ill with the stress working at Unik induces daily. Please accept my resignation.”*

37. EM was disappointed but not surprised by the terms of this letter. AF had previously expressed these frustrations to him.

38. At a Board Meeting on 9 September 2022 AB, FK and EM considered the insolvency options should the current investment round be unsuccessful (there were cashflow issues and a concern that they could not meet the October payroll - the financial situation was grave and they desperately needed investment); EM advised that in the investment round PAR Equity would require confidence in 3 main areas given the uncertainty created by AF's resignation: “349-100 launched as reliable, fit for purpose; due diligence on technical risk, with a clear plan from the business on how this will be managed going forward to reduce reliance on FK; due diligence on structure and team

working in the business, given continued underperformance against objectives and continuing high staff turnover”; the agreed next steps were progressing the investment round with PAR, AB & FK to narrate structure of business going forward “with a particular emphasis on Product Development and IP transfer from FK”; in response to EM’s concern regarding disruption to 349 and key staff leaving in light of AF’s resignation, they agreed “a specific plan needed to be in place to ensure key staff were retained.” On 10 September EM expressly advised AB and FK that key staff included SE, GM and SL in particular.

39. On 15 and 16 September 2021 AB’s accessed AF’s email account and discovered emails which she considered to be of grave concern being defamatory of FK and evidence of a conspiracy to remove him. She discussed this with FK and shared some of those emails with him.
40. On 17 September Par Equity emailed AB cc’ing FK and EM regarding heads of terms as a condition of investment which included a management structure and team review by an independent consultant, and technical and IP transfer due diligence also by an independent consultant. AB replied noting “We are aware we have problems within the team and staff overall. We need help. In fact, this is one of the reasons we invited AF to join us as we have acknowledged that FK is deeply technical expert and is not a ‘people’ person”.
41. On 17 September there was an incident in the clean room involving KF, GM, and BS in which FK by his own admission “could not control myself and he “exploded” at GM and BS.
42. -Q<sub>n</sub> -17 Sept mWf GM sWmitted ITforr ial complaint to SE (on his own behalf and also on behalf of BS) stating: that morning FK was very aggressive and abusive towards them in the clean room, yelling at them and shouting in their face that they were lying, cheating and stealing in regards to the JN1041 project, that they were making up data, specifically that they had not performed any testing with the outer lids on the laser when the evidence for that testing had already been provided to him; “Since AF left last week, FK has made no attempts to hide his bullying of me and BS which escalates each day...Every single interaction with him is pressured, aggressive, rude, loud, overbearing,

undermining and insulting... Both of us have made every possible effort to answer FK's questions and concerns over the course of the JN 1049 project, and we have put up with his constant abuse and attempts to cancel it over the course of the last four months. We accepted at the start of the project that we would not have FK's support, but following AF's departure he is aggressively and actively sabotaging our chances of success at every opportunity. In the last week alone FK has commanded us to change critical parts and repeat multiple tests that were already completed, causing massive delays. It is clear that he sees the undeniable success of JN 1041 as evidence of his own shortcomings and is desperately trying to cancel the project to save face. However finding no scientific basis for stopping our work he is instead personally attacking us on a daily basis in the hopes we will give up, be scared away, or quit...we are a hairs breadth away from releasing [JN1041] to the market, satisfying customers and investors. Yet he [FK] is hell bent on making my life a misery as some sort of sick method of stopping it. This email is written by me, and with BS's full agreement".

43. On 20 September at 10am GM's complaint was passed by SE to AB and cc'd EM. He noted that "These are obviously very serious allegations from both parties involved on either side of the argument".
44. On 20 September BS was suspended by AB in respect of allegations of gross misconduct (risking termination) that "within your academic dissertation you disclosed confidential information on the Company's intellectual property, including the Company's product designs, technical know-hows, technical procedures on product's assembling and manufacturing to a third party, [his academic tutor]".
45. On 21 September EM wrote to AB regarding GM's complaint asking her to be in touch with Peninsula, noting that as a family member she will not be seen as independent if it escalates, urging her to keep a perspective on BS because there is a big difference between someone purposely stealing company secrets for person gain versus as young graduate making a stupid mistake, emphasizing the importance of the 349 project and expressing significant concern that FK is making changes to the 1041 project against the wishes of

the engineers. AB replied providing EM with a copy of FK's complaint dated 17 September.

46. FK's complaint dated 17 September stated "since AF's resignation I have reassumed responsibility for technical progress on all projects, including [1041], I knew and still know that there was / is a lot of manipulation with the data on 1041 build when presented at the technical meetings on product development. In this very untrusted environment I have still to monitor and understand the technical progress in deep, but without 'dressing it up'. On early morning today I went into the lab together with ND, and asked BS and GM to show the latest run results on the 1041 build. The results were still not satisfactory to claim any readiness of this built for potential shipment, and in fact they were not conducted under conditions as it is necessary for qualification of the system. The LH cover was not assembled and I noticed some LH cover parts unwrapped lying on the shelf next to the optical table... as it was reported at technical meetings that the system was run completely assembled, I questioned both GM and BS for confirmation on the date when such runs were conducted. Despite I repeated my questions a few times they did not give any date but were insisting such runs were conducted. I felt very cheated and morally completely distressed in such long continuing misrepresentation of the information crucial for company progress. As a result, I could not control myself and 'exploded' ... I brought my apologies to DB for not being able to 'control' myself...I'm not sure if it would be appropriate to raise a grievance from the company director toward company staff, but we should do something not to allow this untrusted situation in the company to continue."

47. On 22 September AB summarily dismissed GM (with a payment in lieu of notice) on the ground that he had falsely presented project progress information and separately had made unacceptable, defamatory and derogatory statements about FK. GM had 11 month's service. She did not follow their internal disciplinary procedures prior to dismissing him. She did not consult with EM, Director prior to dismissing GM because she did not trust EM.
48. On 23 September GM submitted a formal grievance against dismissal that: the emails AB considered to be defamatory were sent at the request of AF that he

act as a whistleblower by reporting to him the evidence relation to FK's misdemeanours; his dismissal and BS' suspension by AB amounted to retaliatory behaviour because of their complaint against her father; the allegations of falsifying data are without foundation and that after his dismissal AB and FK have been frantically searching for retroactive evidence.

49. On 23 September AB emailed EM the folder of evidence she had prepared and relied upon in support of her decision to dismiss GM the ground that he had falsely presented project progress information and made unacceptable, defamatory and derogatory statements about FK.
50. In late September EM was in discussions with Par Equity about what steps to take in light of the resignation of the CEO on 7 September, the formal complaint of GM and then his dismissal on 22 September. EM was the Par Equity nominated director. EM was highly concerned matters were spiralling out of control and that the absence of a functioning team would severely impact upon their ability to secure investment. EM had lost trust and confidence in FK and AB because he considered that they were no longer acting rationally.
51. EM briefly discussed with Par Equity the option of agreeing FK's exit with notice but they considered that this represented a significant technological risk because FK was the founder of the business with significant knowledge much of which had not been transferred. He did not discuss AB's exit because she was considered strategically less critical and because AF had previously found her to be supportive. Par decided that they wanted matters considered thoroughly by way of a formal investigation.
52. At the end of September 2021 FK owned around 25% and AB 10% of the business and accordingly the investor companies (including Par Equity, Lancaster Capital and Scottish Enterprise) had a majority shareholding. However the investors did not have control of the Board which compromised EM, AB and FK as Directors. It was considered necessary to appoint a third director and remove them as directors to achieve that control with a view to effecting their suspension and the disciplinary investigations.

53. At a Board meeting held on 1 October DM was appointed as a Director by Lancaster Capital exercising their right to appoint an Investor Director. DM is a finance lawyer who advises lenders and borrowers on business funding. He has no expertise in employment law. He held a very small investment (around 0.3%) in the Respondent via Lancaster Capital. He had no prior involvement with EM or the Respondent other than some limited pro bono legal work.
54. At the Board meeting both Claimants were then removed as Directors and were suspended on full pay pending disciplinary investigations.
55. The allegations against FK were:
- “1. Allegations of bullying and inappropriate behaviour towards your colleagues;*
  - 2. pressurising employees to manipulate project reporting; and*
  - 3. breaching your director duties”*
56. The allegations as against AB were:
- “1. acting against company interests and specific direction from [EM] on 21 September 2021 by terminating GM's employment on 22 September 2021; and*
  - 2. pressurising employees to manipulate project reporting;*
  - 3. breaching your director duties”*
57. The Respondent advised both Claimants in writing that: “you must not communicate with any of our employees, workers, contractors or customers unless authorised by [EM]”; and the Respondent would use the following phrase in response to any enquiries from staff and third parties (including customers, contractors and the press): “X will be out of the business for a period of time. Please refer any enquiries you may receive to EM ...”
58. At the board meeting TW was appointed interim CEO to manage the business. He was inducted by EM and reported to him as Chair.
59. The Claimants were then escorted from the office premises by representatives of Par Equity investors.



60. In early October EM reviewed the evidence folder provided by AB in support of her decision to dismiss GM. EM concluded that there was no misconduct. On 4 October EM wrote to GM inviting him to treat his dismissal as rescinded and advised him that FK and AB had been suspended and removed from the board and an independent investigation had been initiated to investigate their conduct both as employees and directors.
61. The allegations against BS were investigated and on 8 October he was advised that there was no case to answer and his disciplinary suspension was terminated. EM wrote to BS's university tutor to advise him accordingly and to apologise. He advised him that FK and AB had been suspended pending an independent investigation, that TE has been appointed as CEO, and that ND will be his industrial supervisor (replacing FK).

*October 2021 - disciplinary investigations - VH*

62. On 4 October VH, MD of Smart HR solutions Limited was appointed by Par Equity on behalf of the investors to conduct an independent investigation into the allegations. She was given access to all staff, Directors, policies, emails, project reports, board reports, exit interviews and past grievances. She conducted interviews with FK, AB, SE, MM, ND, and BS. (Notes of these meetings were not provided prior to the disciplinary hearing.) AF was not interviewed because he had left the company and had advised of health issues.
63. On 5 October VH conducted an interview with ND. The notes of the interview were not provided until the appeal process. ND advised she was asked to provide a neutral overview of the two competing projects 1041 and 1035; she obtained the customer technical requirements for the sale of the 349 laser product; she generated her own table of specifications to see which project was closer to meeting the specifications; she was told off by FK and AB for using that table; she asserted that FK was furious that the data for 1041 appeared complete and he asked her to delete the data until it had been checked/ re-analysed; she was told that what needs to be compared will be defined by FK and his email with the comparison table followed. When asked if she had ever been asked to falsify project reporting she advised "no however

FK did send me a spreadsheet that he suggested would allow a proper comparison of 1035 and 1041" but this did not match the sales quotes. When asked if she felt bullied whilst working here she advised AB told her to support 1035, that she was concerned that if she didn't comply with AB there would be consequences and she felt intimidated by her. ND advised that she saw GM and BS being bullied; there was so much conflict being created between 1035 and 1041; on 17 September FK asked GM about the lid on 1041; he started screaming and shouting that the lid didn't fit; GM told him it did; FK was being aggressive and was red in the face; he was fuming; he called BS and GM cheats and liars.

64. The interview was followed up by an email on 1 November 2021 in which ND stated that on 6 September she was tasked with comparing the two competing products with the aim of shipment to customers, she obtained the customer technical specifications from RB and generated her own table with a view to seeing which project was closer to meeting specifications which was then shared at a review meeting, "This didn't go down well at all with FK...I was categorically told specification will be defined or amended based on what JN1035 met rather than what was sold", that what needs to be compared "will be defined by FK" and she was then asked to include "all available performance parameters."
65. VH conducted an interview with RB on 5 October 2021. The notes of the interview were unsigned and were not provided until the appeal process. He advised that FK had contacted him to advise that in his opinion he would not be needWthe Respondent Business aWh#shbuld resign?
66. On 8 October the Claimants asked for return of their person books. This was understood as a request for return of their personal belongs and some of these were boxed up for collection.
67. On 29 October, VH held an investigation meeting with AB. The notes of the interview were provided as part of the investigation report. During the investigation meeting AB advised that: they mostly use Peninsula for employment matters who provide insurance cover; that they also have

Directors' liability insurance; she was passed GM's complaint on 20 September but she did not deal with it because she was dealing with other pressing matters; between 16 and 17 September she found defamatory and discriminatory emails from GM to AF about FK as a person and his abilities and professionalism; she received FK's complaint on 17 September; FK is a world renowned laser physicist with many patents and publications, whereas GM has limited knowledge and experience; GM falsely reported on 3 occasions that JN1041 was in a fully enclosed shippable but it was only tested in that state once on 17 August for 17 hours; there is photographic evidence (taken by FK) that it remained uncovered and unshippable; she made the decision to summarily dismiss GM on the basis of deliberate misreporting on a key business project and on the basis of prolonged, unfair, derogatory, defamatory and discriminatory behaviour towards FK which had broken down the working relationship beyond repair; she had taken legal advice from an employment lawyer; she did not follow the disciplinary procedure because it was more harmful to have GM in the business and a waste of limited time and resources to follow that procedure; there was only a small risk attached.

68. On 29 October VH held an investigation meeting with FK. The notes of the interview were provided as part of the investigation report. During the investigation meeting FK advised that: he was unhappy with his change of duties from CTO to CSO because no one understands the technology better than him; BS and GM report to him; they failed to follow his technical advice and guidance and disrespected him; when AF resigned on 7 September he resumed Wsfoleef GTO; Tie then asked for detailed information so he could conduct technical diligence on projects which was ignored; he held a meeting with BS and GM on 17 September in order to obtain this information; they were ignoring him and his technical professionalism and were obstructing him from conducting his duties so he raised his voice; he called them liars and cheats because they were hiding original experimental data from him and misrepresenting important technical information; he apologised to ND who witnessed it; he complained about their conduct by letter of 17 September.

*November 2021 - Investigation reports - VH*

69. On 10 November VH provided an investigation report in respect of the allegations against FK. As part of her investigation she had considered complaints made by staff over the past 12 months about FK's behaviour (including RS, MM, GM and BS), exit interviews by staff and together with various other documents. She held investigation interviews with FK, MM, SE, ND, and NM. She found that "there is significant evidence that FK's behaviour to past and current employees is that of bullying." She relied upon the exit interview with RD from August 2020 who advised the reason for his resignation was the ego of FK and his "erratic, unreasonable and often biased behaviour;" the informal grievance by MM against FK; and the formal grievance raised by GM and BS. She found that: "there has been a reluctance to raise issues about FK's behaviour, as the route for this would be to AB and no-one felt she would handle any complaint objectively due to her relationship with him;" "FK has created an intimidating and hostile environment for the staff by his behaviour towards them. He has repeatedly been verbally abusive to staff. Attrition rates are high with at least 9 employees leaving in the last 12 months. The majority have left the business either due to FK's behaviour towards them, or a lack of confidence that FK can create designs and produce a professional prototype that ...will create a quality laser which can be sold and not returned." She found that "There is some evidence of pressuring employees in manipulating project reporting however there is more evidence of FK falsifying project reporting in the case of laser 266 and laser 349-100 JN1035. Additionally, asking him to adjust company data with regards to stock." She noted that "FK raised this point that there was a conspiracy against him, however, provided no evidence to support this allegation apart from stating that he needed to get access to his database."
70. VH recommended that FK be invited to attend a formal disciplinary meeting to address the following allegations of gross misconduct:
- "1. Acting in a manner which constitutes bullying and inappropriate behaviour towards MM, GM, BS and the anonymous witness;*

2. *Pressurising employees to manipulate data specifically (i) preventing Nikita Daga from taking an independent view on the performance of JN1035 and JN1040; (ii) asking NM to adjust stock details on Sage and (Hi) asking the anonymous witness to falsify project data; and*

3. *Presenting incorrect data to the Board (i) in relation to the reporting of laser 266 and (ii) in relation to 349-1 00JN 1035 on 2.09.2021”*

71. She also noted: “In addition, the Company may wish to consider whether there may be grounds to consider termination of employment either due to capability issues or for some other substantial reason being the breakdown of working relationships and the impact of FK’s actions on the Company’s ability to launch a product to the market. It should be noted that there may be some mitigating health related factors to consider.”
72. On 10 November VH provided an investigation report in respect of the allegations against AB. As part of her investigation she had considered complaints made by GM, BS and FK together with various other documents. She held investigation interviews with AB, MM, SE, ND and MM. She made the following findings in her investigation report: EM advised AB that since GM’s grievance was about her father she would not be considered impartial and must keep him informed; AB in her email to SE regarding the grievance states that she would be seeking HR advice and any process would likely need to involve a third party; “there was a clear conflict of interest in her handling any complaint or disciplinary action connected to her father”; AB did not seek advice from Peninsula prior to dismissing GM which rendered their insurance cover invalid; the Director’s liability insurance cover does not cover employment; AB (who was responsible for arranging the insurance) was aware that of this prior to dismissing GM; AB did seek advice from Peninsula on disciplinary action against another employee during the same week as dismissing GM and suspended that employee so she was well aware of the due process; “AB dismissed GM knowingly, without following the disciplinary policy and without taking advice from Peninsula or formally engaging another employment lawyer”; she had not formally engaged an employment lawyer prior to dismissing GM; the directors’ insurance does not cover employment practices; “there is some evidence of pressuring employees to manipulate project reporting”; despite being tasked with providing a neutral overview of

the two projects ND was asked by AB to support JN1035 over JN1041 and felt intimidated; "AB dismissed GM and suspended another employee [JS], both who were the only engineers on a project JN 1041, that was expected to deliver product in October 2021;" AB raised the point that there was a conspiracy against AB, however, provided no evidence to support this allegation apart from subsequently adding an extract of an email to the notes of their meeting.

73. VH recommended that AB be invited to attend a formal disciplinary meeting to address the following allegations of gross misconduct:

*"1. Acting in breach of your director's duties (i) to avoid conflicts of interest; (ii) to promote the success of the company and (Hi)to exercise reasonable care, skill and diligence by dismissing GM on 22.09.2021; and*

*2. Pressurising employees to manipulate project reporting by (i) directing MM to produce a report without full data on 30.09.2021 and (ii) asking ND to support JN1035 over JN1 040 during the meeting to review progress on the two projects on 30.09.2021".*

*Mid-October - Covert-recordings*

74. In mid-October covert recordings were made of a telephone conversation between EM and TW and of a meeting between TW and senior staff members. The Claimants submitted copies of those records to the disciplinary process in around December 2021.

75. A covert recording was made of a telephone conversation between EM and TW where they discuss the messaging to existing investors and in which he states "we've had to make a decision about FK and AB".

76. A covert recording was also made of a meeting between TW, ND, SE and NM. In the recordings TW, CEO is heard to state: "we still have to clean up the mess from FK and AB legally. ...it could turn out. ...we take bad leaver provision to say 'you're gone, you're toast, you're out of here' or we can come to some sort of agreement with them...So, one way or the other - they're gone"; "they [the founders] suppressed the team from implementing what they want to implement down to the point that they set two projects running off in parallel, and because the other guys did a better job than the founder, he fired them"; "I said there was an egotistical autocrat...basically suppressed people, and

basically was a dictator. It was my way or the highway. They're now gone";  
"...that FK and AB were autocratic dictators and whatever they were egotistical  
sons of bitches...that's a founder and owner problem."

#### *Investment rounds*

77. As part of the investment round the Respondent appointed an independent consultant undertake a review of the projects in October and November with a view to determining how close they were to being ready for shipment.
78. There were investment rounds in late 2021 / early 2022 which had the effect of significantly diluting existing shareholdings including the Claimants' (FK's shareholding reduced from 27% to 10%).

#### *January 2022 - Claimants' Grievances*

79. On 18 January 2022 FK raised a formal grievance against EM for failure to address his grievance of 17 September which was sent to EM on 20 September 2021. He stated his original grievance was "1. manipulation of the experimental data on project 1041 by GM and BS and misreporting of the UV1 041 project results and 2. insubordination and preventing my access to the original experimental data that led to ongoing misrepresentation of the information crucial for the company's progress, which had a significant negative effect on my mental health and well-being."
80. On 21 January AB raised a formal grievance regarding breach of suspension, damage to her reputation, and breach of her statutory rights.
81. On 24 January FK raised a formal grievance with DM in respect of the following: exchanges between AF, GM, SE and EM are derogatory and defamatory of him both personally and professionally; that AF and EM were aware of these activities and did not discourage them; that they have planned to remove him from the company; that he has been pressured into retirement; that management/ Directors have breached the terms of suspension; that TW, CEO has made comments which are derogatory and defamatory of him both personally and professionally to staff members and external parties and has

also advised them that he has been dismissed; the disciplinary process is determined and prejudiced against him.

*February 2022 - Disciplinary allegations*

82. Peninsula provided advice to the Respondent on the disciplinary process. Of the two available Directors, DM rather than EM was appointed to oversee the disciplinary and grievance process because DM had recently been appointed and was therefore considered to be more independent. (TW was not made permanent CEO and appointed a Director until 22 February.)

83. On 24 January FK was invited by EM to disciplinary hearing to be chaired by IDM on 1 February 2022 and to a grievance hearing also to be chaired by DM on 1 February 2022. He was provided with a copy of the disciplinary investigation prepared by VH. He was advised of the right to be accompanied and of the risk of dismissal. The allegations were -

*Allegation 1: "rude and objectionable behaviour of a bullying/ harassing nature towards your fellow colleagues, namely MM, DU, RU, RS, BS and GM. Such behaviour occurred on various dates and included but is not limited to your reluctance to confirm verbal instructions, communicating in an aggressive manner, humiliating the individuals and undermining their ability to carry out their role."*

*Allegation 2: "you pressurised ND into manipulating the findings in relation to project JN1035 to mislead the board into the project's success"*

*Allegation 3: "your failure to follow the correct stock management and purchasing policy, by failing to log purchases on the system has resulted in stock amounting to £14k being found in your office rather than the stock .....TXipb&srfran&or the system" .....*

84. On 24 January AB was invited by EM to disciplinary hearing to be chaired by IDM on 1 February 2022 and to a grievance hearing also to be chaired by DM on 1 February 2022. She was provided with a copy of the disciplinary investigation prepared by VH. She was advised of the right to be accompanied and of the risk of dismissal. The allegations were -

*Allegation 1. "by terminating GM's employment on 22 September 2021 without following the correct procedure. .. while aware that this action was not covered by the company's insurance cover"*



*Allegation 2. "failed to deal appropriately with grievances raised against FK, your father, by GM and BS raised on 17 September 2021"*

*Allegation 3. "Knowing failed to notify the company's employment law advisers, Peninsula which is a requirement of our insurance with Irwell"*

*Allegation 4. "pressured ND into manipulating findings of Project JN1035 by asking her to dismiss part of her findings namely that part of the project was failing"*

85. Towards end January the hearings were postponed on account of sick notes provided by the Claimants.
86. On 16 February FK was advised by EM that the allegations were expanded to include the following -

*Allegation 4 "-On...2/3 October you contacted RB and encouraged him to resign...-In February you contact BS Academic Tutor at Heriot Watt University - On the 9<sup>th</sup> February you contacted AH at Innovate UK. Uniklasers has a contractual relationship with all these individuals/ entities and the terms of your suspension specifically forbade you from contacting them"*

*February 22 - Grievance hearings - DM*

87. On 22 February DM held a grievance meeting with AB from 9.30 to 10.05 am. She was accompanied by FK. At the meeting AB read out and lodged a written statement that: senior management wished to force FK to retire and she is being discriminated against by association; that the decision to remove them as directors was inquorate; the suspension was pre-planned and the allegations were unspecified; they were escorted out of the office by 5 men in full sight of the staff; some personal belongings were returned to FK; there have been breaches of the suspension wording; TW, who has never met or spoken to them, has made derogatory comments about their personal and professional character and advised people that they are "toast", etc; the Directors have constructed this disciplinary process to take control of the company, avoid paying out their 12 month notice periods, and dilute their shareholding. AB explained that EM inducted TW and thereby allowed TW to defame them and state that they are gone. DM explained that he has had no conversations with TW about the disciplinary process. AB asserted that the disciplinary process was predetermined; that they were removed as directors

and publicly escorted out of the office. AB sought an apology and a fair process.

88. On 24 February DM held a grievance meeting with FK from 1.30 to 2.10pm. He was accompanied by AB. A written statement for his grievance hearing was read out and lodged on behalf of FK which repeated the terms of his disciplinary statement and added that: he has raised a grievance against EM, FB, GM, SE and TW of forcing him to retire, breaching of the terms of his suspension, reputational damage, failure to progress his grievance of 17 September; AF's references to GM to "keep the heid" "things are moving under the waterline" indicating that more time is need to remove him from the company; EM was aware and was complicit; on many occasions EM and AF have tried to pressure him into early retirement but that was not in the best interest of the business because more time is needed for him to develop the technology; his grievance about false reporting by GM/ BS has not been progressed by EM; the exchanges relating to him, which amount to persistent harassment and age discrimination, have not been investigated; EM personally informed HWU that FK was no longer with the company; the report to Innovate stated FK has left the company; this false reporting was made in his name; staff were told on multiple occasions he had been dismissed, was toast, etc; TW has made derogatory and defamatory comments despite never having met or spoken to him; the decision is predetermined to take control of the company, dilute their shareholding, and avoid payment of 12 months notice; there is no access to employee support; no support from the other Directors has been provided; his years of commitment and multiple achievements at the company have been completely disregarded having determined that they have no more use for his scientific knowledge and skills.
89. At the hearing DM noted that AB had suspended BS and dismissed GM and accordingly action had been taken in respect of FK's complaint. FK explained that this did not relate to his grievance and in any event that action had been revoked. FK sought an apology from the relevant individuals and to be reinstated.

*February 22 -Disciplinary hearings - DM*

90. On 22 February DM held a disciplinary hearing with AB from 11 am to 12.09 pm. She was accompanied by FK. DM advised AB of the allegations. AB read out and lodged a written statement at her disciplinary hearing which repeated the terms of her grievance statement and added that: following AF's resignation, FK took on all technical responsibilities and she was responsible for all operations and HR; GM had engaged in false reporting and was acting in a discriminatory way towards her father (all evidence had been presented); she took advice from an employment lawyer; GM had only 11 months service; there was a low risk of a claim for automatically unfair dismissal or discrimination; her actions were covered by Directors' Liability Insurance; she was acting in the best interests of the company; she had a number of issues which she prioritized; she planned to deal with GM's grievance in due course; the Directors prioritised their suspension and have not dealt with the grievances; she did not pressurize ND into manipulating findings - there is no evidence, she was asked to review all available parameters for both projects.
91. At the hearing DM asked AB why she had summarily dismissed GM without following the correct procedures. AB reiterated her written statement. She advised that she was blackmailed by EM and AF into persuading FK into taking the role of CSO. DM asked AB if she understood that as FK's daughter she had a clear conflict of interest. She replied that she had clear evidence of gross misconduct. DM asked AB why she had not passed the matter to EM. AB advised that EM is party to those emails. DB explained to AB that there were two parallel projects which were very important to the business and asked her why she had removed both of the engineers from one of the projects. AB explained that there was gross misconduct and FK is much more technically capable. DM asked AB why she did not seek advice from Peninsula who provide insurance cover. AB explained that they are employment consultants who aren't highly rated, she sought advice from an employment lawyer, the director's liability insurance has employment cover, and she mitigated matters by paying GM his notice. DM noted that there was no evidence of the legal advice or insurance cover. DM asked her why she did not deal with GM's

- grievance against FK before summarily dismissing him. AB explained that she was planning to deal with his grievance after. DM advised that ND had said she had been asked by AB to support JN1035 over JN1041 and that she felt intimidated. AB explained that ND was to act as the link between R&D and production; to ensure products were ready for manufacture; she was asked to compare projects 1035 and 1041 with a view to producing a laser for shipping; she asked her to objectively compare all possible parameters from both lasers; and that she had not been provided with a copy of ND's witness statement.
92. On 22 February 2022 DM held a disciplinary hearing with FK from 3pm to 3.40 pm. He was accompanied by AB. DM advised FK of the allegations. FK advised that he required sight of written evidence to respond to the allegations. At the meeting a written statement was read out and lodged on his behalf that: on 15 September 2021 AB discovered email exchanges between AF, EM and two employees which were discriminatory, disrespectful and defamatory of him, considered how to force him to retire and accused him of having stolen IP; there was no investigation of this conduct and they were instead removed as Directors; the decision to remove them as directors was iniquitous; the suspension was pre-planned and the allegations were unspecified; they were escorted out of the office by 5 men in full sight of the staff; some personal belongings were returned to him; there have been breaches of the suspension wording; TW, who has never met or spoken to them, has made derogatory comments about their personal and professional character and advised people that they are "toast", etc; the Directors have constructed this disciplinary process to take control of the company, avoid paying out their 12 month notice periods, and dilute their shareholding; the plans to retire him are age discriminatory; this treatment has severely affected his physical and mental health; VH and DM are not impartial. In respect of the allegations of bullying and harassment he asserted that: those relating to DU, RU and RS all reference events prior to August 2020; RS grievance was fully investigated and there was no case to answer; he has not been provided with supporting evidence; GM was actively engaged in a plot to harass him and collaborating with AF to remove him; they have not been provided with any support; the allegations are insufficiently precise. In respect of the allegations of pressure

- on ND to manipulate he asserted that: there was no evidence to support this in correspondence. In respect of the stock related allegations he asserted that these are his personal belongings.
93. At the hearing DM asked FK whether or not he accepted that his behaviour and communication towards colleagues has been poor and/or inappropriate. FK explained that it was too general and he was unwilling to answer without specifics. DM gave the example of him having apologised to ND for having witnessed his behaviour but not to DB and GM for that behaviour. DM noted that RS, MM, GM and BS have raised complaints about his behaviour, that 9 employees have left in the last 12 months the majority due to FK's behaviour. FK admitted that he raised his voice on 17 September 2021 because they were hiding an experimental result from him as CTO (that they were liars and cheats) but it was not bullying. DM asked for the evidence that they had falsified data and FK replied that he was unable to discuss technical matters unless an external technical professional was involved.
94. On 1 March DM emailed FK asking him to explain the breaches of the suspension letter including contact on 9 February 2022 with third parties in relation to the Innvoate IK project. On 2 March FK replied advising that there was no breach because: he did not contact RB and did not encourage him to resign; BS's tutor is not a contractor or supplier, the contact was in relation to his personal supervisory position; the third parties are not contractors or suppliers and contact was to address identify fraud and in response to Uniklasers having advised Innovate that he has left.
95. DM did not conduct any other investigation of the allegations against the Claimants other than the disciplinary hearings he held with the Claimants and was therefore dependent upon the investigation conducted by VH.

*March 2022 - Grievance Outcomes - DM*

96. On 31 March DM advised FK the outcome of his grievances. In relation to the alleged failure to address the letter of 17 September he found that this letter was simply a narration of events, no particular complaint was articulated or action requested other than querying whether it was appropriate to raise a

grievance, and no action was taken following GM's dismissal. This grievance was not upheld. In relation to the alleged conspiracy to oust FK from the company he found that there was no evidence to this effect, the resignation emails of AF stating that FK needs to retire immediately does not provide evidence of any conspiracy or plan to achieve this, and the reports of a behavioural issue were the reasons for his suspension. This grievance was not upheld. In relation to the alleged breach of the terms of the suspension letter he found that the wording on the report to Innovate UK was incorrect and did not follow the agreed wording and that TW used intemperate and inappropriate words to describe the position to staff in an internal meeting. This grievance was partially upheld. In relation to the alleged predetermination and prejudging of the disciplinary process he found that: he, DM, has had no contact with TW in relation to these matters and no prior involvement with EM nor the representatives of Par Equity; through the process he had relied upon the evidence provided during the investigation; he had not been involved with the business more widely (other than attending board meetings) to ensure impartiality; and he has not discussed any aspect of the proceedings with TW (other than a general progress report at board meetings). This grievance was not upheld. In relation to the alleged damage to his professional reputation and personal character at the meetings held by TW he found that this was an isolated incident with a small number of staff. He noted that TW accepted that the language used was inappropriate and assured there would be no repetition. DM explained why he considered the decisions of the board to be quorate, that EM had offered support, and that the fact of payment and instruction to VH are necessary steps which do not render her impartial.

97. On 31 March DM advised AB of the outcome of her grievances. In relation to the alleged breach of the terms of the suspension letter he found that that TW used intemperate and inappropriate words to describe the position to staff in an internal meeting. This grievance was upheld. He stated that TW accepts this and has provided assurances that there will be no repetition. In relation to the allegation that the disciplinary process was prejudiced and predetermined he stated that TW had no involvement in the disciplinary process and that he had no contact with him. He stated that prior to his appointment as a Director

he had no prior involvement with EM or the representatives of Par Equity and that he was appointed because there were serious allegations of misconduct against other Directors which required independent consideration. He stated that he has not been involved with the business more widely other than attending board meetings and that he has not discussed the disciplinary proceedings other than to provide a general report on progress at board meetings. This grievance was not upheld. In relation to alleged damage to professional reputation and character he found that the use of intemperate and inappropriate language by TW was a small number of staff and that there was no evidence of wider dissemination. This grievance was not upheld. In relation to the allegation that the board was not quorate advice has been taken and this was not upheld.

*March 2022 - FK Disciplinary Outcome - DM*

98. On 31 March DM wrote to FK to inform him of the outcome of the disciplinary hearing.
99. Re Allegation 1 he stated: "I uphold this allegation to the extent I believe you demonstrated rude and objectional behaviour of a bullying / harassing nature towards MM, BS and GM specifically: (a) your behaviour at the meeting with BS and GM on 17 September 2021 including calling GM and BS liars and cheats and accusing them of stealing, yelling at them both, accusing them of making up data and being aggressive and abusive towards them..."; "(b) your behaviour towards BS and GM in the period from AF leaving the company to 17 September 2021 including being aggressive, rude, loud, overbearing, undermining and insulting..."; "(c) your failure to confirm verbal instructions in writing to MM in March 2021 undermining his ability to carry out his role...I consider that (a) and (b) above in themselves constitute gross misconduct and that (a) and (c) taken together also constitute gross misconduct. While I have not upheld the allegation in relation to the incident with MM on 27 May 2021 ..., DU..., RU...or RS...I have taken the incidents in relation to MM, DU and RU into account when assessing the likelihood of you behaving in the manner set out in [GM and BS grievance of 17 September 2021], I have not taken the allegations in relation to RS into account as they were not upheld nor have I

taken into account the information set out in the anonymous witness statement.

I have taken into account the fact that...you acknowledge raising your voice...you accept that you 'exploded' and 'lost control'...You stated that you were emotional at the time. I do not accept this as being a valid reason to raise your voice to any fellow staff members...you are a long standing, senior member of staff'.

100. Re Allegation 2 he stated: "I uphold the allegation that you pressurised ND into manipulating the findings in relation to project JN 1035 to mislead the board into the project's success. I consider this allegation to be gross misconduct...She put together technical specifications for the two projects, based on the committed specifications in three customer sales orders provided to her by RB. She has stated that when she presented the results to you, you were clearly unhappy that the data for 1041 was completed while there was missing data for 1035 and you asked Nikita to delete the data she had obtained for 1041".
101. Re Allegation 3 he stated: "I uphold the allegation that you failed to follow the correct stock management and purchasing policy... I consider this allegation to be misconduct warranting a written warning".
102. Re Allegation 4: "I have upheld the allegation that you breached the terms of suspension by contacting RB on the weekend of 2/3 October 2021 and encouraging him to resign...RB has confirmed in a call with VH that you contacted him on Saturday 2 October 2021, the day after your suspension and in the course of that call you suggested that RB should resign.. I consider allegation [4] (a) to be gross misconduct and allegation (b) and (c) [which he upheld] together warrant a final written warning."
103. He noted that "I have not seen any evidence to suggest that (i) the outcome of your disciplinary hearing was pre-determined or (ii) VH was not impartial when conducting the disciplinary investigation... Having carefully reviewed the circumstances and considered your responses and taken into account your service with the company, I have decided in light of the individual findings of gross misconduct and my overall finding in relation to all of the allegations, the



appropriate sanction is summary dismissal". He was advised of his right of appeal.

*March 2022 - AB Disciplinary Outcome - DM*

104. On 31 March 22 DM wrote to AB to inform her of the outcome of the disciplinary hearing.
105. Re Allegation 1 he stated: "while I accept your explanation that dismissing GM created a low risk from an employment law perspective, I uphold this allegation to the extent that, in dismissing GM, you acted against the company interests and you took the decision to dismiss GM aware that the action would not be covered by the companies insurance cover as you did not contact [Peninsula] before taking the decision. I believe that you would have been privy to the fact that the investment round hinged on the success of the 1035/1041 project... I believe that you were aware that dismissing GM, who was one of the two engineers working on those projects, would have a huge impact on the business. I believe that the real reason for dismissing GM was the fact that he had raised a grievance against your father and you took the decision knowing there was a conflict of interest and with no regard to the impact on the business...you should have been aware that the Directors Liability Insurance did not provide the necessary cover...I consider that your decision to dismiss GM against the interests of the company constitutes gross misconduct."
106. Re Allegation 2 he stated: "I uphold the allegation that you failed to deal appropriately with the grievance raised against your father by GM and BS and that such failure exposed the company to further risk in an employment tribunal even though such risk was low... I believe that there was a clear conflict of interest and that is what resulted in you failing to deal appropriately with the grievance raised against your father against the interests of the company...I believe that you should have dealt with GM's grievance before you dismissed him... I find the only reason you suspended BS is because you believed he was party to the grievance and also took issue with the manner in which he believed your father was acting. I consider your failure to deal appropriately

with the grievance against the interests of the company constitutes gross misconduct.”

107. Re Allegation 3 he stated: “I consider that your failure to notify peninsula of the decision to terminate GM's employment warrants a final written warning”.
108. Re Allegation 4 he stated: “I uphold the allegation that you pressurised ND into manipulating the findings of Project JN1035 by asking her to dismiss her findings that part of the project was failing...ND has stated that...you told her to support 1035 at that meeting...[and] the initial comparison which she had made between the 2 projects based on technical requirements obtained from the 3 sales quotes provided by RB made FK ‘furious’ and that FK did provide a spreadsheet for comparison purposes on 30 September which matches 1035 but not the technical requirements from the sales quotes...the impact could have been significant given the importance of this laser product to the future success of the business. I consider [this] to be gross misconduct”.
109. He noted that “Having carefully reviewed the circumstances and considered your responses and taken into account your service with the company, I have decided that, in light of the individual findings of gross misconduct and my overall findings in relation to all of the allegations, the appropriate sanction is summary dismissal”. She was advised of her right of appeal.

*April 22 - Appeal grounds*

110. On 7 April FK appealed decision to dismiss on the following grounds: allegation 1 -the findings were based upon likelihood and not fact; allegation 2 - the findings were based upon a misinterpretation of the evidence - ND was not asked to delete but to add data; allegation 3 - there was no invoice for the optical parts because they were not bought by the company; allegation 4 - there is no breach because these are not contractors or customers; the procedure was unfair because there was no prior warning or discussion of the allegations and the decision of the Board was predetermined, was not quorate and was affected by a conflict of interest; DM failed to exercise independent judgment, care and skill and avoid a conflict of interest; the appeal should be conducted by Peninsula.

111. KF also appealed the grievance outcome on the following grounds: his letter of 17 September 2021 was a grievance presented to the Board and not a response to GM's grievance; DM failed to take into account all of the evidence regarding the damage to his reputation and personal character in correspondence between AF, EM, engineers and external third parties; DM failed to take into account the procedural unfairness as set out in his disciplinary appeal; there are obvious breaches of the suspension wording by others; DM failed to pay compensation for TW's defamatory comments; DM has ignored the involvement of EM in the conspiracy to oust him; the appeal should be conducted by Peninsula.
112. AB appealed the decision to dismiss on the following grounds: allegation 1 - significant steps were taken in mitigation of the low risk and it was a reasonable course of action for a COO; allegation 2 - she was unable to deal with GM's grievance prior to her suspension; she was not aware of GM's complaint until after BS's suspension; allegation 3 - she consulted employment law experts rather than Peninsula who are only HR advisers; allegation 4 - there is no evidence to support this allegation; the procedure was unfair because there was no prior warning or discussion of the allegations and the decision of the Board was predetermined, was not quorate and was affected by a conflict of interest; DM failed to exercise independent judgment, care and skill and avoid a conflict of interest; the appeal should be conducted by Peninsula.
113. AB also appealed the grievance outcome on the following grounds: DM failed to take into account the procedural unfairness as set out in her disciplinary appeal; DM has not addressed her grievance against EM; DM had voted to remove them as Directors before the disciplinary process and was accordingly not independent; his decisions in the disciplinary process are based on opinions and not evidence; DM is a shareholder and has benefitted from their removal; VH was appointed by Par who have also benefitted from their removal; DM failed to pay compensation for TW's defamatory comments; the appeal should be conducted by Peninsula.

*April /May 2022 - Disciplinary and grievance appeal investigations - JS*

114. In April the Respondent appointed an independent chair to hear the appeals. The first chair appointed subsequently advised that they were unavailable.
115. EM appointed JS of Peoplestance, an HR consultant, to act as independent chair to hear the disciplinary and grievance appeals.
116. In early May JS undertook a desk-based review of the documentary evidence. She considered that there were a lot of overlapping issues related to the disciplinary and grievance appeals. She wanted to be thorough and comprehensive in her consideration of matters. She considered that original investigation notes could have been more detailed and the notes of meeting should have been shared. She determined it necessary to undertake further investigations and to conduct a full re-hearing rather than review. JS held investigation meetings with EM, DM, TW, SE, GM, BS, SL, and MM.
117. On 2 June the Claimants were invited to attend separate disciplinary and appeal hearings which they were advised would be conducted as a re-hearing by JS. They were advised of their right to be accompanied and were provided with copies of notes of the investigation meetings (including VH's interviews with ND and RB) and a bundle of documents (which extended to around 150 pages).
118. The Claimants were also invited to attend separate grievance appeal hearings with JS. They were advised of their right to be accompanied and were provided with copies of notes of the investigation meetings and a bundle of documents.
119. AB's and FK's grievance appeal hearings were heard separately by JS on 14 June in the morning and afternoon respectively. FK's and AB's disciplinary appeal hearings were heard separately by JS on 15 and 22 June respectively. The Claimants accompanied each other. The Claimants expanded upon their grounds of appeal in these hearings.
120. JS held a supplementary investigation meeting with EM on 13 July and SE on 20 July. JS provided the Claimants with supplementary information on 18 July and posed additional questions.

*July 2022 - Grievance appeal outcomes - JS*

121. On 30 July JS provided FK with a grievance appeal outcome letter (extending to 36 close typed pages). JS concluded that: FK's letter dated 17 September was written in response to GM's grievance raised on 17 September; there was no evidence of age discrimination, harassment or pressuring him into unplanned retirement (that the views expressed by AF as outgoing CEO were a personal opinion and were not adopted); notwithstanding the return of his belongings, the deviation from the agreed suspension words, and the budgeting of his salary to the year end, the suspension was temporary and there was no pre-determination of the outcome; having engaged a corporate legal adviser to review matters she found that there was no breach of the Articles of Association or Directorial responsibility as regards their removal as Directors and that they would have been re-instated had there been no case to answer; EM could have discussed a more appropriate way to proceed with BS's tutor; EM advised BS's tutors that FK and AB had been suspended pending an independent investigation but there was no indication that the outcome was predetermined; MM did not use the words set out in the suspension letter; MM did not commit identify fraud attempt by masquerading as FK; in respect of TW's statements made to senior staff in mid-October, EM verbally warned TW not to behave like that in the future which response was relatively lenient but adequate; TW had no influence on the disciplinary or grievance process; there was no evidence of any conspiracy to oust FK by EM or others; EM breached the terms of the suspension letter in the words used to GM; EM did not breach those terms when communicating with shareholders but ought to have advised FK accordingly.

122. On 30 July JS provided AB with a grievance appeal outcome letter (extending to 23 close typed pages) plus supporting documentation. JS concluded that: it was fair to suspend her given the allegations of gross misconduct; that some of their personal belongings had been returned as a result of a misunderstanding; the budgeting of their salary to the year-end did not mean that their dismissal was predetermined; that they could not remain as Directors whilst suspended; having taken advice from a corporate lawyer she

understands the correct approach was taken - there was no breach of the Articles of Association or the Directorial responsibilities; the decision to dismiss was not predetermined - the company have engaged two separate independent HR professionals to deal with the process which demonstrates the company's desire to have a fair and through process; the terms of her suspension were breached by TW who had not been properly briefed by EM; there was no evidence that she was victimized by association with her father, FK; DM was the best option but it may have been more appropriate to appoint someone independent of the company but DM has taken all possible steps to remain impartial; there is no evidence the DM or EM gained from their suspension during the funding rounds; the fact that VH had some prior involvement with Par does not indicate impartiality; any potential shortfalls in VH's investigation were addressed by JS's fair and through approach; the inappropriate statements made by TW had been made to a small number of senior staff out of frustration that he kept being told what the founders had done; that EM had formally reprimanded him which was relatively lenient but adequate; there was no evidence that these statements had influenced the disciplinary or grievance processes; EM breached the suspension letter in his communication with GM; correspondence with the shareholders required disclosure of the true facts but the Directors ought to have informed them.

*July 2022 - FK disciplinary appeal outcome - JS*

123. On 30 July JS provided FK with a disciplinary appeal outcome letter (extending to 25 close typed pages) plus extensive supporting documentation.
124. Re Allegation 1, JS understood the grounds of his appeal were that: DM assessed probabilities rather than determined facts; there is no evidence of bullying; his discoveries of confidentiality breaches, false reporting and defamatory emails were relevant. JS noted staff responses about the culture of the Respondent including that SL had described the environment as "hostile and toxic" and that working underneath FK had significantly affected his mental health; that MM stated that things had deteriorated in the last two months from simple disagreements to conspiracy theories that people were lying to him - "It was really bad - I expected the business to fail".

125. In light of the available evidence she found that: “this provides a consistent account of a pattern of rude and objectionable behaviour of a bullying/harassing nature...there is a strong body of evidence to support this Allegation 1, not only in relation to the incident on 17 September 2021, but also an ongoing pattern of behaviour. This is not based on likelihood or probabilities - it is based on the witness statements that I have obtained”; that there were several emails which drew this to FK’s attention; there were concerns about raising a grievance due to the HR remit of his daughter AB as COO; that GM, BS and MM “have experienced a pattern of rude and objectionable behaviour of a bullying/ harassing nature, and this is over and above the 3 incidents that DM references in his outcome letter”; she considered the mitigating factors being his belief on 17 September that there had been plagiarism, false reporting and discrimination; she considered that this was not a legitimate reason for his behaviour that day especially given his seniority and in any event the pattern of rude and objectionable behaviour of a bullying/ harassing nature by him pre-dated that belief; allegation 1 was upheld and constituted gross misconduct.

126. Re Allegation 2, JS understood that the grounds of his appeal were that: there is no evidence that he asked ND to delete data; ND said she was not asked to falsify project reporting; the additional parameters he sought to include provided a full analysis of the UV lasers. In light of the available evidence JS found that: FK had provided ND with a spreadsheet which he suggested would allow a proper comparison of 1035 and 1041 but which did not match the customer specifications she had identified and that “the additional parameters then present 1015 in a more favourable light which then in turn can be viewed as clever influence on the independent report that ND had been tasked to complete”; there was an exchange between ND and SE in which ND indicated that she was being asked by FK and AB to present 1035 more favourably; that MM was asked by FK and then AB to re-analyse the work on the 1041 project, he went through the primary sources of data and found no evidence of fraud or misreporting; and she concluded that “there is a body of evidence to support the fact that you did pressure ND to manipulate the findings” and that in the circumstances this constituted gross misconduct.

127. Re Allegation 3, JS understood that the grounds of his appeal were that the optical parts in his office are his personal belongings. Having reviewed the available evidence she was unable to determine whether the expensive optical parts found in his office were his personal belongings or those of the company without involving a technical expert. By implication she overturned the finding of misconduct and the written warning.
128. Re Allegation, 4 JS understood that the grounds of his appeal were that: this allegation is denied and there was no evidence that he had contacted RB; his contact with BS's tutor and AH of Innovate was not in breach; and that the company was in breach first. In light of the available evidence she concluded that FK had contacted RB and encouraged him to resign. She found that he had breached of the terms of his suspension letter not to communicate with employees, contractors or customers unless authorized by EM which she considered to be gross misconduct. She found that in contacting BS' tutor and AH which was not strictly in breach of the suspension letter and therefore partially upheld his appeal but was contrary to EM's email of 6 October and merited a written warning.
129. JS advised that certain appeal points had been considered and were addressed in the Grievance Appeal Outcome.
130. She stated that having carefully considered the evidence and his appeal points, she considered that the appropriate sanction was summary dismissal. She advised that her decision was made on behalf of the Respondent and was final.

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*July 2022 - AB disciplinary appeal outcome JS*

131. On 30 July JS provided AB with a disciplinary appeal outcome letter (extending to 26 pages of close type) plus extensive supporting documentation.
132. Re Allegation, 1 JS understood that the grounds of her appeal were that: she had the authority to dismiss, took steps to mitigate the risk and understood there was insurance cover; there was no significant risk of a claim; that she had "thoroughly investigated" the misreporting and the harassment by GM and had created a folder of evidence which supported his dismissal; she did not



advise EM of her intention because he appeared to be part of the group working to undermine FK and to manipulate her; she discussed it with an employment lawyer and also with FK.

133. In light of the available evidence JS stated: she was unable to conclude whether GM engaged in false reporting (she could not find any evidence of false reporting in AB's folder but FK and GM had given very different accounts); as such it warranted further investigation including in particular giving GM the opportunity to respond; there was nothing to justify the failure to follow any fair process; no formal legal advice was obtained prior to GM's dismissal, only pro bono; GM had already raised a grievance so his dismissal created a moderate (rather than low) risk of a claim; she failed to consider the impact on the business; it was an emotional time because of the familial relationship; there were other financial and time pressures but this did not require an instant response. She found that AB's decision to summarily dismiss GM constituted gross misconduct.
134. Re Allegation 2, JS understood that the grounds of her appeal were as follows: she was prevented from dealing with the grievance because she was suspended; there was no risk of a claim for "constructive" unfair dismissal and there was a remote risk of a non-qualifying period claim; that grievances can be dealt with in 10 working days. JS noted that: that FK's letter of complaint was created on 20 September and backdated to 17 September; on 26 September 2021 AB had emailed Peninsula noting that she believed EM was not impartial and they are considering a vote of no confidence in him as Chair; she had time to arrange a meeting regarding GM's complaint. In light of the available evidence JS found that AB had engaged in a deliberate and conscious act to deal with matters chronologically as a blatant attempt to obstruct a fair procedure for the grievances raised by BS and GM and that this constituted gross misconduct.
135. Re Allegation, 3 JS understood that her grounds of appeal were that: she consulted an experienced employment law experts rather than Peninsula who are only HR advisers; at the time of dismissing GM she believed she had Directors' Liability cover. In light of the available evidence JS concluded that

contrary to their practice, AB deliberately and blatantly disregarded their establish practice of using Peninsula for all HR matters thereby losing their insurance cover; she failed to take reasonable steps to establish that alternative insurance cover was in place (which it was not); JS considered this constituted gross misconduct.

136. Re Allegation 4 JS understood that her grounds of appeal were as follows: the evidence does not support the allegation that she pressured ND into manipulating finding. In light of the available evidence from 5 individuals she concluded that AB had applied pressure on ND to manipulate her findings but given the nature of her involvement she considered this to be serious misconduct (rather than gross misconduct). She considered that FK was driving the manipulation whereas AB was supporting it.
137. She advised that certain appeal points had been considered and were addressed in the Grievance Appeal Outcome.
138. She stated that having carefully considered the evidence and her appeal points, she considered that the appropriate sanction was summary dismissal. She advised that her decision was made on behalf of the Respondent and was final.

#### **Findings in fact - holiday pay**

139. The Tribunal makes the following findings in fact in relation to the First Claimant's claim for holiday pay:
140. In March 2015 FK entered a Service Contract with the Respondent which included provisions that: he is entitled to 25 annual holidays plus 8 statutory public holidays; that the holiday year runs from 1 January to 31 December; any fraction of a day is rounded up to the nearest whole day; upon termination payment will normally be made for all unused accrued holiday entitlement; no modification, alteration or waiver of the provisions of the contract shall be effective unless it is in writing and agreed by or on behalf of each of the parties. No subsequent written agreement was reached to increase his holidays by 2 days for long service. Public holidays were not observed (with the exception of Christmas and New Year). He had carried over 10 days from

2020 and he had used 7 days holiday in 2021 . He was paid in respect of 38.25 holidays upon termination.

### **Observations on the evidence**

141. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

#### *AF - CEO*

142. AF was not called to give evidence at this hearing and he was not interviewed during either disciplinary process (because he had left and was unwell). Copies of email exchanges with AF and GM were provided and relied upon particularly by the Claimants as evidence of a conspiracy to remove them from the business such that the decision to dismiss them was pre-determined and a sham. Notwithstanding that neither AF nor GM gave evidence under oath and were not cross-examined about these emails or their context, it is considered likely that the statements made by them in these emails represented their opinion and they are relied upon to that extent.

#### *EM - Non-executive director*

143. EM came across as entirely credible and reliable in his testimony which was fair and measured, without material hesitation, and consistent with the other evidence.

144. EM gave evidence that as an investor appointed Director he was concerned to transition the business from an R & D shop into a profitable business (reflected in his email "that we are not being taken along for another 11 years of tinkering") and that this required three things: specialist knowhow, a commercial market and a capable team; that he already had concerns about high staff turnover but after AF's resignation he had increasing concerns about FK- he was unsure if it was a clash of personalities or something more fundamental; he was then shocked by BS suspension (on 20 May) and GM's

dismissal (on 22 May) and thought things were spiralling out of control; after his conversation with ND on 23 September he was very concerned that FK and AB were not acting rationally. He readily accepted in evidence that he had lost trust and confidence in FK and AB and he considered that one option was their exit involving dismissal with notice; it was discussed briefly with the Par Equity but rejected - there was massive concern about removing the founder and IP originator; a lot of technical information was still in FK's head; there was no discussion about AB because she was strategically less critical and AF had found her to be supportive.

145. The interim CEO TW expressed to senior staff that FK and AB were not returning to the business either because they would be dismissed as bad leavers or because there would be an exit agreement with them. TW was no longer involved in the business and he was not called to give evidence. It is considered likely that TW came to that view in light of his discussions with staff and with EM to whom he reported as Chair. EM gave evidence that TW was not involved in the disciplinary and grievance hearings and outcomes and there was no evidence to the contrary.

*First investigation - VH*

146. VH came across as entirely credible and reliable in her testimony which was fair and measured, without material hesitation, and consistent with the documentary and other evidence.
147. VH had no prior involvement with the Respondent and did not know EM. VH had some involvement with Par Equity: "VH had that her role was to conduct the investigation fully and impartially."
148. VH gave evidence that when conducting the investigation she had kept an open mind and there was no reason to doubt this. There was no evidence that any of the Respondent Directors or investors (including Par Equity, EM and DM) had sought to influence her investigation. There was no evidence that she had been advised that the Claimants would not be coming back to the business regardless.

149. VH's occasional references to project 1040 were understood as references to project 1041.

*Disciplinary hearings - DM*

150. DM came across as entirely credible and reliable in his testimony which was fair and measured, without material hesitation, and consistent with the documentary and other evidence.

151. EM gave evidence that he did not express any opinion to DM on the expected outcome of the disciplinary process and that he was not involved in the decision to dismiss the Claimants which was taken by DM. DM gave evidence that: he had been advised that that the disciplinary process need to be independent and impartial; that he was appointed to chair the disciplinary and grievance hearings because he was new to the business and had no prior involvement; he was not involved in the business (other than to attend Board meetings) with a view to maintaining his independence; he could not recall EM either stating or giving the impression that he had lost trust and confidence in the Claimants; whilst EM was involved in organising the disciplinary process he was not involved in and had no influence on his decisions on the merits; and the effect of bad leaver provisions had no influence on his decision making - that he would not risk his professional reputation for whatever marginal gain there might be.

152. DM gave evidence that: he had taken into consideration that FK was emotional at the meeting on 17 September because he had just discovered emails involving GM which he believed were defamatory and because he believed GM was falsifying data but in his opinion this did not offer sufficient mitigation because as a senior manager there were other options available to him rather than shouting and calling them liars and cheats.

*Appeals - JS*

153. JS came across as entirely credible and reliable in her testimony which was fair and measured, without material hesitation, and consistent with the documentary and other evidence.

154. JS gave evidence that she had no prior involvement with the Respondent or its staff and investors (she had some limited and historic connection with an employee of Par) and that she was independent. EM gave evidence that he did not express any opinion to JS on the expected outcome of the appeal other than to ensure it was a re-hearing rather than a review and to convey that the company would abide by JS's decision. This was supported by JS in evidence. JS gave evidence that she was independent and wanted to be thorough and comprehensive, she would have expected detailed meeting notes from the first investigation and that's why she elected to do a hearing; she considered that the issues raised in the grievances overlapped with the disciplinary issues.
155. JS gave evidence that whilst the emails from GM to AF showed no regard or respect for FK and his work they were not aimed at FK; she considered that FK had engaged in a pattern of bullying behaviour towards GM and BS since early August 2019 (i.e. prior to AF's departure); to add additional parameters to ND's comparison would make one project look more favourable than the other; she had not specifically cross referenced her grievance finding that EM had breached the suspension terms in correspondence with GM in the disciplinary outcome (she had however cross referenced EM's contact with BS's tutor noting that it was not material because FK contacted him without knowing of EM's earlier contact); she knew DM was a shareholder but she did not take the shares into account when considering the disciplinary process; she did not accept that the Respondent had failed to follow their own procedures by not raising the alleged bullying with FK sooner because by .....September it had escalated at such a pace. ....
156. JS gave evidence that AB knew of GM's grievance and that EM had asked her to contact Peninsula; that his dismissal was not low risk because of that prior grievance; that AB made a conscious and deliberate decision not to contact Peninsula; that AB had pressured ND but that she had less involvement than FK who was driving it.

*First claimant - FK*

157. FK came across as not wholly credible and reliable in his testimony which was not wholly consistent with the other evidence and was at times somewhat self-serving.
158. FK gave evidence that when AF came on board in 2020 the expectation was that the lasers would be taken forward from the development stage to commercial production with a view to the investors exiting in 3 to 5 years; he was very enthusiastic about AF's appointment; in time he considered that the culture changed, that they did not have a good relationship, and the engineers no longer respected him (FK).
159. FK gave evidence that the plan was that he would retire once he had passed on his expertise and knowledge but not before he turned 76; it could take longer depending upon when a successor CTO would be ready to take over; by September 2021 he thought it would take 2-3 years.
160. In relation to allegation 1, FK was asked when he first became aware that any staff were unhappy with his behaviour. He stated that he probably first became aware in August 2021 when he saw MM's complaint. However staff had formally raised issues of bullying by FK in 2020 (RS had raised a grievance citing FK bullying in 2020 - which was investigated but not upheld, RU had cited FK's bullying as the reason for his resignation in 2020, and SE had raised his treatment of DU directly with FK in 2020). AF in his first resignation in May 2021 had expressly referenced FK's behaviour. FK gave evidence that he had only seen AF's first resignation letter after the second resignation in September. He did however recall it being discussed in early May. Given the terms of that resignation (that FK's behaviour was the reason for it), given that it was provided to his daughter AB, given that FK was very reluctant to move from CTO to CSO but was persuaded to do so in the circumstances, it is considered likely that by early May 2021 FK was fully aware of the general tenor if not the full terms of that letter. Accordingly his answer regarding when he first became aware that staff were unhappy was not considered credible.

161. In respect of Allegation 1, FK gave evidence that AF had decided to run parallel projects on the UV349 laser in May 2021; the 1041 project was based upon modifications to his original designs made by 'young inexperienced engineers' working in the production team; he did not consider the 1041 project to be viable; he first raised concerns regarding data manipulation with AF in early June 2021 and he had decided not to do anything; in late August/ early September 2021 they were reporting it ready for shipment when it was still disassembled and not properly tested fully closed; he raised this issue with AF and the engineers in a number of technical meetings; AF elected not do so anything; from 2 September he took photos at night to evidence this; he did not raise it with EM because he is not a laser engineer but EM was present at some of the technical meetings when it was raised; on or about 15 and 16 September he was provided with some of the defamatory emails; he then found out BS had plagiarised his work (in his dissertation); there was an untrusted situation and he was furious, he was unable to control himself and exploded at the meeting on 17 September; it was justified given the untrusted situation but he did not bully them; he apologised to ND for witnessing it; he prepared his complaint and handed it to AB before he saw GM's complaint; he knew AB was conflicted but he did not trust EM to be impartial because he was part of the conspiracy group - he believed EM and AF had made the plan to remove him at the end of November 2020 and GM, SE and BS were executing the plan.
162. In respect of Allegation 2, FK gave evidence that he sought for ND to include all parameters - as much data as possible; all of these parameters were listed in the preliminary data sheet; this data sheet was provided to customers so better met the customer specifications than that provide by RB with reference to the sales orders. This last assertion was not put to the Respondent witnesses during cross examination and does not reflect the evidence he gave during the disciplinary process in which he sought to include "all available performance parameters" "to ensure full performance analysis" (he did not assert that this was a better match for the customer specifications). FK would not accept in cross that adding additional parameters that would change the nature of the comparison exercise. As a laser physicist well versed in scientific



methods his refusal to accept what was logically obvious called into question the credibility of his evidence.

163. In respect of Allegation 4, FK gave evidence that he had not called RB but rather RB had called him which undermined the integrity of RB's evidence.
164. FK gave evidence that he believed that there was a "conspiracy group" comprising AF, SE, GM and BS who were trying to remove him from the business; EM knew about it but did nothing to address it; the evidence for the conspiracy was in the emails; he was unwilling to elaborate to VH about the conspiracy because he did not trust her.
165. FK gave evidence that he was initially pleased about DM's appointment - he thought he would bring good independent judgement; the decision to suspend them as employees and remove them as Directors had previously been discussed and agreed - it was a sham; that there were funding rounds after his suspension and before his dismissal which reduced his shareholding from 27% to 10%; the bad leaver provisions then reduced his shareholding from 10% to 5%; TW who had never met them had been briefed by EM that they were to be dismissed; DM was not the decision maker because the decision to dismiss should have been taken by the Board which involved TW .
166. FK gave evidence that JS was not truly independent because she had not been contacted through Peninsula and was instead instructed by Par Equity.

#### *Holiday entitlement*

167. FK gave evidence that the Respondent had failed to include public holidays when calculating his accrued holidays on termination; his annual entitlement was 35 days (25 days holiday, 8 public holidays which the office does not observe; and 2 additional days accrued for long service); he had carried over 10 days from 2020; he had used 7 days holiday (1 day mandatory leave on 1<sup>st</sup> January plus 6 days 2 to 9 July); he was therefore due 38 days for 2021 and 9.29 days for 2022.
168. AB, who had been Operations Director, was not called upon to give any evidence regarding public holidays or holidays accrued for long service.

169. EM understood that his annual entitlement was 25 days per his contract; he accepted that he had carried over 10 days from 2020; he understood the office observed public holidays but was due 2 days because he was off sick during public holidays; he was therefore due 30 days for 2021 and 8.25 for 2022.
170. As a non-executive Director EM did not have oversight of the holiday arrangements, whereas FK as CEO and AB as Operations Director would have full oversight and at one time control of those arrangements subject to Board approval. It is therefore considered more likely than not that public holidays were not observed (with the exception of Christmas and New Year which EM accepted fell due anyway).
171. Given the no-waiver provisions in his contract, given that other contract changes had been formally documented, given the absence of any other evidence to support FK's assertion, it is considered unlikely that his holiday entitlement had been increased by 2 days for long service.
172. Accordingly at termination FK had accrued but unused holidays of 45 (36 days for 2021 and 9 (8.75) days for 2022).

*Second claimant - AB*

173. AB came across as not wholly credible and reliable in her testimony which was not wholly consistent with the other evidence and was at times somewhat self-serving.
174. AB gave evidence that they had high hopes for AF because of his previous successes but there was a significant change in the culture after his appointment and FK felt he was losing respect amongst the engineers.
175. AB gave evidence that in the period May to September 2021 there was pressure by AF and EM on FK (who was age 74) to retire immediately. This opinion was expressed by AF at the point of his resignation in September 2021. EM gave evidence that FK's retirement had been discussed in May 2020 but that the timing of that was dependent upon the knowledge transfer which would take a number of years. FK did not give any evidence that he been pressured by EM to retire immediately. AB then gave evidence that EM was pushing FK

to get the IP finalised. EM gave evidence that there was still significant work for FK to do by way of the knowledge transfer. AB also considered that there was still 2 to 3 years of work for FK. FK considered that there was a risk to the business if he did not complete that exercise. In the circumstances it is considered likely that in the period May to September 2021 FK's retirement was being discussed, that FK was under pressure from AF to retire, that EM was putting pressure on FK to transfer his knowledge and that both EM and AB considered that there was still significant work for FK to do. Accordingly EM was not putting pressure on FK to retire immediately and AB had been disingenuous to assert this in evidence.

176. In respect of Allegation 1, AB gave evidence that: FK had been concerned for a while that GM was falsifying data; GM had stated it was shippable but FK had told her it wasn't; on 15/16 September she found disrespectful and derogatory emails about FK between EM, AF and GM which constituted personal and professional harassment by GM; AF had done nothing to stop it; she did not discuss GM's misconduct with EM before dismissing him because she did not trust EM.

177. AB gave evidence that there was no conflict of interest affecting her decision to dismiss GM on grounds of false reporting and separately his defamatory and derogatory statements about FK (her father). She considered that "it was very very clear - he said the laser was in shippable form and it wasn't. It wasn't about my father - it was about the laser"; GM reported in 3 presentations in 3 different weeks that it was fully closed and shippable. Her decision that GM was misreporting was wholly dependent upon her father's assessment of the state of the laser (she is not technically qualified) and was affected by an obvious conflict of interest given that he was furious about the emails. AB gave evidence that GM's emails about FK were obviously very disrespectful and derogatory of FK as a person and as a professional. She had described being deeply distressed and shocked by them and FK was furious them. GM had then submitted a complaint against FK. Her decision that his emails amounted to gross misconduct was affected by obvious conflict of interest. As an

experienced HR practitioner her assertion that she did not believe that there was any conflict of interest was not credible.

178. AB gave evidence that she did not have time to follow a full disciplinary process - she needed to prioritise because of business pressures including the risk of bankruptcy; she had conducted an investigation; she had taken legal advice and the employment lawyer said there was no risk of a claim because he had only 11 months service.
179. In respect of Allegation 2, AB gave evidence that she had been advised by EM not to deal with GM's complaint because it was affected by a clear conflict of interest and that his grievances could be dealt with after his dismissal - she saw his complaint and his conduct as two different/ separate matters.
180. In respect of Allegation 3, AB gave evidence that she was confident that she had cover for GM's dismissal under the Directors Liability insurance; she did not call Peninsula because they are not experts and it would have resulted a lengthy process.
181. In respect of Allegation 4, AB gave evidence that she had asked ND to complete the comparison tables objectively; that ND had been affected by the culture of the conspiracy group.
182. AB gave evidence that the decision to dismiss them had been predetermined - she that from the suspension onwards it felt terminal/ final - like they weren't coming back - they'd been marched out of the office in front of everyone, they were removed as directors, people were told they'd left the business, they took back their laptops, keys and bankcards, GM was re-instated on the same day. She gave evidence that VH wasn't impartial because she was contacted by the Respondent and that she believed that DM was acting in collaboration with EM.
183. AB gave evidence that if the investigation had found no case to answer they would not return. She considered that there had been a breakdown in relationships - she did not trust these people and felt like they couldn't work there anymore.

*Interview notes from disciplinary process*

184. For the purpose of the claim for notice pay it is necessary to consider whether on balance of probabilities the Claimants engaged in conduct which may justify termination of their contracts without notice.
185. Both VH and JS conducted interviews with witnesses who were not called to give evidence at this hearing. Those interviews were captured in interview notes made by them and were also summarised in the disciplinary investigation reports and the appeal outcome letters. Having regard to the testimony of both VH and JS respectively it is considered likely that these interview notes are reasonably accurate and were fairly summarised in the reports. Notwithstanding that these interviewees did not give evidence under oath and were not cross-examined, their interviews as captured in the disciplinary and appeal investigations fall to be given some weight.
186. The following is noted in summary having regard to the evidence heard at this hearing including from the Claimants and also having regard to the disciplinary and appeal investigations -

*First Claimant - FK*

187. Re allegation 1, FK denied having engaged in bullying behaviour but a significant number of employees (DU, RS, RU pre August 2020 and subsequently BS, MM, SE, GM, SL, ND) described having experienced or witnessed bullying behaviour by FK including bullying behaviour towards GM and BS (including shouting at and belittling them) which had escalated in the two-month period prior to their dismissal / suspension. There was as the Claimants submitted a toxic culture, but one that was created by FK's behaviour.
188. Re allegation 2, FK denied having pressured ND into manipulating her findings, but ND considered that FK had instructed her to add additional comparators to her neutral comparison of the two projects which she considered was a different comparison "to their liking" and which she noted did not match the sales quotes such that she felt it necessary to footnote those changes on the

comparison as “not advertised”/ “included as per FK request”. ND was a new employee and there was no reason to doubt this.

189. Re allegation 4, RB had stated that FK had contacted him, that he said RB would not be needed in the business and that he should resign - FK denied this; FK also said he had not initiated contact but the call log showed otherwise.

*Second claimant - AB*

190. Having regard to the timing of events and the obvious conflict of interest it is considered likely that AB’s decision to summarily dismiss GM on 22 September without due process was not motivated by her acting in the best interests of the company in difficult circumstances, as asserted by AB, but was instead motivated by receipt of GM’s complaint of 17 September about her father FK’s behaviour in circumstances where AF, CEO had just resigned on 7 September also citing FK’s behaviour.

191. GM was one of two engineers working on modifications to improve the original design of the company’s priority laser. EM had recently referenced GM as a key member of staff. AB had just suspended the other engineer BS on allegations of gross misconduct. Contrary to AB’s assertion in evidence it was considered more likely than not that at the time of his dismissal GM was a key employee. If she genuinely considered he was a risk to the business she could have suspended him pending discussion with the other Directors and advice from Peninsula on the allegations.

192. Given the request by EM on 21 September to contact Peninsula about GM’s complaint, it is considered likely that AB made a deliberate decision not to progress GM’s complaint in the 10 day period prior to her suspension and instead proceeded to summarily dismiss him for the reasons noted above.

193. ND stated that AB had required her to support 1035, that if she didn’t comply there would be consequences, and she felt intimidated by her. ND was a new employee and there was no reason to doubt this.

**Findings in fact in relations to claims for notice pay**

194. The Tribunal makes the following findings in fact in relation to the claims for notice pay:

*First Claimant (FK)*

195. FK engaged in a pattern of bullying behaviour particularly towards GM and BS (including shouting at them) in the two-month period prior to their dismissal / suspension (August and September 2021).

196. On 20 September 2021 FK pressured ND to manipulate the findings of her neutral comparison of Project 1035 and 1041 by requiring her to add additional comparators with a view to presenting 1035 in a more favourable light.

197. On 2 October 2021 FK breached the terms of his suspension by contacting RB and encouraging him to resign.

*Second Claimant (AB)*

198. In taking the decision on 22 September 2021 to summarily dismiss a key staff member (GM) in respect of allegations of false reporting on 1041 and sending derogatory emails about FK (her father), AB was aware that her involvement was affected by conflict of interest, she made deliberate decisions not to contact their HR provider (which removed their insurance cover), not to involve the other Director, EM, and not to follow a proper process, which decisions were motivated by receipt of GM's complaint about her father of 17 September rather than what was in the best interests of the business.

199. Despite being asked by EM on 21 September contact Peninsula about GM's complaint, AB made a deliberate decision not to progress GM's complaint in the period prior to her suspension on 1 October and instead decided to proceed with disciplinary action against him.

200. In mid-September 2021 AB pressured ND to manipulate the findings of her neutral comparison of Project 1035 and 1041 by adjusting her findings to favour project 1035 over 1041.

## **Relevant Law**

### Unfair dismissal

201. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides the Claimant with the right not to be unfairly dismissed by the Respondent.
202. It is for the Respondent to prove the reason for the Claimant's dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. If the reason is in dispute, the Tribunal must either make findings in fact on balance of probabilities as to what conduct caused the employer to dismiss or find that the employer has failed to discharge the burden of proving the reason. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.
203. The reason for dismissal is a set of facts known or beliefs held which operate on the mind of the decision maker and causes them to make the decision. The decision maker will ordinarily be the dismissing manager unless a person in a position of authority misleads or manipulates them in pursuit of a hidden reason (*Uddin v London Borough of Ealing [2020] IRLR 332, EAT* which may be relevant both to determining the reason for and/or the fairness of that dismissal). The reason given may be a false reason intended to hide the true reason.
204. The reason for dismissal is determined at the time of the decision to dismiss and not at the time of the internal appeal. However the issue of the fairness of that decision encompasses consideration of the whole process including any internal appeal and thus may take into account of evidence relevant to that reason which emerges in the course of an internal appeal (*West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192, HofL*).
205. Just because an employer has a prior desire or reason to dismiss does not mean that an employer cannot rely upon a reason for dismissal which arises subsequently - an opportunistic dismissal is not necessarily unfair provided that the reason is genuine and operative (*Associated Society of Locomotive Engineers and Firemen v Brady 2006 UKEAT/0057/06/DA*).



206. Where there are multiple reasons for dismissal the employer must establish the principal reason. The principal reason may encompass one reason or multiple reasons which are said to justify the dismissal cumulatively or individually.
207. If the reason for the dismissal is potentially fair, the Tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant. At this second stage of enquiry the onus of proof is neutral.
208. Equity in this context is equivalent to fair play (e.g. that there should be a degree of consistency of treatment). It is part of but not separate to the test of reasonableness.
209. If the reason for the Claimant's dismissal relates to conduct, the Tribunal must determine that at the time of dismissal the Respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation in the circumstances (*British Home Stores Ltd v Burchell* [1978] IRLR 379, [1980] ICR 303).
210. In determining whether the Respondent acted reasonably or unreasonably the Tribunal must not "substitute itself for the employer or to act as if it were conducting a rehearing of, or an appeal against, the merits of the employer's decision to dismiss. The employer, not the tribunal, is the proper person to conduct the investigation into the alleged misconduct. The function of the tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the results of that investigation, is a reasonable response" (*Foley v Post Office; Midland Bank plc v Madden* [2000] IRLR 827) The Tribunal must not substitute its own view as to what it would have done in the circumstances. Instead the Tribunal must consider the range of reasonable responses open to an employer acting reasonably in those circumstances.

211. The tribunal is not conducting a rehearing or an appeal but determining whether the decision to dismiss was procedurally and substantively fair. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT)*). The need to investigate mitigation depends upon the degree of relevancy to sanction, whether the employee advanced any evidential basis which merited further inquiry, and the extent to which it could have revealed information favourable to the employee (*Tesco Store Ltd v SEATS 0040/19*).
212. In determining whether the Respondent adopted a reasonable procedure the Tribunal should consider whether there was any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Tribunal then should consider whether any procedural irregularities identified affected the overall fairness of the whole process in the circumstances having regard to the reason for dismissal (*Taylor v CCS Group Ltd [2006] IRLR 613*).
213. Any provision of a relevant ACAS Code of Practice which appears to the Tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code of Practice on Disciplinary and Grievance Procedures provides in summary that: employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions; employers and employees should act consistently; employers should carry out any necessary investigations, to establish the facts of the case; employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made; employers should allow employees to be accompanied at any formal disciplinary or grievance meeting; employers should allow an employee to appeal against any formal decision made

### Notice pay

214. Under Section 86 of the ERA 1996 an employee is entitled to one week's notice of termination of employment for each year of continuous employment up to a maximum of 12 weeks' notice. A contract of employment may provide for a longer period of notice.

215. A contract of employment may be terminated without notice where the employee is in repudiatory breach. Satisfaction of the Burchell test (that there is a reasonable belief held on reasonable grounds) is insufficient - the Respondent must prove actual repudiation on balance of probabilities (*Enable Care & Home Support Ltd v Mrs J A Pearson UKEAT/0366/09/SM*).

216. The Tribunal must come to its own view about the claimant's conduct for the purposes of a wrongful dismissal claim but must take care not to take those findings into account in deciding whether the dismissal was unfair.

### **Respondent's submissions**

217. The Respondent's submissions were in summary as follows-

- a. The employer does not need to have evidence proving employee's misconduct beyond reasonable doubt but a genuine and reasonable belief of it which it came to by way of a reasonable investigation.
- b. The process must be viewed as a whole and any alleged deficiencies in the process can be remedied by subsequent stages.
- c. The tribunal must determine whether it was reasonable for the employer to have treated the misconduct as a sufficient reason to dismiss (*Eastland Homes Partnership Ltd v Cunningham UKEAT/027/213*)
- d. Gross misconduct justifying dismissal must amount to a repudiation of the contract by the employee (*Wilson v Racher [1974] ICR 428 CA*). The conduct must be deliberate wrongdoing

or gross negligence (*Sandwell and West Birmingham NHS Trust v Westwood EAT 0032/09*).

- e. The investigation was carried out by an impartial third party HR professional, witness statements and documents were taken from relevant individuals.

#### First Claimant - FK

##### *Allegation 1*

- f. There was overwhelming evidence that FK was “screaming and shouting” at the GM and BM and calling them “cheats and liars”; that he apologised to ND but not to them; that the incident on 17 September 2022 was not an isolated incident but represented a pattern of behaviour which had been going on for months; that this was systemic behaviour which had caused a high turnover of staff that jeopardised the viability of the company.
- g. FK’s service contract provides that verbally abusive behaviour constitutes gross misconduct.

##### *Allegation 2*

- a. There was clear evidence of FK pressurising AD into manipulating the findings in relation to project JN 1035

##### *Allegation 3*

- b. VH had found clear evidence of rules violation around company purchasing.

##### *Allegation 4*

- a. The Claimant breached the terms of his suspension by contacting persons connected with the company.

*Sanction*

- b. The seriousness of his conduct and the failure to recognise or apologise meant that there was no reasonable alternative to dismissal.
- c. FK refused to provide explanations to the investigating officers.
- d. His explanation that GM and BS were falsifying date was not substantiated or raised properly and in any event did not justify or adequately mitigate his treatment of them. His letter dated 17 September was not expressed as a formal grievance or complaint and he did not raise any failure to deal with it for 4 months.
- e. There is no evidence of an alleged conspiracy to remove him planned by EM and AF and executed by GM and BS (the so called 'Conspiracy Group').
- f. The dismissal was substantially and procedurally fair.

*First Claimant - AB*

- g. AB occupied a senior position as COO and Director. There was deliberate or reckless disregard for the Board resolution and the concerns of the fellow Director EM by ignoring the conflict of interest and summarily dismissing a key employee without bringing those concerns to the attention of the Board and without seeking advice from the company HR advisors.
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- h. The seriousness of her conduct and the failure to show contrition or provide mitigation meant that there was no reasonable alternative to dismissal.
  - i. She engaged in reckless disregard rather than a careful assessment of risk.

## Claimants' Submissions

218. The Claimants' submissions were in summary as follows-

*Reason for dismissal*

- a. The reason for dismissal was not their conduct - the decision to dismiss them had been predetermined and the process was a sham.
- b. EM had lost confidence in FK and AB. In September he was on the same page as AF when he resigned. He discussed with Par Equity their exit with notice but Par wanted a process. Their removal as Directors was not described as temporary. Par instructed VH and appointed a new Director. Par publicly escorted the Claimants out of the office. Their personal items were returned to them.
- c. EM was the point of contact for DM and JS. DM knew EM has lost confidence in them - it is not realistic that his views were not shared. DM and EM both dealt with the disciplinary process. JS was investigator for the Respondent and did not keep an open mind. She sought to verify that which supported the Respondent but did not investigate what exculpated or mitigated the Claimants.
- d. GM's grievances were not investigated. No investigation was carried out into the allegations raised by the Claimants regarding GM. EM's decision to bring back GM on the same day as the Claimant's were suspended implies that the Respondent chose GM over the Claimants. JS noted that the allegations of false reporting by GM warranted investigation but there was no such investigation. BS' suspension was ended.
- e. TW was inducted by EM. In October 2021 EW advised TW that they had to make a decision about FK and AB. TW has formed the view that they would not be returning to work. He formed that view from discussions with EM. TW expressed that view in emotive terms to staff in October 2021 but was not disciplined by EM.

- f. In December 2021 MM advised Innovate that they had lost their CEO, CTO and CSO in a short period and on 27 January 2022 he advised them that FK has left the company.

*Disciplinary process*

- g. If it is established that conduct is the reason for dismissal the employer must have carried out an investigation that was reasonable in the circumstances; the employer must believe that the employee was guilty of the misconduct; and the employer must have reasonable grounds for that belief. The tribunal must not substitute their own subjective view of what they would have done but rather must determine whether the employer acted within a band of reasonable responses (*Graham v Secretary of State for Work and Pensions (Jobcentre Plus) 2012 EWCA Civ 903*).
- h. In determination of whether a dismissal is fair involves a consideration of equity and the substantial merits of the case.
- i. The focus is upon reasonableness of the employer's conduct and not injustice to the employee (*J Sainsburys pic v Hitt 2003 ICR 111; Tesco Store Ltd v SEATS 0040/19*)
- j. The Respondent did not carry out an investigation that was reasonable, did not believe that they were guilty of misconduct, and did not have reasonable grounds for that belief.

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*First Claimant - FK*

*Allegation 1*

- lk. Following the appointment of AF, the culture of the business changed and FK was side-lined and no longer respected. AF encouraged and condoned mutinous animosity amongst the engineers and created competition amongst the 1035 and 1041 projects. EM was aware of this conduct and failed to take action.

There was manipulation of the data on 1041 and AF failed to take action.

- i. FK was de facto CTO after AF's departure on 7 September and was therefore entitled to act on long held concerns about project 1041.
- m. FK in his complaint dated 17 September stated that he could not control himself and exploded. He has thereby accepted that his behaviour was inappropriate. He immediately apologised to ND who witnessed it. He believed GM and BM were telling him untruths to his face which explains his behaviour - it was not a fully enclosed shippable system.
- n. Neither FK nor GM were invited to a meeting to discuss or investigate their respective complaints. The Respondent accepted GM's grievance as a basis for suspending FK.
- o. Neither VH nor JS investigated FK's complaint of manipulation of 1041 build data. An independent review of the 1035/1041 project commenced before the disciplinary hearing and concluded that it was not market ready. FK's grievance could have been so reviewed. The culture and manipulation of data are linked and relevant to an assessment of his conduct. FK was not misleading but informing the board.
- p. EM's views on FK were communicated to DM.
- q. FK was CTO following AF's departure and was entitled to ask for parameters to be added to ND's comparison of the 1035 and 1041 projects which better met the customer requirements.
- r. Any alteration of findings of project in relation to project JN 1035 to mislead the board into the project's success could not have had a financial detriment because the project was neither complete nor shippable (it was being reported to the Board that both projects were shippable).



*Allegation 3-FK*

s. JS overturned this decision on appeal.

*Allegation 4- FK*

- t. The phone records fail to show the number that made the calls.
- u. It is contrary to the obligation of mutuality for him to be found guilty of misconduct where the Respondent have also breached the terms of the suspension (*McNeil iz Aberdeen City Council 2013 CSIH 102* - the contractual doctrine of mutuality of obligation is not excluded from the application of Section 95(1)(c)).

*Sanction - FK*

v. The data manipulation by GM and BS would explain or mitigate the loss of control on 17 September. It would explain or mitigate his request to ND for a full comparison of the projects. His behaviour was a response to the culture created by AF and condoned by EM. His behaviour was known to AF and EM and was unchecked and condoned. It is mitigation that the Respondent also breach the terms of suspension. The sanction would have a substantial effect upon him as Founder and on his substantial shareholding given the bad leaver provisions. The sanction was not therefore a reasonable response.

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Second G/a/manf— AB .- .....-.....-.....

*Allegation 1 & 3 - AB*

a. If the allegation of false reporting had been investigated it would have shown gross misconduct on part of GM. His presentation of 25 August 2021 and 2 September that it was a fully enclosed shippable system amounts to false reporting when it was not enclosed and not shippable. Further, GM's emails were derogatory of FK.

- b. AB was COO. The decision was within her remit and expertise. GM did not have qualifying service for unfair dismissal. She sought advice from an employment lawyer about whistleblowing and discrimination risk. Her conduct does not amount to misconduct.
- c. She did not act knowingly - she believed she had insurance cover.
- d. AB was not given fair notice of that allegation (which was not remedied on appeal) that she had dismissed GM for raising a grievance against her father FK which would have a huge impact on the business because he was one of the two engineers working on the 1041 project.

*Allegation 2 - AB*

- e. AB did not fail to deal GM's grievance appropriately. Grievances can be dealt with following termination. By 24 September Peninsula were aware of his grievance and dismissal. AB was suspended 9 days after she received GM's grievance.

*Allegation 4- AB*

- f. AB asked ND to support a project - she did not pressure ND to favour the project.
- g. ND was brought into a toxic environment and was unhappy.

*Sanction - AB*

- h. If the allegation of false reporting had been investigated it would have shown gross misconduct on part of GM which would have mitigated AB's conduct. The independent review of the 1035/1041 project could have been considered as part of the disciplinary process. Other engineers could have covered the project. Two of the three directors had lost confidence in GM. No claim was made by GM. The sanction would have a substantial effect upon her shareholding by virtue of the bad leaver provisions. The sanction was not therefore a reasonable response.

## Discussion and decision

### Unfair dismissal

*What was the reason for dismissal?*

219. From early 2021 engineers (including GM, SE, MM) had raised concerns about FK's behaviour with AF. FK was the Founder and CTO. FK's daughter was the COO responsible for HR. AF was trying to address this issue 'behind the scenes' in discussions with EM and also with AB. In May 2021 AF CEO resigned stating that he would have dismissed FK for his appalling behaviour but dismissing the Founder /CTO was not an option and therefore he had no alternative but to resign. Following discussion with Board (EM, AB and FK) AF was then persuaded to stay on. This was conditional upon a management restructure which included agreement that FK would move from CTO to CSO and would engage in a knowledge transfer allowing FK to retire in a few years.
220. Notwithstanding the restructure, the engineers continued to raise concerns about FK's behaviour with AF. By July AF was expressing concerns to AB and EM about FK's belligerent interrogative manner with the engineers and expressing the need for him to retire. However AB and EM considered that there was still considerable work for FK to do on the knowledge transfer. On 7 September AF resigned with immediate effect citing FK's behaviours towards the engineers and his refusal to handover technical control.
221. At a board meeting on 9 September the need to retain key staff was agreed by EM, AB and KF. On 10 September EM expressly identified those key staff as SE, GM and gi\_ particular. Following an incident on 47 September GM (and BS) submitted a complaint regarding FK's bullying of them which had further escalated since AF's departure. On 20 September BS was suspended by AB on allegations of gross misconduct. On 21 September GM was summarily dismissed by AB for gross misconduct without any disciplinary process. On 21 September FK's complaint was passed by AB to EM. By end September AB and FK had lost trust and confidence in EM and EM had lost trust and confidence in them.
222. EM and the investors considered the options of agreeing exit with notice or considering the issues by of formal investigations. Both options had significant

implications - the Claimants were entitled to 1 years notice; FK was the founder whose knowledge had not yet been transferred; the investigations would entail paid suspensions, consultants fees, disruption and uncertainty; the bad leaver provisions if triggered would materially reduce the Claimant's shareholding. The investors decided in favour of independent disciplinary investigations. This required the investors to take control of the Board by removing of FK and AB as Directors and suspending them on full pay.

223. Neither AB, FK nor EM envisaged that AB and FK would return. As the interim CEO TW recognised in discussions with senior staff in mid-October, the options in reality were either dismissing for gross misconduct or agreeing exit with notice. Which option would depend upon the outcome of the independent investigations.
224. Contrary to the Claimants' assertions, EM and AF did not engage in a conspiracy to remove FK (and AB by familial association). Following the events which started with AF's resignation, EM and the investors were entitled to decide whether to negotiate their exit with notice or whether to proceed with an independent investigation.
225. An independent HR consultant was appointed to conduct the investigations. A new director was appointed who held the disciplinary hearings. Another independent HR consultant was appointed to investigate and hear the appeals. Neither EM nor TW influenced the outcome of the investigation or the disciplinary and appeal outcomes which were wholly independent. The decision to dismiss them was not predetermined and the process was not a sham.
226. gy explained in detail the reason for his decision to dismiss FK which was his bullying behaviour towards MM, BS and GM, his pressure on ND to manipulate project data, and his contact with RB encouraging him to resign.
227. DM explained in detail the reason for his decision to dismiss AB which was she had decided to dismiss GM contrary to business interests because he had raised a grievance against FK, her father, she failed to progress GM and BS's grievance because it had been raised against her father, and that she pressured ND to manipulate project findings.

228. DM's explanations were balanced and measured, without material hesitation, and consistent with the other evidence. There was no evidence that DM had another unrelated reason in his mind when he made the decision to dismiss FK and separately AB. There was no evidence that DM was misled or manipulated by EM or TW. His belief in their misconduct was the genuine and operative reason for his decisions.
229. FK was dismissed by the Respondent by reason of his conduct. AB was dismissed by the Respondent by reason of her conduct. This is a potentially fair reason within the meaning of Section 98(1) of the ERA 1996.

*Was the dismissal fair having regard to Section 98(4) of the Employment Rights Act 1996?*

230. It falls to be determined in accordance with equity and the substantial merits of the case whether in the circumstances (including the size and administrative resources of the undertaking) the Respondent act reasonably in treating the reason as a sufficient reason for dismissing the Claimant.
231. The disciplinary process falls to be considered as a whole, having regard to the reasons for their dismissals. An independent HR consultant was appointed to conduct the investigations. Another independent HR consultant was appointed to investigate and hear the appeals. The investigations were conducted thoroughly and meticulously particularly on appeal. All materially relevant documentary evidence was reviewed and all materially relevant witnesses still employed were interviewed. Detailed investigation reports were provided setting out the relevant facts. There was no evidence either HR consultant was misled or manipulated by EM or TW.
232. FK submitted that his belief in false reporting of the 1041 project exculpated or mitigated his behaviour on 17 September and should therefore have been investigated. FK had been raising issues with the 1041 project at the weekly meetings since its inception in May 2021. FK asserted that he had been raising concerns with AF regarding data manipulation since June 2021 - this was not something he had just discovered. Furthermore AB asserted she had, with FK's assistance, "thoroughly investigated" the false reporting before

GM's dismissal. Her evidence folder was then provided to EM who reviewed it and concluded that there was no misconduct by GM.

233. The investigation of the allegations of misconduct by FK were reasonable in the circumstances. The investigation of the allegations of misconduct by AB were reasonable in the circumstances.
234. The allegations against FK and separately against AB were framed with sufficient precision particularly if regard is had to the first investigation reports. They had sufficient notice of the alleged misconduct to enable them to respond and any issues were remedied on appeal. AB submits that she had no notice that her motivation for dismissing GM was under consideration. The issue of her operating under a conflict of interest in handling the disciplinary allegations connected to her father was raised in the investigation report, was discussed at the disciplinary hearing, was referenced in the decision to dismiss and was reconsidered on appeal (that she had elected to dismiss GM to obstruct his grievance).
235. FK and AB were advised of and exercised their right to be accompanied. They were both warned of the risk of dismissal. They were called to disciplinary hearings conducted by a recently appointed Director who was impartial. They were given detailed reasons for their dismissal and afforded a right of appeal. Their appeals were conducted by an independent and impartial consultant.
236. Although the size and administrative resources of the Respondent were not significant, the procedure adopted (including recourse to independent consultants) was appropriate given that the allegations were made against the Founding Director and against the long serving COO and given the implications for their shareholdings if found guilty.
237. Considering each disciplinary process as a whole, and having regard to the reasons for their dismissals, the procedure process followed in respect of FK, and in respect of AB, fell within the range of reasonable responses open to an employer acting reasonably in the circumstances.
238. Having regard to the investigations there was a reasonable basis for DM's belief that FK had engaged in bullying behaviour towards MM, BS and GM, had pressured ND to manipulate project data, and had contacted RB

encouraging him to resign. Having conducted a thorough and meticulous investigation this belief was shared by JS on appeal.

239. Having regard to the investigations there was a reasonable basis for DM's belief that AB had dismissed GM contrary to business interests because he had raised a grievance against FK (her father), had failed to progress GM and BS's grievance because it had been raised against her father, and had pressured ND to manipulate project findings. Having conducted a thorough and meticulous investigation this belief was shared by JS on appeal.
240. Both DM and JM held genuine beliefs in FK's misconduct and separately in AB's misconduct based upon reasonable grounds following reasonable investigations.
241. Another employer acting reasonably in the circumstances might well have taken the decision to dismiss a long serving Founder/ Director and CTO who had engaged in bullying behaviour towards staff and had pressured a staff member to manipulate project findings. The decision to dismiss FK was a reasonable response in the circumstances.
242. FK submits that it was contrary to equity and mutuality of obligation for him to be found guilty of breaching the terms of the suspension where the Respondent was also in breach. There was justification for EM's failure to use the suspension wording (he was reassuring GM what steps had been taken to address conduct which he had complained about); FK was not aware of this failure when he contacted RB and encouraged his resignation, and there was no justification for that conduct.
243. Another employer acting reasonably in the circumstances might well have taken the decision to dismiss a long serving COO/ Director responsible for and experienced in HR matters who had taken the decision to summarily dismiss a short serving but key employee without due process motivated not by business interests but by a grievance raised against her father. The decision to dismiss AB was a reasonable response in the circumstances.
244. It was therefore determined in accordance with equity and the substantial merits of the case that the Respondent acted within the band of reasonable responses in treating the reasons given as a sufficient reason for dismissing

the Claimants in the circumstances. The Claimants were not therefore unfairly dismissed.

Contractual notice pay

245. The Claimants' contract expressly provided that the company may terminate without notice if the CEO/ Director "is guilty of any gross misconduct, in the reasonable opinion of the Board, incompatible with the CEO/ Director's status and authority in the Company including without limitation physically or verbally abusive behaviour...". On one view the reasonable opinion of the board may arguably be determinative given the express contract terms, but any event it was objectively determined that the Claimants did in fact engage in the relevant acts of misconduct.
246. FK had bullied staff (including shouting at and belittling them), he had pressured a staff member to manipulate the findings of her neutral project comparison, and he had breached the terms of his suspension encouraging a team member to resign. It was determined that FK had engaged in deliberate acts of misconduct which amounted to repudiation of his contract such that the Respondent was entitled to terminate his employment without notice or pay in lieu.
247. AB had summarily dismissed a key member of staff without due process, without contacting their HR provider (removing their insurance cover), without involving the other Director (EM), motivated by receipt of his complaint about her father rather than what was in the best interests of the business; had not progressed the complaint and had pressured a staff member to manipulate the findings of her neutral project comparison. It was determined that AB had engaged in deliberate acts of misconduct which amounted to repudiation of her contract such that the Respondent was entitled to terminate her employment without notice or pay in lieu.



Contractual Holiday pay

248. At termination FK had accrued but unused holidays of 45 (36 days for 2021 and 8.75 days for 2022). He received payment in respect of 38.25 holidays. He is therefore due 7 days holiday pay (rounded up from 6.5).

249. In the unlikely event that parties are unable to quantify the holiday pay entitlement a remedies hearing will require to be arranged.

**Employment Judge: M Sutherland**  
**Date of Judgment: 11 April 2023**  
**Entered in register: 12 April 2023**  
**and copied to parties**