



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4101932/2023**

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**Held in Glasgow by on Held in Glasgow 26, 27, 28, 29 and 30 June and (via CVP) on 28 September 2023**

**Employment Judge Rory McPherson**

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**Mr Iain Miller**

**Claimant  
Represented by:  
Mr A Crammond -  
Counsel &  
Ms L Braunholtz -  
Trainee Solicitor**

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**MacDonald Resorts Ltd**

**Respondent  
Represented by:  
Ms A Stobart -  
Counsel &  
Ms R Ward -  
Solicitor**

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

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The judgment of the Employment Tribunal is that the claimant's claim for unfair dismissal does not succeed and is dismissed.

### **REASONS**

#### **Introduction**

#### **Preliminary Procedure**

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1. The claimant presented his ET1 on 3 March 2023 following referral to ACAS Early Conciliation and issue of certificate.

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2. ET3 was received by the Tribunal 4 April 2023 giving notice of the respondent's position. In summary, the respondent admitted the claimant was employed as Managing Director – Aviemore until dismissal with immediate effect on 6 December 2022 asserting that he was dismissed for a fair reason namely conduct and capability, the respondent following a full and fair procedure prior to same, or in the alternative the claimant was dismissed for some other substantial reason such as a to justify the

dismissal of an employee holding the position held by breaching express contractual obligations under (set out below as) the June 2019 Agreement, the claimant so eroded trust and confidence in him as to make him continuing in his senior role untenable and the dismissal was fair.

- 5 3. The ET3 gave notice in the paper apart, over 26 paragraphs, of the respondent's position. The ET3 did not give notice that the respondent would argue that they would have dismissed in any event for reasons connected to a letter dated 10 August 2022 from Watch Commander MacNaughton Scottish Fire and Rescue Service which was issued to the  
10 the respondent's then Manager and Duty Holder and copied to Hugh Cooper the respondent's Development Manager, the respondent's Maintenance Manager and the claimant (the SFRS August 2022 Notice letter).
4. Parties were notified of this Final Hearing by Tribunal Letter 20 April 2023 which described that the 5 days had been set aside for full disposal,  
15 including remedy if appropriate, and set out in paragraph 3 "*You are responsible for making sure all the witnesses you want to call can attend the hearing and know the place, date and time of the hearing*" and at paragraph 4 "*You should bring 3 copies together with the originals (i.e., 4 sets of documents in total) of any document which you consider is relevant to your case and which you wish the Employment Judge to take into  
20 account*". Paragraph 5 set out that "*Where possible, it is helpful if parties liaise to provide a joint set of documents which includes both sides' documents.*"
5. At the outset, in addition to a Hearing Bundle (which extended to 422  
25 pages) provided to the Tribunal in accordance with the Tribunal Letter of 20 April 2023 and within a Supplementary Bundle (which continued the page numbering from 423 to 441) the respondent sought to introduce the SFRS August 2022 Letter addressed to a named now former respondent General Manager identified as the Duty Holder, who had subsequently left  
30 the respondent's employment.
6. The respondent argued that the SFRS August 2022 letter was relevant, the claimant at the time had been the Managing Director, it raised serious matters was cc'd to other individuals including the claimant and the claimant would have an opportunity to consider his position during the

hearing. The respondent argued that the claimant would have, in any event, been dismissed because of the matters set out in the SFRS August 2022 letter, in effect, when that came to light.

7. Objections for the claimant included the SFRS August 2022 letter not having previously provided as directed for any Joint Bundle nor previously disclosed within the respondent Supplementary Bundle.
8. For the claimant, an objection was maintained including on the basis that the document had only been disclosed on the Sunday preceding (by email at 9.58 a.m. 25 June 2023) the hearing, the claimant would not have the opportunity to consider his position and on the basis that it was not relevant. The SFRS August 2022 letter was not foreshadowed in pleadings nor was any argument that the claimant would have been dismissed in any event for matters therein and thus was not relevant.
9. The document was admitted under reservation in terms of Rule 45 of the Employment Tribunal Rules of Procedure it being intimated that parties would have the opportunity to further address the Tribunal at the conclusion of the hearing.
10. The Tribunal heard evidence over the 5 days allocated days from Ms Natalya Macholla, Mr Jim Davidson and Mr Hugh Gillies who are all employees of the respondent and the claimant himself.
11. Following the evidential element of the hearing on 30 June written submissions were provided as directed after the exchange of draft submissions; for the respondent this included written submission together with an Appendix broadly of proposed findings in fact prepared for the respondent (and which for the hearing on 28 September 2023 the respondent relied upon a version which included revisions from claimant), with the claimant providing written submission, an outline Chronology (which was not agreed) and revised version of respondent Appendix and which were all supplemented by oral submissions on 28 September 2023.

### 30 **Unfair Dismissal**

12. The claim is one of Unfair Dismissal, the respondent admits the dismissal and pleads that the claimant was dismissed for a fair reason namely

conduct and capability further, or in the alternative, the claimant was dismissed for some other substantial reason. The issues for the Tribunal include:

- 5 a. What was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a conduct dismissal.
- 10 b. Was the dismissal fair or unfair in accordance with Section 98(4) ERA? Was the decision to dismiss a sanction within the "*band of reasonable responses*" for a reasonable employer?
- 15 c. If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 (ERA 1996); and, if so, was the dismissal fair or unfair in accordance with Section 98(4) ERA 1996, and, in particular, did the respondent act within the "*band of reasonable responses*"?
- 20 d. Was the principal reason for the claimant's dismissal a potentially fair reason in accordance with section 98(1) (b) of the Employment Rights Act 1996 (ERA 1996)? It was asserted (but disputed by the claimant) by the respondent that it was a reason relating to the claimant's conduct and capability, or in the alternative for some other substantial reason of a kind such as to justify dismissal (SOSR).
- 25 e. If so, did the respondent act reasonably in treating that reason as sufficient for dismissing the claimant within the meaning of section 98(4) of ERA 1996?
- 30 f. If not, what is the appropriate remedy, including having regard to the claimant's assertion that the dismissal was not for conduct, capability or for SOSR, the extent to which the Tribunal considers there were any procedural defects in the process followed by the respondent, and the dismissal was procedurally unfair would the claimant have been dismissed in any event? Whether it would be just and equitable for there to be a reduction to compensation to reflect any blameworthy conduct on the part of the claimant contributing to dismissal. Whether

there should be an increase in compensation to reflect an unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievances?

### Remedy for unfair dismissal

- 5 13. If the claimant was unfairly dismissed and the remedy is compensation:
- a. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed? **Polkey v AE Dayton Services Ltd** [1987] UKHL 8 (**Polkey**).
  - 10 b. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to Section 122(2) ERA 1996; and if so to what extent?
  - 15 c. Did the claimant, by blameworthy or culpable actions, cause or contribute to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to Section 123(6) ERA 1996?
14. If the claimant was unfairly dismissed, issues in relation to remedy would include, what loss is attributable, did the claimant minimise her loss; whether it be just and equitable to reduce the amount of the claimant's award because of any blameworthy or culpable conduct before the dismissal, under Section 122(2) and 123(6) ERA 1996, and if so, to what extent?
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### 25 Findings in fact

15. The Respondents operate a group of hotels and self-catering resorts across the UK and Spain and employ over 2,000 members of staff.
16. Prior to the claimant's engagement with the respondent in Aviemore, he was employed with various other hotel companies and had extensive experience within the hospitality industry.
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17. On **Thursday 18 July 2019**, the claimant was appointed as **Managing Director- Aviemore**. His net monthly salary at termination was £5,977.19 the respondent's monthly pension contribution was 10%. The Aviemore Resort consists of 4 hotels (Aviemore Hotel Highland Hotel, Morlich Hotel and the Strathspey Hotel) two resorts (Lochanhully Resort and Spey Valley Resort (also known as Dalfaber) and woodland lodges. The resort also includes a conference centre for 600 guests, function rooms for 1,100 guests and retail units. He was the most senior person within the respondent organisation based wholly on this site. Prior to his appointment by the respondent, he had extensive employment experience working within the hotel and hospitality sector.
18. At the commencement of his employment the claimant was provided with a Contract of Employment (The June 2019 Agreement, **page 69**).
19. The June 2019 Agreement did not contain a job description. The claimant was operationally responsible for the day-to-day running of the Aviemore resort a resort, working a 5-day week within the Aviemore resort. In the period of his employment, he reported to 6 different line managers with the last being Ms Natalya Macholla who succeeded Mr Jason Ridout.
20. The June 2019 Agreement set out commencing page one:
- Powers and Duties:***
- "The Executive shall in a competent manner to the best of his ability, perform and exercise the powers which may from time to time may reasonably be assigned to him or vested in him by the Employer /the Board and shall devote the whole of his time, ability and attention to his duties under this agreement during normal office hours and at other such times as may be reasonably required for the proper performance of his duties. The Executive shall use his utmost endeavours to promote the interests of the Employer.*
- The Executive shall at all times keep the Employer promptly and fully informed (in writing if so requested) of his conduct of the business or affairs of the Employer and provide such explanations of his conduct as the Employer may reasonably require.*

*The Executive shall at all times and in all respects faithfully competently and diligently perform such duties and exercise such powers, authorities and discretions as are consistent with the Executive's position as Managing Director – Aviemore as may from time to time be vested in, or*

5 *assigned or delegated to, him by the Employer's Board of Directors.*

..

*The Executive shall at all times use his best endeavours to promote develop and protect the business interests and reputation of the Employer and any Group Companies for which he is required to perform duties.”*

- 10 21. The June 2019 Agreement under Termination (termination with notice provisions) set out:

*Subject to this clause, the prior written notice required from the Executive or the Employer to terminate the employment shall be as follows:*

- *12 weeks prior written notice*

15 *The Employer reserves the right in its sole and absolute discretion to terminate employment forthwith at any time and with immediate effect by notifying the executive that it is doing so and that it will make a payment in lieu of notice. If the Employer exercises its right to terminate pursuant to this clause, the payment in lieu of notice will be paid as part of the next*

20 *available payroll run and will consist of basic salary and benefits which shall be valued at the cost to the employer or providing such benefits for all or any unexpired part of the notice. For the avoidance of doubt, any payment in lieu made pursuant to this clause shall not include any element in relation to:*

25 *any bonus....*

22. The June 2019 Agreement under Termination further set out (termination without notice provisions):

*The Employment may be terminated immediately without notice or payment in lieu of notice where the Executive:*

- 30
- *is guilty of gross misconduct which includes, but is not limited to dishonesty, fraud, theft, being under the influence of alcohol, drugs*

*at work, causing actual or threatening physical harm or causing damage to Company property.*

...

- 5 • *commits a material or repeated breach or non-observance of the Executive's duties or any provisions of this agreement or fails to observe the lawful directions of the Employer.*
- *fails to reach performance requirements reasonably set by the Employer after receiving two written warnings from the employer regarding the Executive's performance.*
- 10 • *acts in a manner which in the opinion of the Employer, brings the employer into disrepute or otherwise prejudices or is considered likely to prejudice the reputation of the Employer.*
- *in the reasonable opinion of the Employer is guilty of any serious negligence in connection with or affecting the business or affairs of*  
15 *the employer”*

23. Disciplinary and Dismissal procedures were set out in the Respondent's Employee Handbook which was available on the respondent's intranet although they were non-contractual.

24. The Employee Handbook set out in respect of Company Rules

- 20 13.2.9 *You are required to take all necessary steps to safeguard the Company's public image and preserve positive relationships with its customers. You are at all times expected to conduct yourself in a professional, courteous, friendly and businesslike manner consistent with the style*  
25 *and image of the Company”.*

25. The Employee Handbook set out in respect of Disciplinary Procedures (Purpose):

#### **14.1 Purpose**

30 *The primary objective of the disciplinary procedure is to ensure that all cases of discipline are dealt with fairly and consistently and where there*



*has been a breach of discipline to encourage an improvement in individual conduct performance. Management are under a duty to establish standards of discipline; you are entitled to expect fair, just and consistent treatment.*

5 *This procedure does not form part of your contract of employment it may be varied by the company from time to time.*

26. The Employee Handbook further set out in respect of Disciplinary Procedures (Formal Procedure)

### **14.3 Formal Procedure**

10 *If your manager decides it is necessary to use the formal disciplinary procedures, the following process will be followed:*

14.3.1 *Before a disciplinary hearing is arranged any necessary investigation will be carried out to establish the facts of the case. In some cases, you may be required to attend an investigation meeting. You are entitled to be accompanied at this meeting by a fellow employee of your choice or by a trade union official.*

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*The Company may decide at any stage of the formal disciplinary procedure that it is necessary to suspend you in full pay. This will be for as short a period as possible in the circumstances and will be kept under review. Suspension is not considered to be a disciplinary sanction.*

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14.3.2. *Following the investigation the appropriate manager will write to you, either to confirm that no further action is to be taken or to invite you to disciplinary hearing. You will be given at least two working days' notice of the hearing. Where appropriate copies of written evidence collected during the investigation process will be provided to you in advance of the disciplinary hearing. If you wish to call any witnesses at the hearing you must inform the manager in advance of the hearing.*

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30

14.3.3 *You are entitled the company that the disciplinary hearing by a fellow employee of your choice, or by a trade union official. The person who accompanies you will be permitted to address the meeting and confer with you but will not be entitled to answer questions on your behalf.*

14.3.4 *Wherever possible the disciplinary hearing will not be conducted by the person who carried out the investigation. At the hearing, you will be given the opportunity to set out your case and to respond to any allegations that have been made. Where appropriate, you will be given a reasonable opportunity to present evidence and call witnesses you have notified to the disciplining manager in advance of the hearing.*

14.3.5 *The manager conducting the hearing will consider all the evidence and decide what action, if any, is appropriate. You will be notified of the decision in writing and after the hearing.*

14.3.6 *If you're unhappy with the outcome of the hearing, you are entitled to an appeal the decision*

#### **14.4 Appeal Procedure**

14.4.1 *You have the right to appeal any disciplinary action taken against you.*

14.4.2. *If you wish to appeal against any disciplinary action you should do so in writing to the person identified in the disciplinary decision letter, setting out the grounds of appeal by no later than the end of the fifth working day after the disciplinary decision was notified to you in writing. The first of these five working days is the deal in which you received written confirmation of the disciplinary decision.*

14.4.3 *Appeals will be heard by an appropriate member of management. This will be someone other than the manager who conducted the disciplinary hearing.*

14.4.4 *An appeal hearing will be organised and held as quickly as possible. You will be entitled to attend the appeal hearing and given and will be given an opportunity to state your case.*

5 14.4.5 *You are entitled to be accompanied by a fellow employee or a trade union official at the appeal hearing.*

14.4.6. *In the event o of any new evidence being produced, which was not available at the original disciplinary hearing, an adjournment and further investigation may be necessary.*

10 14.3.6 *The findings of the appeal hearing will be notified to you, in writing, as soon as possible after the hearing. The decision of the appeal hearing is final.*

#### **14.5 Sanctions**

*The disciplinary action will be determined by the severity of the offence or the performance issues.*

15 14.5.1 **Verbal Warning**

*If your conduct or performance is unsatisfactory you may receive a written warning...*

14.5.2. **Written Warning**

20 *If you fancy sufficiently serious or there is no improvement in standards following a verbal warning, or if a further offence occurs a written warning will normally be issued...*

14.5.3 **Final Written Warning**

25 *If the offence is sufficiently serious or there is no improvement in standards following a written warning, or if a further offence occurs, a final written warning will be issued. A further act of misconduct or a failure to improve your performance may result in dismissal or action short of dismissal....*

14.5.4 **Dismissal or action short of dismissal**

*If your conduct is repeated or performance fails to improve, you may suffer demotion, disciplinary transfer, loss of seniority (depending on your contract) or dismissal.*

#### **14.6 Gross Misconduct**

5                    *Where there is an allegation of gross misconduct you will not normally be permitted to continue working and you will be suspended on full pay. This will be for as short a period as possible in the circumstances and will be kept under review. Suspension is not considered to be a disciplinary sanction.*

10    27.    It further set out a non-exhaustive list of the type of conduct normally regarded as amounting to gross misconduct which normally merited dismissal for a first offence.

28.    The Company Handbook provided in relation to **Commercial and Legal Effects of Email**

15                    *21.3 E-mail is a vital business tool, but an informal means of communication, and should be used with great care and discipline. Employees should always consider if an e-mail is the appropriate medium for a communication. Messages sent on the e-mail system should be written as professionally as a letter or fax. Messages*  
20                    *should be concise and directed only to the relevant individuals...*

*You must not send emails which make representations, contractual communication or any other form of statement, concerning the Company unless you have specific authority from the Company to do so.*

25    29.    On **Wednesday 13 November 2019** the respondent issued written notice to the claimant (and others) proposing varying the June 2019 Agreement increasing the contractual notice period from **12 weeks** to **24 weeks**. This variation to the June 2019 Agreement came into effect on **Monday 18 November 2019** after the claimant signed acceptance of same. The  
30                    company had decided to so vary for commercial reasons around a possible commercial sale.

30. On **Tuesday 12 May 2020**, reflective of the respondent's challenges around the commercial impact of the COVID pandemic the respondent, via the Deputy Chairman, there not being a separate HR department operating across the company, issued written confirmation expressing thanks for its employees such as the claimant who had agreed to defer part of their salary confirming that any salary which has been, or which may be deferred, shall be paid in full.
31. On **Friday 3 June 2022** Mr MacDonald, founder of the respondent business attended the Dalfaber Resort within Aviemore Resort, and which consists of around 96 self-catering lodges a restaurant and pool bar.
32. On **Saturday 4 June 2022** the claimant was telephoned by Mr McDonald (**the 4 June 2022 telephone call**) and the claimant recorded a typed note (it being accurately recorded that it was the late Queen's Jubilee weekend although the month was inaccurately recorded) at or around that time, the claimant felt that he was being aggressively spoken to about criticisms of the operation at the **Dalfaber Resort** including Mr MacDonald describing the resort as an absolute disaster; he hated the new menu; further having identified (from an invoice) that fish, which he was told was delivered on Friday, had been delivered on Monday; absence of new potatoes and broccoli on the menu; describing that the claimant had let the place go, contrasting Aviemore which was very busy. In response to the comments, the claimant asked if Mr MacDonald wanted his resignation, to which Mr MacDonald asked why the claimant would say that. Upon the claimant repeating some of what Mr MacDonald said (being criticisms of Dalfaber Resort), Mr MacDonald told him not to be defeatist, a reference to not being defeatist in facing operational challenges as the Managing Director.
33. On **Monday 13 June 2022** Ms Heather Russell Secretary of the Board issued an email to Board members Mr Fraser, Mr Smith, Ian Gillies and Corporate Finance Manager Jim Davidson, together with the respondent's Deputy Chief Financial Officer and Mr Hugh Gilles; a 4-page dictated note (dictated Tuesday 7 June 2023) from the founder Mr MacDonald setting out his experience of attending the Dalfaber Resort (The June 2022 Dalfaber Note) on the evening of Friday 3 June 2022, and which set out his unhappiness at the Reception/Foyer, Toilets, Restaurant, Marketing

and General comments with an addendum added 8 June which make criticism of marketing locally, describing that the business can't go anywhere until the marketing and the claimant's attitude towards marketing is improved and described that he had arranged for the claimant to be introduced to the person who does the marketing for Drumossie. The June 2022 Dalfaber Note was not emailed to Simon Blagden, the claimant's then-line manager, nor either Jason Ridout who became the claimant claimant's line manager, nor the claimant.

34. On **Wednesday 10 August 2022** outcome of the Fire Safety Audit on **Wednesday 3 and Thursday 4 August 2022** in respect of the Strathspey Hotel (which had been closed for around 3 years but was due to reopen as part of a Government refugee temporary housing contract) was issued to the respondent's then General Manager and Duty Holder by Watch Commander MacNaughton Scottish Fire and Rescue Service and copied to Hugh Cooper the respondent's Development Manager, the respondent's Maintenance Manager and the claimant (**the SFRS August 2022 letter**).

35. The SFRS August letter described that "*the existing fire and safety arrangements, as audited on that date, are not considered appropriate*" and set out a provided action plan should be completed and returned to SFRS within 28 of receipt (so by around 7 September 2022).

36. The SFRS August 2022 Notice letter was copied to the respondent's Property Development Director, the respondent's Maintenance Manager and the claimant.

37. The SFRS August 2022 Notice letter set out over 4 pages that in order to comply with Fire (Scotland) Act 2005 (Part 3) and Fire Safety (Scotland) Regulations 2005, effect should be given without delay to; Fire Safety Risk Assessment, Managing Fire Safety, Measures to Prevent the Spread of Fire and Smoke, Measures for Prevent the Risk of Fire, Fire Warning and Detection System, Means of Escape, and Staff Training. The SFRS August 2022 Notice letter described that the risk control measures set out should not be regarded as the only options for achieving the benchmark standards, other fire safety risk assessment methods of fire safety measures which achieve the same may be considered.

38. The claimant received the SFRS August 2022 Notice letter by email on Wednesday 10 August 2022, having spoken to his then-line manager Simon Blagden when the audit was carried out, he told Mr Blagden the details of the SFRS August 2022 Notice letter and what happened. He did not take further steps following the departure of Mr Blagden 5 days later.
39. On or about **Monday 15 August 2022** the claimant's then-line manager Mr Blagden left the respondent's business.
40. The SFRS August 2022 Notice was not passed to the respondent Board in August 2022 and did not otherwise come to the attention of the Ms Macholla until January 2023.
41. On **Saturday 20 August 2022** the Strathspey Hotel re-opened to provided accommodation as part of a Government refugee temporary housing contract.
42. On **Monday 22 August 2022** the claimant attended a respondent **Hospitality Meeting** at 2 pm which primarily focussed on Dalfaber Resort. Also in attendance were Board members Mr Smith and Mr Fraser together with Mr Jim Davidson Corporate Finance Manager, Jason Ridout and Hugh Gillies. Minutes were created, it is not suggested that the minutes were inaccurate. The claimant at this meeting was asked by Mr Smith to explain matters around the founder Mr MacDonald's visit to Dalfaber on Friday 19 August 2022. The claimant described various aspects including indicating that he would discipline a driver and investigate aspects around the fish at the restaurant. At this meeting, Mr Smith and Mr Fraser expressed concern about the selection of sandwiches presented for lunch during a meeting with Knight Frank. Further, the claimant was requested by Mr Smith to get a proper manager for Dalfaber to take responsibility for the resort. Mr Hugh Gillies issued no requests or directions that the claimant should take any actions.
43. On **Tuesday 23 August 2022**, a further general **Hospitality Board** meeting place from 8 am, this was general in nature with a figures review from the Monday meeting including from Aviemore Resort and which also included a report on Food, Drinks and Restaurants including a presentation on breakfasts and afternoon teas. Mr Ridout attended and

spoke to matters including Revinate and feedback. Revinate is a system whereby, when a hotel provides a response to an online review comment on an on-line booking system within 48 hours, the online score is improved. At the conclusion of the agenda, it was noted that there would be two meetings per month going forward, an Interim meeting in the middle of the months and the usual Hospitality Board meeting at the end of each month.

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44. In or around **August 2022** the respondent appointed Jason Ridout, their overall Chief Commercial Officer as temporary Chief Executive of Aviemore with a remit to provide strategic direction for the Aviemore resort and improve the performance of the resort. Mr Ridout was also the respondent's Chief Commercial Officer. Mr Ridout who lived in the south of England was not principally based on site. The claimant reported to Mr Ridout from that point, he was in effect the fifth successive person the claimant reported to.

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45. On **Friday 1 September 2022** Jason Ridout acting as the claimant's line manager prepared an email for issue to the claimant (the draft Mr Ridout email of 1 September 2022) which was intended to set out that as the respondent was nearing the end of the financial year, that Mr Ridout:

15

*"wanted to outline some key areas of focus for you and your team moving into FY23.*

20

*Firstly I would like to thank you for everything you've done this year you are on track to deliver a record year I'm excited about the next year as I believe with the right focus you're in a good place to break all records and deliver over 3.5 M HOP*

25

*Since you have been in place the resort has moved forward significantly. However there are some frustrations that need to be addressed, rectified and procedures put in place to ensure that issues do not reoccur.*

*Main issues over the summer of 2022:*

- *Re-opening of the Strathspey Hotel*

30

- *The funds required for the Strathspey hotel reopening was approved back in February 2022. The hotel did not end up opening until mid-August and potentially cost us both sales*



and profit over the summer. Whilst I fully understand the reopening was a huge task I believe this could have been managed more efficiently by yourself. I am also of the belief that we have potentially damaged our relationship with the fire officer.

5

- Moving forward I'd like to see a more structured approach to major projects with clear timelines and responsibilities.

- *Spey Valley Resort*

- The restaurant and bar operation is a constant frustration and this continued to law run at a loss for the year. Mr McDonald has experienced multiple poor visits which when you analyse the detail I believe could have been avoided with the right leadership and involvement from yourself.

10

- It is crucial you appoint the right GM to lead the Spey Valley Resort and deliver a profitable business that we can be proud of.

15

- *The Basics*

- Aviemore is clearly a large operation however basic food and service standards should be in place and should not be compromised. i.e. At this stage we should not be struggling to deliver basic dishes like sandwiches and business lunches. The use of agency will be making this situation worse and costing us on the bottom line.

20

- Moving forward it is vital you implement clear specs and brand standards for all dishes. It is also vital the reliance on agency staff is stopped.

25

- *Lochanhully*

- Having no food and beverage offering is a disappointment to all customers that stay at the resort and clearly a missed financial opportunity.

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- *It is crucial you find and appoint a partner to run the food and beverage unit, without such an operation in place the resort lacks atmosphere and will continue to disappoint.*

5                   *We are close to completing the refinancing of the business which will give us much needed funds to begin a strategic investment programme.*

*Myself and the board believe Aviemore has huge unrealized potential, it is vital these issues are put to bed so you and I can work together to move Aviemore to the next level.*

10                   *Thank you again for your support and hard work.”*

46.   The claimant was made aware of the matters raised within the draft Mr Ridout email of 1 September 2022, and while it thanked the claimant it described areas of criticism.

15   47.   Also, on **Thursday 1 September 2022 at 4.22 pm**, Mr Ridout issued a brief email to the claimant *“Hi Iain Please can I have a breakdown of all agency and why we need them for this week and next? Costs as well please. We have to find a solution to help reduce the reliance. Thanks J”*, to which the claimant responded at 4.59 pm *“Sorry on a call. I don’t know what you want me to say, we don’t have enough staff and we are trying hard to recruit and have been since the start of the year. Recruiting is a constant, it never had been off the agenda, for almost every manager recruitment is their biggest issue”* and described that they were on Indeed job site, they encouraged staff to refer a friend and paid to advertise on Caterer. Mr Ridout responded on Friday 2 September 2022 at 9.26 a.m.  
20                   indicating that understood how difficult it was, he was not asking to stop using agency immediately. However, he wished to see a robust plan setting out 9 suggestions in bullet points concluding *“Let’s set goal to stop agency use by a certain date. Happy to help as always, nothing will change unless we have a clear plan.”*

30   48.   While weekly staff rotas were created by a General Manager who reported to the claimant, the claimant as Managing Director would approve same. Staff rotas (manning) impacted on payroll which impacted on cost forecasting which in turn impacted on the respondent's operation.

49. On **Monday 3 October 2022** after an initial approach from the founder Mr McDonald followed by a subsequent independent interview process with members of the respondent's Board, Ms Natalya Macholla was appointed by the Board as Chief Executive Aviemore, effectively as successor to Mr Ridout's temporary role. Ms Macholla was directed by the respondent to provide strategic direction to the Aviemore Resort and further improve its performance. Ms Macholla was not based in Aviemore and planned to attend 2 to 3 days a week in an initial period and thereafter 2 to 3 days a month. She was appointed by the Board following an interview process reflective of what the Board considered to be her financial skills and having described her responses to past situations. Ms Macholla was also tasked with the respondent's group functions namely managing Central Reservations and the respondent's Facilities Management. The first week of the Ms Macholla's appointment was spent on induction training, the second week principally with the respondent Board, although she attended the Aviemore Resort on **Friday 14 October 2022** of that week to meet colleagues including the claimant she commenced on-site for the third week, that is Monday 17 October 2022. There was no direction given to Ms Macholla by the Board or any other person regarding the claimant with the focus from the Board being on improving the financial position of the respondent and Ms Macholla's focus on the strategic direction following on from Mr Ridout.
50. The claimant was not involved in Ms Macholla's appointment. Her background was a chartered accountant and prior to her appointment had been employed as Managing Director of Customer Services with a large social housing provider and prior to that was Deputy Chief Executive with Glasgow based social housing provider and having had a previous senior role with another social housing provider, the claimant understood Ms Macholla did not have any experience of working within the hotel or hospitality sector. While her father was the founder Mr Macdonald's barber, the operative reason for the appointment of Ms Macholla by the respondent Board was that the respondent had commercial concerns relating to the performance of the Aviemore resort, as described in the draft Mr Ridout email of 1 September 2022 of which the claimant was aware,

and which had resulted in the temporary appointment of Mr Ridout and thereafter the appointment of Ms Macholla.

51. On **Wednesday 12 October 2022**, the claimant was informed by Jason Ridout, the claimant's then-line manager who was also the respondent's Chief Commercial Officer, that Ms Macholla had been appointed as CEO of Aviemore.
52. From **Friday 16 October 2022** to **Sunday 22 October 2022** a film crew from The Forge Entertainment (Debutante) Ltd (The October Film Crew) who had stayed on previous occasions, stayed at the Aviemore Resort. There were a number of complaints from this period of stay including that the respondent failed to service (that is change towels and linen) 85 rooms which had taken by the October Film Crew over a period of 5 days and a laptop was reported stolen from one of the rooms.
53. On **Monday 17 October 2022** at 10.29 am the claimant, following Ms Macholla attending on-site on Friday 14 October 2022, emailed Ms Macholla "*Morning Natalya, It was good to meet you on Friday. Could I ask that you confirm the responsibilities of my role as Managing Director going forward and also it would be helpful to know what you will be responsible for as I think it is important that I and the team are clear. Ideally can I have before I go on holiday on Thursday. Thanks.*" The claimant did not suggest that he considered that he had strategic responsibility for the Aviemore resort including its growth, nor did he reference any discussion with the founder Donald MacDonald having suggested to the claimant that the claimant either had such responsibility or otherwise had extended such responsibility to the claimant.
54. On **Tuesday 18 October 2022** at **8.22 am** Ms Macholla responded "*Good Morning Iain. Thanks for your email. As per our discussions on Friday your role and responsibilities have not changed, and you will remain accountable for all aspects of the managing director role. My appointment will aim to provide strategic and operational support as we continue to grow and develop our Aviemore business. I will also be responsible and reportable to the board on all aspects of our Aviemore business as noted during our meeting on Friday I am really looking forward to working with you and the team I trust this clarifies the position... Natalya Macholla, Chief*

*Executive, MacDonald Aviemore Resort.*” Ms Macholla confirmed that the claimant remained accountable for all aspects of his Managing Director role while she provided strategic and operational support to the Aviemore Resort. Unlike the claimant who was based at the resort, Ms Macholla was not on site each working day as she had other responsibilities within the respondent’s business. The claimant was not under any form of investigation by the Board, either via Ms. Macholla or otherwise throughout the summer and thereafter.

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55. From **Thursday 20 October 2022** to **Sunday 30 October 2022** the claimant was on annual leave

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56. On **Friday 28 October 2022** the respondent’s General Manager, who reported directly to the claimant, issued a detailed email apology and explanation to **the October Film Crew**, copying in Ms Macholla (although not the claimant as he was at that time on holiday) (**the 28 October 2022 detailed email apology**). The 28 October 2022 detailed email apology described the outcome of an investigation which in relation to Check-In noted a “*clear breakdown in communication from our side with yourselves which resulted in some errors on the 1<sup>st</sup> day of arrival*”; in relation to Card Issues “*My sincere apologies that you felt the team were unhelpful in this matter as they would have been unaware of the faulty machine until recently*”; in relation to VIP Guests “*These guests were clearly marked and apologies they had to move rooms*”; in relation to Laptop “*We are close to finalising our investigation in this regards and working closely with the Police in this matter and will revert back in due course*”; in relation to Bedroom Servicing “*My sincere apologies that over the whole of the 5 days none of your rooms had been serviced and as a 4 star resort this is a minimum of serving we should be providing. Staff has been challenging within housekeeping however this is no excuse that a change of linen, towel and a general clean should have happened throughout your stay. There was also a breakdown in communication from the front desk team to the housekeeping team once this was highlighted which has been addressed*” and concluded “*There was a lack of care and attention from the team in regard to the group which as a resort were delighted to host and please accept my sincere apologies in this regard. I have copied in Natalya Macholla who is our new Chief Exec for Aviemore who is fully*

*involved in regards to the issues you have faced, and she will be delighted to have a call with yourself along with” the Director Sales “on how going forward we improve our reputation with yourselves and for you to regain faith back to the MacDonald Aviemore Resort”.*

- 5 57. On or around **Thursday 27 October 2022** a booked family dinner for a group known as **the Campbell Family dinner** took place within the Conference Centre part of the resort. It was an 80<sup>th</sup> birthday celebration, the respondent’s Director of Sales passed on her then colleague’s report to Ms Macholla on Thursday 28 October 2022, the claimant being on holiday, that the Dinner was due to start at 5 pm with the bar having been requested to open from 3 pm however although staff had been advised at 10.30 the function required to be set by 2 pm no preparation had been carried by 12 noon following a football dinner the preceding night, with difficulties including limited cutler, bar required cleaning and setting was still ongoing at 4.30 pm.
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58. Subsequently poor feedback was provided directly to the respondent founder Mr MacDonald. The claimant was directed to contact the family to offer an apology, with contact detail being provided by Ms Russell Secretary to the Board. The claimant unsuccessfully attempted to do so but did not follow up, in particular, the claimant did not follow up with Ms Russell, to press for contact alternate details and explain that contact had not been successfully made.
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59. On **Monday 31 October 2022** at **4.35 pm** the respondent’s Director of Sales asked the claimant and Ms Macholla to support and approve payment for the October Film Crew to reflect their complaints. Ms Macholla asked the claimant to approve the same in response.
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60. On **Friday 4 November 2022:**
- a. At **10.19 am** Ms Macholla emailed the claimant, forwarding on email chain starting Saturday 22 October which included the 28 October 2022 detailed email apology, and concluded on Thursday 3 November with email from Production Co-ordinator of the **October Film Crew** which, in relation to what was described as the stolen laptop, enquired on “*the next step to resolve this matter*”. Ms
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5 Macholla asked for a copy of the Police report, together with a full detailed report on the investigation that the General Manager was carrying out (with another individual), for the claimant to confirm if the Hotel Proprietors Act document was shown at the reception in each of the respondent hotels, and further asked *“Can I have these documents before the end of today”*.

10 b. At **1.35 pm** claimant confirmed to Ms Macholla by email that the Act was on display; that colleagues did not have the Police Report and that it *“is very unusual”* for the Police to come back to the hotel and not the complainant, indicating that the Police had not interviewed the team members, and provided a time-line including indicating that the guest reported the laptop loss 3 days after she last saw it and concluded that he would update further when he heard.

15 c. At **2.02 pm** Ms Macholla thanked the claimant for the update, asked that the customer be updated, and asked where they were with their own internal investigation/had this been completed. She further asked to be kept updated when they hear back from the Police.

20 d. At **2.20 pm** the claimant responded *“Internal, Yes”* and described that it was reading lock and speaking to team members, describing the bottom line is they don't know what a guest brings into the hotel and *“I've seen little evidence of theft here or previously in the area, much more common is guest misplacing things.... We will call the client.”*

25 e. At **4.16 pm** Ms Macholla emailed the claimant, describing that she understood the internal process, but asked whether an internal investigation had been completed and drawn a conclusion. Ms. Macholla noted that as the rooms were not serviced there should have been no staff in the rooms. Ms. Macholla further set out that she understood from the General Manager that there were two staff  
30 members in the bedroom and until they saw the Police report the respondent would be unable to progress and asked the claimant whether someone had spoken with the customer that day.

61. On **Thursday 9 November 2022** the claimant received a text from the chair of the local Community Council which alerted the claimant to a local community council meeting, although not the substance or content of same, being held on **Thursday 10 November 2022**.

5 62. On **Friday 11 November 2022**:

1. At **10.41 am** an MSP issued an email (the MSP email of 11 November 2022) forwarding an email (**the forwarded 11 November 2022 email**) he had received earlier that day, to the respondent intending the email for the founder Mr MacDonald's PA, asking that it be passed to him as he was sure he would wish to deal with it.

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The **forwarded 11 November 2022 email** was issued by a local Councillor Convenor of Highland Council, to 3 MSPs and two councillors, and described that on Thursday 10 November 2022 the email author had attended the monthly meeting for the local Community Council describing that it was unusually well attended with a dozen or so Ukrainian guests in attendance. This was a reference to Ukrainian refugees for whom the respondents had provided accommodation since around June 2022 via a Government contract and agreement with CTM, which was of value to the respondent, those refugees having been housed at the Strathspey Hotel by the respondent since the reopening of the Strathspey in August. The **forwarded 11 November 2022 email** set out that the refugees had told harrowing stories of living conditions in the Strathspey Hotel and provided photograph and video to back up concerns which included lifts (in the 7 storey building) which did not work, infestation with vermin, appalling food especially for children with a daily diet of chips and whatever nugget was provided, there was no kitchen facility and no means of contacting home despite the hotel's excellent Wi-Fi describing that the hotel had been rarely occupied for many years and indicating that not paying guest would accept the condition it was in. He further described that the residents were complimentary about



Government, Council and local support but they were “*at the end of their tether.... surely we can do better than this.*”

2. At **10.57 a.m.** the Chair of the local Community Council issued a separate email (**the Local Community Council Chair’s 11 November 2022 email**) to the Chief Executive of Highland Council, a further MSP, the claimant, and an MP, and which email was cc’d (copied) to two individuals, a local councillor and an individual being a journalist for the local newspaper (in respect of which email the domain name aspect of the email contained the word “*media*”). The Local Community Council Chair’s Email of 11 November 2022 was headed Ukrainian Refugees- Strathspey Hotel, Aviemore and described the Community Council was pleased to “*welcome a number of local Ukrainian refugees to our meeting last night. However it then emerged that they had come to raise a number of serious concerns about their temporary accommodation in Aviemore. All of them, and their families, have been staying at the ...Strathspey Hotel, some for upto 4 months, other arrived more recently*” and set out 8 bullet points which the author described as a litany of completely unacceptable issues which shocked and appalled all those present.
3. At **2.38 p.m.** the claimant sent out a response (**the Claimant’s Response Email of 11 November 2022**) to **the Local Community Council Chair’s 11 November 2022 email**, in doing so he replied to all those included in the 10.57 am email being Chief Executive Highland Council, an MSP an MP and two the two individuals cc’d being a local councillor and the individual from the local paper. However, the claimant did not notice that the second cc’d person was someone from the local paper. He did not otherwise identify on this date that the domain name aspect of the second cc email contained the word “*media*”. The claimant subsequently described (at the Disciplinary Hearing as below) that he would normally deal with a differently named person from the same local paper. In the subsequent period of a couple of hours and although he took

5 various steps to prepare his response as he set out in his reply, the claimant did not seek support, guidance and/or consent from Ms Macholla, the respondent Board, or the respondent's communication advisers. The claimant's response set out "*Dear Peter, I am very concerned to have received this and would like to respond to the points raised one by one.*"

10 *Fire Alarm*, the claimant described that the fire alarm was a completely new installation, and "*Hotel's often experience false alarms and in normal circumstances you might experience this occasionally during a given stay, in this case with long staying residents they will be aware of every such incidence. To add to this the system had an issue with some detectors in the lower ground floor triggering falsely, the detector heads were replaced but we are still receiving errors, this has been identified as a sensitivity issue and*" the supplier "*are attending to rectify this as a matter of urgency. It is in no-one's interest for there to be false alarms*".

20 *Lifts*: the claimant described that there was a fault in the lift and it had been offline for 7 days (at the date of the email), the lift contractors were working on it, they were chased "*yesterday*" and were awaiting a part, "*Additionally we have ordered a new lift and this work will start next month with completion in the new year*" and described that no one was staying above the 4<sup>th</sup> floor and they would offer a move to a lower floor.

25 *Mice*: The claimant set out categorically that the building is not infested with mice, describing that they had a contract with a pest control company with proactive measures, regular inspections and reactive elements "*As you know this is a rural location and it is not that unusual to see mouse activity at this*"  
30 *time of year as it gets colder*" the pest control company "*are dealing with it*"

*Wifi Speed*: the claimant described "*We were not aware that this was an issue and we will look into it*", he described that broadband to the site "*should be more than acceptable if all*"

5 *were on line and streaming” and further described that the guests have access to everything other guests do, swimming pool, entertainment running through the holidays and described that families are invited to Santa Breaks including 3 days entertainment and a pantomime.*

10 *Food: the claimant described that “we endeavour to tailor our menus to the group and have learned over ... time... what generally works and what does not, furthermore we have employed two as part time cooks so there would be dishes that would remind them of home... We do speak with our guests and have not heard of any particular issues with the food although over time menus may be becoming repetitive. We will of course review given the comments made”.*

15 *Leaks: The claimant described there had been two notable instances, one where a guest caused some having left taps on an and the other due to heavy rain with a leak in the restaurant and reception “this does not happen with normal rainfall levels. Both... have flat roofs and the drains were overwhelmed in exceptional weather... Long term solutions are being worked on.”*

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25 *The claimant further set out “We have a dedicated manager looking after the hotel, I called him in this morning and we had a conversation on how things were going. The only point of note that he raised was that the lift being broken. **I have now shared your email with him and the management team. I can appreciate that hearing this would be shocking,** it certainly was a surprise to read your email this morning as these guests have become our friends in many cases, we employ around 45 in our business, many on a part time basis and we are grateful to have them staying and working with us. We talk regularly, more so with those working and have not been getting the same impression, **however I can easily see that taken as a whole this does not look good. I also fully appreciate that false alarms and a broken lift add strain to an already difficult***

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*situation for them. I'd be more than happy to show you the hotel, let me know when works for you."* [bold emphasis added]

The claimant did not provide his response to Ms Macholla at this time.

5           4.       In response to the MSP email of 11 November 2022, Ms Macholla as the most senior person at Aviemore Resort, was urgently asked to join a phone call between the founder Mr MacDonald, Jim Davidson, Gordon Fraser and Gerry Smith which had been arranged to consider how to respond. The  
10           claimant had not been invited to attend and they were not aware the claimant had issued, the claimant's response email of 11 November 2022, nor had the claimant raised with them the Local Community Council Chair's 11 November 2022 email to which he responded to direct. Ms Macholla agreed that she  
15           would go on-site to meet with these guests to investigate the matters raised.

              5.       Following that call Ms Macholla phoned the claimant, who advised that he was already aware of the issues and described that he had received **the Local Community Council Chair's 11 November 2022 email** and that he had responded.

63.       On **Saturday 12 November 2022**, Ms Macholla met with around 25 of the Ukrainian guests to discuss the points raised at the local Community Council.

25       64.       On **Monday 14 November 2022**, Ms Macholla spoke with the MSP who had forwarded the 11 November 2022 email and, that evening, she had a further meeting with several of the Ukrainian guests, to seek, to ensure that she captured the feedback from the full group. In addition, on this date, the claimant and Ms Macholla spoke regarding the matter with the claimant indicating that he felt that the story would appear in the local  
30       paper. He offered this view as he understood by this time that his response (the **Claimant's Response Email of 11 November 2022**) was cc'd to the local paper. Ms Macholla thereafter took steps to contact the local paper making contract with the editor.

65. On **Monday 14 November 2022**, Mr Macholla while driving into the resort saw and took pictures of a **Luton box-type laundry van** with a tail lift being driven on site which had its sides off, it was being written from around June /July that year and was uninsured; and

- 5 1. At **10.31 am**, Ms Macholla emailed the claimant with 4 pictures of the van and the message *“I hope you had a nice weekend. ... can you confirm if the pictures below are of one of our company vehicles? When on Resort, this van was driving around which is completely unroadworthy and dangerous for both the person driving*  
10 *it and for any guests. I’m sure you can appreciate, that safety aside this also presents a very poor image for our business. Can I be very clear that this vehicle should be removed from the road immediately. Can you provide full detail on what happened to this vehicle, how long it has been like this and what we are using it for. Thanks”*
- 15 2. At **10.47 am** the claimant responded to Ms Macholla *“It is not meant to be used at all. It is subject to an insurance claim and is being written off, this is what I mentioned to you that we need to lease or buy when we spoke last week, I saw it this morning and have told them to park it out of sight and asked for the keys to come to me.*  
20 *The Kubota has been at the garage and they used this van to move things across the resort. This should not have happened, it is meant to be parked out of site and not used.”*
- 25 3. Also on this date, Ms Macholla spoke with the MSP who had forwarded the 11 November 2022 email, and that evening had a further meeting with several of the Ukrainian guests to ensure that she captured the feedback from the full group.

66. On **Tuesday 15 November 2022**

- 30 1. At **12.54 pm** while in an unrelated email, the respondent’s Chair of the Board (Gordon Fraser) asked Mr Davidson, one of the respondent’s Corporate Finance Directors who was on holiday *“where do I (we) go to get contract details e.g., for”* the claimant *“or general legal help”*, reference was made to a law firm *“but who is the day to day contract for minor matters? We need to discuss on*

*your return*". This was on the back of the (then known to the Respondent Board) communication with the MSP being the MSP who emailed the forwarded 11 November 2022 email. There was no determination of any form of disciplinary action against the claimant.

- 5           2.    At **12.56 pm** Ms. Macholla asked Ms Chan, another of the respondent's Corporate Finance Directors, copying in Mr Davidson as the other respondent's Corporate Finance Director, for a copy of the claimant's contract (the June 2019 Agreement). Ms. Macholla was provided with the Agreement by Ms. Chan by email at 1.07 p.m.
  
- 10           3.    At **1.05 pm** Mr Davidson replied to Mr Fraser Chair of the Board 12.54 email that "*Christina is dealing with minor matters and has access to the legal drive*". This was a reference to the then absence of in-house legal counsel; and
  
4.    At **1.13 p.m.** Mr Fraser replied to Mr Davidson "*Thanks Jim. Is she generally around*".
  
5.    At **1.14 pm** Mr Davidson replied to Mr Fraser "*She is and I am watching the emails*" a reference to Mr Davidson watching for intimated slips and trips which he understood had only a few days to reply, and "*She has sent*" the claimant's "*contract to*" Ms  
15           Macholla.
  
6.    At **10.54 pm** Ms Macholla issued an email response to MSP who had forwarded the 11 November 2022 email, offering her assurance that she was personally managing the situation, she had met with several of the Ukrainian guests as above, and setting out her assurance on the steps that the respondent was taking addressed  
20           each in turn.
  
1.    Fire alarm. She had the property manager attend on Saturday and he had been on site on Monday and Tuesday, they had their alarm company on site to review the alarm.
  
2.    Lifts, describing that although the hotel has 7 floors no one was staying beyond the 4 floor, they had a new lift on order and she attended on Saturday there was a fault with the lift,  
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describing that they escalated this immediately with the contractor.

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3. Infestation, described what she indicated were proactive measures to prevent infestations, had regular inspections, and they remain in contact with a pest control company.
  4. Food, described that they will provide examples of foods and they would agree example menus, offering guests the opportunity to eat twice a week at one of the other food outlets.
  - 10 5. Wi-Fi Speed, they will have engineers on-site to address an issue.
  6. Other; including describing that he should be assured that leaks (following a heavy rainfall impact on flat roofs) were rectified timeously.

15 She described that she was speaking with guests, and encouraged them to make use of the full resort, she had noted a few minor items in a meeting on Monday regarding laundry and access to microwaves, offering assurance that these would be addressed timeously and with engagement with colleagues at CTM, she would be meeting the guests regularly, had encouraged the full group to provide feedback and suggestions, described her senior roles and that he had her assurance that they will aim to ensure the guests remain as comfortable as possible, and invited him to visit the Hotel.

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67. On **Wednesday 16 November 2022** Ms Macholla, having been provided with the claimant's contract, again approached Ms Chan asking "*Do you have any job profiles on file for*" both the claimant and the then General Manager. Ms Macholla indicated she was "*just trying to find where everything is held. Also, if I have some new staff starting at a senior level – are you able to draft up their contracts*". This did not reflect any predetermination that any form of disciplinary procedure would follow, there was no such predetermination.
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68. By this date Ms Macholla had contacted the local paper editor who described that they would run with the story but agreed that they would publish an online response thereafter.

69. On **Thursday 17 November 2022**

5 1. At **9.29** am the claimant emailed Ms Macholla *“Morning. The local paper have run a front page story on the Ukrainians at the Strathspey. The journalist was copied in on the original email and received my reply to the community council. The Front page is not good at all and not reporting the response well either, the*  
10 *continuation on page 3 is more factual. I’d expect a request for a formal quote however he’s taken the information from the email to the Community Council and the subsequent update.”*. The claimant did not suggest that such reporting in the local paper was of little or no import. The front page of the weekly local newspaper, published  
15 that day, had a prominent photograph of Strathspey Hotel with its main headline *Living like this brings shame on whole community*, an upper smaller headline *Refugees unhappy with conditions but hotel boss disputes accusations*” to the right of the front page was a column headed *“Response to Complaints”*.

20 2. At **10.45 pm** Ms Macholla emailed the claimant regarding the van on the resort *“Can you provide the following documents relation to this:*

*A copy of the incident report from when the van was damaged.*

25 *A copy of all correspondence with the insurance company, including the confirmation that the van is being written off.”*

70. On **Friday 18 November 2022** the local weekly newspaper published a further article, online, after Ms Macholla’s engagement with the respondent’s communication advisors, which was headed *“Aviemore resort take steps to ensure Ukrainian refugees made to feel at home.”* It  
30 described that good progress was made in resolving complaints raised by refugees at their temporary hotel accommodation and that since the local paper had published concern over living standards resort bosses had met again with the refugees to discuss their concerns and said they have taken



steps to ensure they are looked after as well as possible. Ms Macholla was quoted as saying *"We are pleased to have been given the opportunity to respond to our Ukrainian guest and have taken a series of actions to ensure that they are as comfortable and well looked after as possible during their stay with us."*

71. On **Monday 21 November 2022**

1. At **10.56 am**, absent response to her email of 17 November seeking documents regarding the van on the resort matter, Ms Macholla emailed the claimant *"Do you have an update on"* her email of 17 November 2022 *"Can you send this through for close of business today."*
2. At **11.35 am**, the respondent's Director of Sales issued an email to the respondent's Financial Controller regarding the October Film Crew issue setting out *"To be clear and finally bring this to a conclusion. There are two refunds due 1. £150 for a missing laptop"* which Ms Macholla regarded as gesture of goodwill as the matter had been dealt with badly and *2. £,4750 for various issues during their stay.* That email was cc'd to the claimant and Ms Macholla.

72. On **Tuesday 22 November 2022**

1. The respondent had their regular Hospitality Board Meeting starting at 11 a.m., this is separate and subordinate to the Board, it is attended by managers from respondent hotels who would be peers of the claimant and operated to a standard agenda, it covered matters of general interest such as report on Figures Review including Aviemore & Resorts- actions require to improve sales and HOP; Spa/ Beauty Presentation and Report on Food Drink and Restaurants. The claimant had been invited to such meetings but decided not to attend. Ms Macholla attended for the Aviemore Resort. Discipline of the claimant was not the subject of general discussion. Ms Macholla established separately that Mr Davidson would attend as Notetaker before arranging for issue of the **Notice of Disciplinary Hearing letter** later that day.

2. As Ms Macholla was attending the Hospitality Board Meeting, Ms Russell Secretary to the Board issued an email to the claimant on behalf of Ms Macholla, at 2.47 pm with **Notice of Disciplinary Hearing letter** drafted by Ms Macholla confirming it would be held at the respondent's Inchyra Hotel on Wednesday 30 November 2022 at 10 am. Ms Russell, on behalf of Ms Macholla had placed the letter on respondent headed notepaper and pp'ing for Ms Macholla signature. Ms Macholla took legal advice prior to the issue of the letter, the letter however was her own. There were no documents accompanying that letter nor was any written output of Ms Macholla's informal investigation included.

73. Prior to the issue of the Notice of Disciplinary Hearing letter, Ms Macholla carried out informally as much investigation as she considered necessary to establish the facts of the case. She had not convened a separate prior Investigation Meeting. There was no requirement to do so in terms of the Employee Handbook 14.3. (Formal Procedure). There was no output report from Ms Macholla's informal investigation.

74. The Employee Handbook provided that at least 2 working days' notice of the hearing will be given and that wherever possible the disciplinary Hearing will not be conducted by the person who carried out the investigation. Ms Macholla concluded, having taken legal advice, that as his line manager, it was appropriate that she conducted the Disciplinary Hearing.

75. The Notice of Disciplinary Hearing letter identified that Mr Davidson would be the Notetaker and gave in effect 8 days' notice of the Disciplinary Hearing and set out that the Disciplinary Hearing was to consider 9 allegations against the claimant. Those allegations had been decided upon by Ms Macholla and are summarised as:

**Allegation 1** – *The claimant had failed to properly oversee arrangements at Strathspey Hotel for a group of Ukrainian refugees placed with us under a contract with CTM have led to serious and damaging complaints to the local community council, Government Ministers and the main contract administrator, CTM.*

**Allegation 2** – *That, once the complaints had been received from government authorities concerning (the Strathspey Hotel) you took it upon yourself to respond to them without liaising with central management or MacDonald Hotels communication advisers.*

5 **Allegation 3** – *The claimant failed in his duty to oversee the operations of the Aviemore resort when, in early October 2022 during a visit by a film crew that has historically used the resort as a location for filming, 85 rooms went un-serviced over a period of 5 days.*

10 **Allegation 4.** *The claimant failed in his duty to oversee the operations of Dalfaber Resort*

**Allegation 5.** *The claimant failed, despite reminders and prompting to deal promptly following poor feedback to Mr MacDonald personally following the dinner held for the Campbell family at the MacDonald Aviemore Resort in early October of this year.*

15 **Allegation 6** – *Despite various requests, the claimant failed to provide assurances around financial forecasts and manning costs.*

**Allegation 7** – *Standards within the hotel had declined across a number of areas. This being highlighted in Revinate scores and loss of preferred status with agents such as Booking.com.*

20 **Allegation 8** – *The claimant allowed a written-off vehicle to remain on Resort, and as recently as the last two weeks, driven around the Resort causing danger to guests and the staff.*

25 **Allegation 9-** *Alternatively, in acting as above, the claimant was guilty of serious negligence in connection with or affecting the business or affairs of the respondent.*

30 It continued *“You will be given a full opportunity to comment on the allegations at the hearing. If there is any evidence you would like to be taken into account as part of this process please let me know and please provide copies of any documents you intend to refer to in advance of the hearing...”* The claimant was advised of his right to be accompanied and the letter concluded *“It goes without saying that the allegations set out above are very serious. If held to be founded upon after you have the*

*opportunity to speak to them at the hearing, then they strike at the root of trust in you as an employee and senior member of the management team. Accordingly, I should make clear that, should they be upheld, possible outcomes range from a written warning to your summary dismissal for gross misconduct. If anything in this letter is unclear, or if you have any questions, please do not hesitate to contact me.”*

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76. The Notice of Disciplinary Hearing letter did not suspend the claimant. While the letter which had been drafted by Ms Macholla described that the allegations if upheld struck at the “*root of trust*” of the claimant as an employee and senior member of the management team, it did not deploy the phrases gross negligence or breach of contract. Ms Macholla considered that to allege a breach of contract would have been to draw a conclusion.

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77. While Ms Macholla had carried out the informal investigation, she was impartial in her approach to the Disciplinary process.

78. The claimant upon receipt of the Notice of Disciplinary Hearing letter understood the allegations.

79. **On Thursday 24 November 2022**

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1. The MSP who had forwarded the 11 November email replied to Ms Macholla's email of 15 November 2022, stating that he was grateful for her detailed reply and her personal determination to make the Uranian guest as welcome and comfortable as possible and offered his thanks for her work and that of the team in Aviemore.

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2. At **12.40 am** the respondent's Financial Controller forwarded to the claimant, Ms Macholla, and the respondent's now former General Manager a copy of a Financial Forecast.

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80. On **Friday 25 November 2022** at **8.24 am** in an email Ms Macholla, thanked the Financial Controller for his email of the preceding day and set out to both the claimant and the General Manager Aviemore, that the figures were completely unacceptable and needed to be reviewed in full immediately and line by line. She set out that she needed to see full justification for

- Reduction in sales and what actions were being taken to address this.
- Confirmation that food and beverage projected sales are accurate and have been reviewed in full.
- Detail on where a reduction of £29k in catering sales had arisen from.
- 5 - Details on where a reduction of 11k in leisure sales has arisen from.
- Full review of payroll and manning, stating that the respondent cannot justify a £15.7k increase in payroll for catering, leisure and other when sales had dropped by the margin indicate, the respondent could not justify a 54% and 52% payroll % in weeks 2 and 4 of the forecast and  
10 this needed to be reduced substantially to around 34%.

She described that this required to be worked on as a priority and addressed immediately so that they avoided any losses like November, and to the General Manager (only) set out *“please make this your priority today and provide an update for close of business. If this is not possible, please let me know.*

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81. On **Monday 28 November 2022**

1. At **12.24 pm** by email the claimant acknowledged the Notice of Disciplinary Hearing issued on Tuesday 22 December 2022. The claimant further set out *“I write to request that the meeting be postponed by a week. As you will appreciate there are a number of allegations that cover a variety of different topics and issues and I need more time to prepare my response in order to adequately defend myself.”*
2. At **2.23 pm** Ms Macholla responded *“Our view is that sufficient time has been provided for you to prepare for the hearing and therefore the hearing will go ahead as planned. Should any matter arise during the hearing that require further consideration then we will adjourn to ensure we have the full picture. I trust that clarifies our position.”*. Ms Macholla's use of the collective terms Our and We reflected her practice, and that of others within the respondent to use such terms when referring to matters within the respondent, it was however her view and her decision. While she copied Mr  
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Davidson into her response, this was as he was scheduled to act as the Notetaker.

3. At **3.57 pm** Ms Macholla emailed the claimant, the General Manager and the Financial Controller in a separate email to those earlier that day, and confirmed that she had looked over the December figures and added some notes in the tab which she *“would be grateful if you could action before close of business tomorrow”*, and specific to the claimant noted *“as previously advised the business is carry out a full review of all hotel budgets with figures being present to the Board next week with the progress that has been made. Considering this, we need to get into the detail of all lines of the budget to see where sales can improve and where costs can be reduced. This needs to be looked at for December, January and February as a priority”*. Ms Macholla further commented that the Board’s other main ask was that any loss in November be made up in December and commented with careful cost control they could make the best attempts to recover this in December and further described targets for Food, Liquor and Manning.
4. At **4.45 pm** Ms Macholla emailed, forwarding on report received a few minutes earlier from Revinate, the claimant *“Hi Ian. Do we now have steps in place for someone to respond to the good and bad reviews”* a reference to Revinate system.
5. At **5. 38pm** the claimant responded to Ms Macholla’s email and confirmed that they had someone starting on it that week.
6. At **6.42 pm** the claimant responded to Ms Macholla’s email of 2.33 pm copying in Mr Davidson *“I am disappointed that you are not willing to agree to a short postponement to allow me to prepare in circumstances where, according to the letter my continued employment is in question and I would ask you to reconsider. Please also send me copy of any investigation report which was prepared as part of these disciplinary proceedings along with any documentation considered as part of the investigation.”*

82. On **Tuesday 29 November 2022:**

1. At **10.43 am** Ms Macholla set out her response to the claimant's final email of 28 November set out above. *"I am sorry you are disappointed but by tomorrow you'll of had a period of eight days to prepare which I believe to be ample as I said in my earlier e-mail should any matters arise during the hearing that require further consideration then we will adjourn to ensure we have the full picture"*. She confirmed there had been no investigatory report prepared; for Strathspey Hotel the claimant had seen the correspondence from Government authorities, the claimant had written his own response and he had seen the report in the local paper; he was well aware of the complaints from the film crew and the issues surrounding the Campbell Family Dinner which were escalated through a call to which he were present; similarly there had been several meetings and requests for assurances around the financial forecasts, specifically manning costs. Ms Macholla set out that should the claimant require access to the Renvate Data he would be able to obtain this through his log in *"If you have any issues accessing this, please let me know"*. With regard to the written-off vehicle Ms. Macholla confirmed she could provide photos following this e-mail should he require these and concluded *"I will see you at the hearing at 11am tomorrow I stated in the invitation letter. Please let me know if you will be bringing a companion with you."*
2. At **4.59 pm** the claimant issued an email to Ms Macholla which set out that *"I would also consider that that the following people be spoken to as part of the process before any decision is made"*, the claimant listed 5 names without job titles giving no specification as to what their relevance was.

83. On **Wednesday 30 November 2022**

1. at **8.37 am** Ms Macholla emailed the claimant asking if there was an update from her email of 28 November 2022 noting that as she had not received an email from the claimant advising that he or the team were unable to address this yesterday she was expecting to receive this information for the close of business yesterday and concluded *"Please provide an update"*.

2. At **10 am** the **Disciplinary Hearing** commenced; Ms Macholla attended as did the claimant together with **Mr Jim Davidson** the respondent's Corporate Finance Manager as Notetaker. Mr Davidson whose background is as an accountant had been asked to take on this role by Ms Macholla as he was trusted to take notes as Company Secretary, at the formal meetings of the respondent Board and the claimant was a senior person within the respondent. The respondent at the time did not have in-house legal counsel since around October 2020. It was Mr Davidson's practice while acting as Company Secretary at formal Board Meetings that he would not agree to revisions by others to the Minutes he prepared as he was trusted to prepare accurate, though not verbatim notes. Mr Davidson approach the Disciplinary Hearing in the same way. Mr Davidson was not acting as an undisclosed representative of the Board or any alleged Inner Circle to oversee that Ms Macholla reached any Board (or otherwise an Inner Circle or indeed for the founder Mr MacDonald) pre-determined outcome.

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3. At the start of the Disciplinary Hearing, the claimant was reminded of his right to be accompanied, and the claimant described that he could not think of a colleague who could accompany him, this was due to his seniority.

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4. The claimant was asked if was clear as to the purpose of the meeting and was happy to proceed. The claimant confirmed he was. The claimant asked for the meeting to be recorded and Mr Davidson advised that if the request had been made earlier it would have been agreed to, but the short notice did not give adequate time to set up. The claimant did not object to Ms Macholla conducting the Disciplinary Hearing. The notes of the hearing created by Mr. Davidson were provided within the Bundle. The notes are so far as material accurate with the modification the claimant having again asked who specifically carried out the investigation with Ms Macholla responding that the points were all well known.

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5. The claimant was given an opportunity to comment on each allegation at the Disciplinary Hearing. In relation to:



**Allegation 1** – *The claimant had failed to properly oversee arrangements at Strathspey Hotel for a group of Ukrainian refugees placed with us under a contract with CTM have led to serious and damaging complaints to the local community council, Government Ministers and the main contract administrator, CTM.* The claimant accepted that there were various delays to things being put in place, such as the ordering of the lift. The claimant also accepted there were issues with the fire alarms that had been going off and how they had put CCTV in the basement to try and see what was causing the alarms to go off. The claimant also commented, *“he found this situation difficult to deal with and he had no solution”*.

The claimant accepted that there could have been better menus. He also accepted that he had not met with the Ukrainian refugee guests as a group. He described that had spoken with a few who had been given jobs at the respondent.

**Allegation 2** – *That, once the complaints had been received from government authorities concerning (the Strathspey Hotel) you took it upon yourself to respond to them without liaising with central management or MacDonald Hotels communication advisers.* The Notes summarise this as Response to Press, although the allegation was as set out above. The claimant stated that it was not his intention for *“this”* (being the issues raised about The Strathspey Hotel) to appear in the paper. The claimant’s response described that *“however I can easily see that taken as a whole this does not look good. I also fully appreciate that false alarms and a broken lift add strain to an already difficult situation”*. The claimant had agreed in relation to the 1<sup>st</sup> allegation that *“while this was good business the press coverage was not good”*. He did not deny this allegation and accepted *“that he would not normally comment to the Press as responses to the Press would normally be dealt with by Alex Barr of the Big Partnership”*. He did not suggest that the coverage in the local paper was of little or no import. While the notes record that the claimant intimated that he did know that there was a journalist on the email, the claimant was intending to intimate that he did not

understand that when he responded by email. He described that he normally dealt with a different person from the local paper.

5 **Allegation 3** – *The claimant failed in his duty to oversee the operations of the Aviemore resort when, in early October 2022 during a visit by a film crew that has historically used the resort as a location for filming, 85 rooms went un-serviced over a period of 5 days. This allegation was limited to rooms not being serviced because staffing, or lack of staffing, was something he was accountable for in his capacity as Managing Director. During the hearing, the claimant said that rooms being un-serviced was “not common” and was caused by absence issues with housekeeping staff. The claimant accepted that this was “not good” and he “could only apologise”.*

10 **Allegation 4.** *The claimant failed in his duty to oversee the operations of Dalfaber Resort. During the hearing, the claimant discussed problems with Dalfaber, which he said had started in June 2022 (when the founder Mr MacDonald visited). The claimant advised Ms Macholla about his call with Mr MacDonald at which Mr MacDonald’s concerns and feedback about Dalfaber were discussed, although at the Disciplinary Hearing, he mentioned that he had “taken notes” he did not however provide a copy of his typed notes. The claimant described that the former General Manager had cancer and had left in July and that he would appoint a new General Manager tomorrow.*

15 **Allegation 5.** *The claimant failed, despite reminders and prompting to deal promptly following poor feedback to Mr MacDonald personally following the dinner held for the Campbell family at the MacDonald Aviemore Resort in early October of this year. During the meeting, the claimant talked about sales and how the resort was busier. He confirmed that the “meal was a disaster” and said that “staff had been dismissed”. The claimant confirmed that he understood what had gone wrong. Ms. Macholla asked him if he had followed up with the guests and he confirmed that he had not as he did not have their contact details. The claimant blamed*

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Heather Russell for not providing the contact details but accepted that he had not followed up with her.

**Allegation 6** – *Despite various requests, the claimant failed to provide assurances around financial forecasts and manning costs.*

5 The claimant described that he considered that the problem was the time taken to do the forecasts and that he could not be doing it all the time as he had other jobs to do. In the context of manning figures submitted being difficult to justify as rotas were not signed off the claimant argued that there were in excess of 40 departments, and  
10 he could not review each one.

**Allegation 7** – *Standards within the hotel had declined across a number of areas. This being highlighted in Revinate scores and loss of preferred status with agents such as Booking.com.*

15 During the hearing, the claimant explained that he had taken the decision to come off Booking.com's preferred status, to save on commission. The claimant "*held his hand up that he did not review the responses*" and that "*additional resource was needed for that*".

**Allegation 8** – *The claimant allowed a written-off vehicle to remain on Resort, and as recently as the last two weeks, driven around the Resort causing danger to guests and the staff.* He described that the  
20 vehicle had been written off in mid-July 2022, agreed that the vehicle should not have been used, explained that his team required to move stuff and that as the other vehicle was in the garage they used this vehicle, described this was not the correct decision and  
25 described that he took keys the away on 14 November 2022 after being made aware.

**Allegation 9** – The claimant, set out that he felt some of the issues were performance issues and should not be included in the disciplinary.

30 The Disciplinary Hearing adjourned at 11.50 to allow Ms Macholla to consider her decision.

84. On **Friday 2 December 2022** at **7.02 am** Mr Davidson emailed Ms Macholla *“Sorry for delay, Very first draft. Let me know if you want any changes.”* Mr Davidson while providing draft minutes of the Disciplinary Meeting to Ms Macholla, did not provide a draft for comment to the claimant.
85. On **Sunday 4 December 2022** at **7.15 am**, Ms. Macholla emailed the claimant asking for an update to her email on 28 November 2022 (the Budget email), describing that this was the second chasing email without any response, *“I would be grateful if you could at least respond with an update and detail of when this information will be available for me to review“.*
86. On **Monday 5 December 2022** at **9.53 am**, Mr Davidson issued the notes from the Disciplinary Hearing to Gerry Smith who was the Chief Executive of the whole group, he did so as he considered that the matters were serious, he was not however liaising with the Board or seeking any input from the Board or indeed from Mr Smith or indeed the founder Mr MacDonald nor any alleged inner circle.
87. On **Tuesday 6 December 2022** at **5.02 pm**, Ms Macholla having reached her decision on her own wrote the Outcome Letter and emailed the claimant cc'ing Mr Davidson with a copy of the Disciplinary Outcome Letter also dated 6 December 2022 (**the Disciplinary Outcome letter**) and corresponding notes from the Disciplinary Hearing (they had not been previously disclosed to the claimant) intimating that the letter attached provides *“full detail of our position”* and asked the claimant to make the necessary arrangements to return any respondent equipment.
88. The Disciplinary Outcome letter confirmed that Ms Macholla had listened very carefully to what the claimant had to say about the various allegations, she had taken some time since to consider his submissions. She upheld Allegations 1, 2, 3 and 5 setting out her conclusions in relation to each allegation:
1. **Allegation 1.** Finding. The failings in relation to the Strathspey Hotel and the resulting reputational damage were the most egregious. The claimant's role as Managing Director Aviemore is a very senior

one, with consequent responsibilities to be on top of how operations are functioning and ensure their smooth running. The Agreement requires that you “*at all time use [your] best endeavours to promote, develop and protect the business, interest and reputation of the*”

5 respondent. She considered the responses fell under 3 headings; That the problems occurred over a period of time - she concluded that this was the point, there was a series of problems that the claimant should have been aware of ensuring they were addressed reasonably promptly and efficiently; That repairs took longer than

10 hoped and while she agreed consider that with proper management by the claimant, they could have been completed sooner; And other staff did not deal with the issues when they should, which Ms Macholla considered was blaming others while ultimately the claimant was Managing Director and their line manager so must

15 take at least some of the blame for not overseeing their work. She described that under the terms of the Agreement (i) a material or repeated non-observance of your duties (ii) serious negligence of the claimant’s part affecting the business of the company; and (iii) acting in a manner which in the company’s opinion is likely to

20 prejudice the company’s reputation are grounds for termination without notice. She found that all of these things happened.

2. **Allegation 2.** Finding: Ms Macholla referred the claimant to Section 21.3 of the Employee Handbook. Ms Macholla described that the claimant acknowledged this allegation was well founded, criticising

25 the claimant for not realising that among those cc’d was a member of the press. “*It should have been immediately... evident to you on receipt of the email you received from various government officials in copy that there were reputational issues for the hotel and the company*” and criticised the claimant's approach to his response including reply to all, not escalating to the Board “*or at least to me*”,

30 and for not following the protocol of involving the communication advisers. Ms Macholla described under terms of the Agreement (i) acting in a manner which in the respondent’s opinion prejudices the respondent’s reputation and (ii) serious negligence of the claimant’s

part affecting the business of the company. She found that both of those things happened.

5 3. **Allegation 3.** Finding: Ms Macholla's noted the explanation offered was that it was caused by the head Housekeeper being of sic, having given the Deputy Housekeeper a holiday, but described that it was not clear why the claimant was unaware, describing that it occurred "*over a period of 5 days involving 85 rooms*" and described it as a glaring rostering issue. Ms Macholla set out that the fact that it had never happened before did not excuse it and this points to a dereliction of duty. She referred to the terms of the Agreement (i) a material non-observance of your duties (ii) serious negligence of the claimant's part affecting the business of the company; and (iii) acting in a manner which in the company's opinion is likely to prejudice the company's reputation are grounds for termination without notice. She found that all these things happened.

10 4. **Allegation 4:** Finding: Ms Macholla described that the claimant suggested that problems had been caused by what the claimant was a freeze on hiring indicating that the claimant suggested that a lot of problems with food were down to a chef who had cancer and who the claimant with hindsight felt he should have replaced sooner. She described that if this was the only issue, she would have been inclined to issue a written warning for poor performance.

15 5. **Allegation 5.** Finding: She set out that the claimant had acknowledged the meal was a disaster, the event had not been set up as instructed and staff had been dismissed as a result "*All that is understood, however this allegation concerns your failure to follow up promptly and effectively ... with the important customer... you did not diligently find a way to get in touch with the Campbell family ... despite being instructed to do so and that even now have not followed up with them after all this time.*" She described that under the terms of the Agreement (i) a failure to observe lawful instructions (ii) a material or repeated non-observance of your duties(ii) and (iii) acting in a manner which in the company's opinion is likely to

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prejudice the company's reputation are grounds for termination without notice. She found that all these things happened.

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6. **Allegation 6.** Finding: Noting the claimant's criticisms of the system Ms Macholla set out that she accepted that the respondent systems for forecasting could use improvements, she expected the claimant to do his best describing that if the claimant was not going to produce a forecast when she requested it, she expected to be told this. She described that she expected better performance in this area and set out that if this was the only issue, she would be inclined to issue a written warning.
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7. **Allegation 7.** Finding: Ms Macholla set out that while she believed that the claimant should be able to do better, she did not uphold this allegation.
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8. **Allegation 8.** Finding: Ms Macholla set out, her conclusion at the time, that the claimant had acknowledged that it was not the correct decision to use the damaged vehicle to move things and the vehicle had since been collected and taken to the repairers. While Ms Macholla has been alarmed at the allegations, in approach the matter with an open mind and set out that if this was the only issue, she would have been inclined to issue a written warning for misconduct.
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9. **Allegation 9.** Finding: "see above"
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89. Ms Macholla set out that the claimant's employment was terminated without notice from that day (6 December) pursuant to the terms of his employment contract, that she was genuinely sorry that it had come to this but the claimant's "*multiple (and in a number of cases, very serious) breaches of your obligations.*" She further confirmed that the claimant would be paid outstanding salary including accrued but untaken holiday pay to that day. She concluded that he had the right to appeal, and if he wished to do so, he should write to Mr Davidson within 5 days of receipt giving the full reason why the claimant believed the sanction of dismissal was too severe.
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90. On or about **Wednesday 7 December 2022** Will Stephenson took up the role of Director of Operations, that role was not a replacement for the role of the claimant, it was a less senior role.
91. On **Friday 9 December 2022** at **4.52 am** the claimant issued an email to Mr Davidson Ms Macholla “*Dear Jim. Please find attached, my appeal letter as previously mentioned*”. The claimant set out his grounds of appeal (**the claimant’s Grounds of Appeal**) in 11 bullets points:
1. The claimant did not consider that an adequate investigation was carried out and it appeared that the decision was predetermined.
  2. The claimant argued that was not given adequate time to prepare given that he was undertaking his duties on a full-time basis, particularly so given that the allegations covered “*a variety of issues over a significant period of time*”.
  3. No supporting evidence was provided prior to or at the meeting.
  4. The claimant considered that relevant witnesses were not spoken to.
  5. The claimant questioned the suitability and impartiality of the people involved in the process.
  6. The claimant argued that the minutes were not a true reflection of the Disciplinary Hearing “*I will provide amended minutes next week.*”
  7. The claimant argued that certain comments in the disciplinary letter were inaccurate “*I will highlight these in the amended minutes.*”
  8. The claimant argued that most if not all the allegations should have been dealt with as performance issues. “*No formal performance issues management process was undertaken nor was I advised that those matters had reached a stage where it was considered that there was any significant concern in relation to my performance.*”
  9. The claimant considered that he was doing his best in challenging circumstances and if any sanction was appropriate then the outcome was too harsh in the circumstances which included resources, lack of investment “*the fact that certain of the issues were*



as a result of the actions of others” his clean disciplinary record, length of service and his performance.

5 10. “While I accept my responsibility as managing director my view is that in many of those matters, I am being blamed for circumstances which were as a result of the conduct of others, of which were as a result of the sort of challenging circumstances I have referred to ... above”.

10 11. “I do not accept that I did anything which amounted to gross misconduct or gross negligence which would justify summary termination.”

The claimant described that he did not consider that it was appropriate to ask a colleague to the meeting and requested “that the meeting be recorded, I can do this on my mobile phone.”

92. **On Tuesday 13 December 2022**

15 1. at **8.28 am** Mr Hugh Gilles the respondent’s Chief Financial Officer in an email headed AHR budget, sent to Ms Macholla, described that he had tried to improve Aviemore's budget describing that the Reforecast Summary would give good visibility of where improvements were v the original budget and listed various changes including increased commission, Food improved due to additional  
20 £1 for breakfast, controllable costs reduced identified as room expenses, catering expenses and leisure expenses all significantly higher than last years as a % of sales.. but I’ve pulled them down to a more acceptable level, stilling allowing for increase in laundry  
25 costs. He described that if Ms Macholla could get to 24%conversion they might be able to get approval and suggested that the main area of opportunity remains in manning, and he thought they would expect to see improvement from the original model. He described if they could find roughly £10k per month from January, this would get  
30 her up to 24%. He reminded Ms Macholla this was a stretch budget and so should feel difficult to achieve and they would report both against this and the original with bonuses triggered through the original budget.

2. at **8.49 am**, Ms. Macholla replied to Hugh Gilles that she had the team together to work through the budget line by line and that she was “*working on a new staff structure- we won't be replacing*” the claimant and the Manager would be let go in the new year. She described her view that there was a large payroll, but they were using staff at the wrong times, so they were not seeing the impact quality of product /service and that the structure was missing critical roles- maintenance, quality chefs, effective HODs. She set out her view that there was room to make savings and would review December as there was a further drop in sales and described her view of the cost effectiveness of a weekend event. She described that she was meeting with the Financial Controller to look at costs that have increased and described that there was room to make savings and in relation to Dalfaber was critical of management of staff and indicated operating hours were not sustainable however described that she had a few ideas to fix it and just needed to ensure it was “*operationally doable*”.

While Ms Macholla described that she would not be replacing the claimant, in her email to Mr Gillies, that was in the context of the then budget projection and did not preclude a successful appeal. It did however reflect that she did not intend to replace the claimant. While Mr Will Stephenson was appointed to the role of Director of Operations, that was a less senior role than that held by the claimant.

3. At **2.54 pm** Mr Davidson issued to the claimant, cc'ing Mr Gillies notice of Appeal Hearing to take place on Monday 19 December 2022. Mr Davidson in that letter described that he would be in attendance “*to take notes and advise on any points of procedure*” and set out that the claimant should come prepared to comment on the basis of any evidence for his grounds of appeal “*If there is any evidence you would like to be taken into account as part of this process please let me know and please provide copies of any documents you intend to refer to in advance of the hearing.*” It was confirmed that the claimant could be accompanied by a colleague or trade union official and noted that the claimant had stated that he

did not intend to bring a companion. It further set out “*You have also asked whether you may record the meeting, and I confirm that we do not consent to that. You will, however, be provided with my notes of the meeting.*”

- 5 93. On **Thursday 15 December 2022** at **6.10 pm** by email to Mr Davidson, the claimant provided a modified version of the Disciplinary hearing Minutes with “*my changes/comments. I am happy to elaborate on this at the appeal hearing.*” The claimant’s revisions so far as material reflected his genuine but inaccurate recollection of the Disciplinary Hearing on  
10 Wednesday 30 November 2022. The claimant in addition, as he no longer had access to respondent systems following termination, requested a copy of the email he described as sending to the Community Council on 11 November 2022 (the claimant’s response email of 11 November 2022).
- 15 94. On **Saturday 17 December 2022**, Mr Davidson, as the notetaker responded “*The changes to the minutes are not agreed but will be made available to*” Mr Gillies who had been appointed to hear the Appeal and set out “*We do not consent to the appeal being recorded.*” No recording was made.
- 20 95. On **Monday 19 December 2022** the Appeal Hearing took place it was chaired by Mr Hugh Gilles with Mr Davidson again attending in the role of Notetaker. Mr Gillies had commenced employment in May 2022 and had been promoted in October 2022 as Chief Financial Officer, he was considered to be an appropriate appeal manager given his seniority and lack of material involvement. Mr Gillies read the available documentation.
- 25 96. Mr Gillies approached the appeal with an open mind. Mr Gillies confirmed that he was approach the process with an open mind, so was keen to hear what the claimant had to say. While he is the son of a Board member, he was not acting on behalf of the Board or any alleged Inner Circle. The claimant attended without a companion or trade union representative, it  
30 being the claimant’s view that owing to his senior position within the respondent it would not have been appropriate to ask for a colleague to attend with him. The Hearing was due to commence at 9 a.m. and concluded at 10.30 am.

97. The claimant read out a prepared 6-page statement (The December Appeal Statement) within which he referred to “*relevant witnesses*” listing 8 named individuals and one individual by job title (driver of the vehicle- i.e., the laundry van), setting out he would “*expand on why they are relevant witnesses as matters proceed.*” The statement did not provide job titles (other than driver of the vehicle), in relation to the named individuals the claimant described:

1. (For **Allegation 1 and 2**) “*Following James Montgomery’s departure in late August, Kenny MacLennan (who had always been involved) took lead in the fire alarm and lift issues, both can testify*” to the claimant’s description of issues broadly around Fire Alarm at the Strathspey Hotel, and described that the day after the Disciplinary Hearing on Thursday 1 December 2022) while he was in the Strathspey Hotel with Mr MacLellan, he was approached by Ukrainian guest who described that she had met with a second Ukrainian person staying in a different hotel “*She explained that she was shocked*” by the story in the local newspaper “*and this was not the experience of the majority of guests and was from a small group..*” The claimant suggested he spoke to Ms Macholla later that evening and relayed the feedback (given on Thursday 1 December 2022). The claimant set out that Mr McLellan and the guest “*I believe her name was*” name provided “*should be spoken to* and described that this reflected his own understanding that the vast majority of Ukrainian guest were entirely satisfied with the accommodation, food and general set up.
2. In relation to **Allegation 5** the claimant referenced Jess Atkinson, the claimant intimated that both he and Ms Atkinson tried to contact the organiser on more than one occasion and described that there would be an email from the claimant to Ms Russell asking if she had any other contact details.

Further:

3. In relation to **Allegation 2** the claimant set out that his intention in sending the claimant’s response email of 11 November 2022 was to act in the best interests of the respondent and to try to resolve the

issue, he did not appreciate that he had responded to a journalist, but that journalist was already present at the local Community Council meeting “so was already well aware of all the issues that had been raised”. The claimant argued that Ms Macholla was  
5 “aware of the position by Friday 11 and the local press were aware on Monday 12, she had a copy of my response to the CC so there was ample opportunity to involve Alex Barr of the Bog Partnership before the article was published had” Ms Macholla “been concerned about the response I had given. Why is it considered that my actions  
10 and the email you send put the Hotel... at significantly greater risk than could have been the case?”

4. In relation to **Allegation 3**, set out that he only became aware when the client complained. “I had no knowledge of it until this point had I known I would have acted immediately”. The claimant described it  
15 had never happened before, and commented “I wonder if in the absence of the housekeeper that staff became confused as during covid we did not service stayover rooms and this did continue for some through the summer”.
5. In relation to **Allegation 4**, the claimant set out that he visited  
20 Dalfaber 5 or more often 6 days a week. The claimant argued that it was important that the new GM was better and likely to stay for a longer period and that two (unidentified) good candidates were lost due to alternative (unspecified) views of Mr MacDonald and while the chef “was a challenge” the claimant took the decision to stick  
25 with him until they were able to find a proper solution and/or able to support from the main resort.
6. In relation to **Allegation 5**, the claimant argued that he had not  
acknowledged that the meal was a disaster. The claimant  
referenced Jess Atkinson, the claimant intimated that both he and  
30 Ms Atkinson tried to contact the organiser on more than one occasion and described that there would be an email from the claimant to Ms Russell asking if she had any other contact details.
7. In relation to **Allegation 6**, the claimant argued that he had spoken  
to Ms Macholla on more than one occasion that it was not possible

or sensible to be re-forecasting several times a week, it was putting pressure on the team. He argued that demands on margins were unachievable, while the response was always “*this is unacceptable*”.

- 5 8. In relation to **Allegation 8**, the claimant argued that while he accepted that it was not the correct decision to use it, it was not his decision, and he was only aware after it had happened at which point took steps to ensure it did (not) happen again.
- 10 98. The claimant concluded the December Appeal Statement arguing that most if not all the allegations should have been dealt with as performance issues, describing that no formal performance management process was undertaken, he described that he had not advised his performance had reached a stage where there was any significance concern in relation to performance. He set out that he was doing his best in challenging circumstances and the outcome was too harsh having regard to all the
- 15 circumstances including but limited to resources, lack of investment in parts of the business, certain issues were due to others (the laundry van), his clean disciplinary records, length of service and performance with the respondent.
- 20 99. For the sake of brevity, it is not considered necessary to set out the full detail of the Appeal Minute. Mr Gillies in the course of the Disciplinary hearing, responding to positions adopted by the claimant, such as the claimant arguing that no evidence (meaning that no documents) had been presented sought to clarify matters for the claimant that the Notice of Discipline Hearing clearly (that is on the face of it) outlined the allegation
- 25 and the company’s position and that nothing should have come as a surprise. He did not, in doing so, preclude the claimant from arguing (though it had not been set out in the December Appeal Statement) that an aspect had in fact come as a surprise or that the claimant was unclear as to what was alleged.
- 30 100. In the course of the Disciplinary Hearing, Mr Gillies described his opinion that as Ms Macholla was CEO it made sense for her conduct the disciplinary and continued that he hoped his involvement in taking the appeal showed impartiality. Mr Gillies confirmed that he had a copy of the claimant’s revisions to the Minutes of the Disciplinary Hearing and

explained that *“the company’s view”* was that Mr Davidson’s Minutes were a true reflection. In doing so Mr Gillies was using the term the Company to reflect Mr Davidson’s position.

5 101. Mr Gillies described that the claimant’s conduct had fallen below acceptable standards in the context of the claimant intimating that he was doing his best, setting his view out that while investment was criticised, food quality and service had nothing to do with investment and setting out that gross misconduct coupled with performance issues were the reasons given in the letter for termination. Mr Gillies did not set out that he had  
10 concluded that he had agreed with the reasons.

102. While Mr Gillies described that the lifts had been broken for a long time and that corrective action could have been taken before it was, that was in the context that the claimant had intimated that there was not a significant delay and that no guest had been put into the Strathspey until the lifts were  
15 up and running. The claimant following upon Mr Gillies’s description set out his position (in the context of matters around the Fire Alarm) that every effort was made on his part to resolve both the lift issue and the fire alarm issued as quickly as possible that the claimant did not accept that he was guilty of unacceptable delays as mentioned in the dismissal letter.

20 103. The claimant went on to name two others subordinate to him describing that Mr McLennan took the lead for both the fire alarm and the lift issue describing that the issue was discussed at least 3 times a week. The claimant did not identify efforts or steps he had taken in his role as Manager Director overseeing arrangements, to avoid or minimise delay in  
25 issues around the lift, beyond noting that a more junior colleague had the lead, and the issue was discussed up to 3 times a week.

104. The claimant set out that he did not consider that in any way any of this could be considered to be gross negligence or gross misconduct. The claimant described that he did not appreciate that he had responded to a  
30 journalist but the journalist was present at the Community Council meeting so was already well aware of all the issues raised, Mr Macholla was aware of the position on Friday 11 and she knew that the local press was aware on Monday 14, that she had a copy of his response so there was, in his

view, ample opportunity to involve the communication advisers before the article was published.

105. The claimant described that he did not consider any of this could be considered gross negligence or gross misconduct, in response to which Mr Gillies described that from the respondent's (the company's) point of view, it was expected that this would have been first raised with Ms Macholla and then to senior management.
106. In conclusion, the claimant set out that he was doing his best in challenging circumstances, in the event that any sanction was appropriate the outcome was too harsh having regard to all the circumstances including but not limited to the challenges in relation to resources, the lack of investment in certain parts of the business, the fact that certain of the issues were as a result of the actions of others (the laundry van), his clean disciplinary record, his length of service and his performance with the company.
107. Mr Gillies concluded the Appeal Hearing confirming that he would not make his decision that day, he needed to consider all the points the claimant made and whether any follow-up investigations were required, if he needed to speak to others, he would do so before reading his decision. He set out that while he hoped to be able to email a decision letter as soon as possible given the upcoming holiday period he may well not be able to conclude his further investigations and deliver a decision before the New Year. Mr Gillies spoke briefly with Ms Macholla raising the claimant's allegation that she was not impartial, Ms Macholla confirmed that she was impartial.
108. Had Mr Gillies felt it appropriate he would have felt empowered to overturn the Ms Macholla's decision to dismiss the claimant. Mr Gillies had more recently overturned a decision to dismiss in a different appeal.
109. On **Wednesday 21 December 2022 at 3.09pm** (the claimant's email of 21 December 2022) the claimant emailed Mr Davidson with a copy of his December Appeal Statement with a number of comments. The claimant described that on reading "*it is less clear why I had listed*" two of the 8 named individuals he referred to The December Appeal Statement suggesting, without specification that one "*can testify on various areas as*



*the*” General Manager and a second named individual (who was Financial Controller) *“can comment on the added workload since”* Ms Macholl started particularly *“relating to but not restricted to forecasts”*.

5 110. The claimant described that while he accepted that (in relation to Allegation  
3 around the October Film Crew) rooms were not serviced he described  
that no evidence had been provided that it was 85 rooms or that it was for  
5 day for all rooms *“so I am not able to confirm the position in this regard”*  
and set out his position that the General Manager and the Rooms Division  
10 Manager, who he described was responsible for Housekeeping, were very  
stretched; there was no Housekeeper for the few weeks prior to and during  
the October Film Crew’s stay; the deputy housekeeper was on holiday,  
there was no Front Office Manager; there was no Facilities Manager and  
a number two. Further the claimant argued that housekeeping was short  
of supervisors and Front Office was generally short staffed and described  
15 that around this time Ms Macholla had instructed the General Manager to  
dismiss the Executive Chef which he described *“put further pressure on  
the operation”*.

20 111. The claimant did not in his revision to the Appeal Minute set out that he  
had not accepted during the Appeal (or did not accept on reflection), Mr  
Gillies opening comment that he was approaching the process with an  
open mind and was keen to hear what the claimant had to say. The  
claimant did not argue that Mr Gillies was not an appropriate person to  
hear the appeal and did not argue that Mr Gillies was not able to, or  
otherwise did not approach the appeal with an open mind.

25 112. On **Tuesday 10 January 2023**

1. at **10.38 am** Mr Gillies issued an email to the claimant, copied to Mr Davidson with an apology for the delay in doing so attaching copy of Notes from the Appeal Hearing *“I will give you an opportunity to review and hope to issue you with an outcome later this week.”*
- 30 2. At **2.42 pm** Mr Stephenson received a critical email in connection with fire safety standards across the Aviemore resort which included the SFRS August 2022 Notice letter.

113. On **Wednesday 11 January 2023** at **10.17 am** Mr Stephenson forwarded the Fire Safety email to Ms Macholla, Mr Hugh Cooper Property Development Director for the respondent and Mr Kenney McLennan with the appended SFRS August 2022 Notice letter.
- 5 114. On **Thursday 12 January 2023** at **9.15 am** the claimant emailed Mr Gillies (having already emailed a copy shortly before to Mr Davidson setting out that the attached was marked out with a few corrections and some notes for clarification) a revised version of the Appeal Notes. The claimant did not in his revision to the Appeal Minute set out either that he had not during  
10 the Appeal or did not on reflection accept Mr Gillies's opening comment that Mr Gillies was approaching the process with an open mind and was keen to hear what the claimant had to say. The claimant's revisions so far as material reflected his genuine but inaccurate recollection of the Appeal Hearing.
- 15 115. On **Friday 13 January 2023**, Mr Gillies issued his conclusions on the outcome of the appeal meeting to the claimant (the appeal decision). While these were his conclusions, the letter was drafted by the respondent lawyers. Mr Gillies confirmed that during the meeting, he had listened very carefully to the claimant's points of appeal outlined in the letter of 9  
20 December in addition, although that letter did not make specific comments in respect of the substance of and detail of the disciplinary allegation, they had spent time in the meeting going through these with the claimant providing comments on each. Further and since the appeal hearing he confirmed that had taken time to consider the points of appeal and the  
25 matters discussed at the appeal hearing.
116. The appeal decision confirmed the decision to dismiss the claimant setting out responses to 11 grounds of appeal:
- Ground 1.** You do not consider an adequate investigation was carried out and it appears the decision was predetermined. This was not upheld. Mr  
30 Gillies described that he did not consider that there was any evidence to suggest that the decision to dismiss was predetermined, he noted that the Disciplinary Outcome letter set out why the allegations were considered and why action was taken, he set out that he considered whether any additional investigation would have made any difference and set out that

he did not consider it would have done. Mr Gillies described that put simply serious concerns were identified which were raised with the claimant promptly and in accordance with the respondent's internal procedures. He confirmed that he had spoken with Ms Macholla and that he was satisfied that that decision to dismiss was not made until she held the disciplinary meeting and heard what the claimant had to say.

**Ground 2.** The claimant was not given adequate time to prepare for the disciplinary meeting given that he was still undertaking your duties on a full-time basis. This is particularly so given that the allegations cover a variety of issues over a significant period of time. Mr Gillies noted that the claimant had eight days to prepare and described that the respondent's standard procedure would be to give five days' notice. Mr Gillies set out that he considered the time given should have been sufficient time to prepare whilst the claimant continued to work full-time. In addition, Mr Gillies described, that the issues were issues that the claimant was well aware of given the claimant had been involved in them for a period of time.

**Ground 3.** No supporting evidence was provided prior to or at the meeting. Mr Gillies set out that the claimant did not identify either in his appeal letter or in their meeting what supporting evidence the claimant says should have been sent to him but was not. Mr Gillies described that many of the disciplinary findings were based on facts that the claimant. Mr Gillies set out that his finding on this ground of appeal is that the claimant was given the full details of the basis of allegations against him which he would have understood given the claimant's close involvement in these matters.

**Ground 4.** Relevant witnesses were not spoken to. Mr Gillies set out that while the claimant had said that relevant witnesses that should have been spoken to were not, as most of the issues which formed the basis of the allegations had been raised at the Hospitality Meetings, this meant there was no reason to speak to further witnesses. Mr Gillies described that the issues had been investigated and raised and any further information was not required to proceed with the disciplinary process. Mr Gillies set out that in disciplinary process it was important to ensure a fair and balanced process which he believed had occurred here.

**Ground 5.** The suitability and impartiality of the people involved in the process. Mr Gillies noted that the claimant had explained that Ms Macholla had decided there should be a disciplinary hearing and chair that hearing even though she had been a witness to certain witnesses. Mr Gillies described that as she is the CEO and was the claimant's line manager, it made sense for her to conduct the Disciplinary Hearing. He described that as he was hearing the appeal, he hoped that this demonstrated that the respondent was working to ensure that there is fair process with impartiality.

**Ground 6 and 7.** Minutes were not a true reflection of the Disciplinary Hearing. Mr Gillies set out that he was not persuaded that the minutes were not an accurate reflection of the meeting, describing that they were not intended to be a verbatim record but rather capture the key points. He set out that he reviewed the minutes which were detailed and extended to seven pages. Mr Gillies described that he did not consider that the claimant's complaint that he was not able to comment on the minutes would have made any substantive difference or rendered the decision unfair in any way.

**Ground 8.** Most, if not all of the allegations should have been dealt with as performance issues not through disciplinary process no formal performance management process was undertaken nor were you advised that matters had reached the stage where it was considered that there was any significant concern in relation to the claimant's performance. Mr Gillies in summary described that he did not accept this, describing that some of the allegations involved both conduct and performance and only two of the allegations can really be said to be pure performance. Mr Gillies described that in any event, the allegations were deemed so serious as to warrant dismissal in accordance with the claimant's employment contract terms, he did not think an alternative process would have made any difference.

**Grounds 9-10.** The claimant considered he was doing his best in challenging circumstances and in the event that any sanctions appropriate, the outcome was too harsh having regard to all the circumstances including, but not limited to, challenges in relation to resources, lack of investment in certain parts of the business, the fact that certain issues

were the result of the actions of others, the claimant's clean disciplinary record, the claimant's length of service and the claimant's performance with the company. Mr Gillies described that in reviewing this ground of appeal he considered whether any lesser sanction would have been more appropriate given the other factors the claimant identified. Mr Gillies set out his view, given the seriousness of the numerous allegations against the claimant combined with the potential risk to the company Mr Gillies' view was that the outcome was appropriate.

**Gound 11.** The claimant did not accept that he did anything which amounted to gross misconduct or gross negligence which would justify summary termination. Mr Gillies set out that he considered there was a misunderstanding on claimant's part, a number of the more serious findings against claimant were not findings of gross misconduct as such, rather they were findings that the claimant had breached specific provisions provided for in summary termination terms of the employment contract in each case the specific obligation that the claimant had breached were expressly and clearly identified.

117. Mr Gillies described that following their meeting he had re-read the Disciplinary Outcome Letter and considered whether anything the claimant told him at their meeting would lead him to a different view from the findings and disciplinary sanction of dismissal as set out in that letter. Mr Gillies set out that having reflected carefully on this, his considered decision was that even taking the matters the claimant raised at the appeal into account Mr Gillies supported the original disciplinary findings and sanctions against the claimant for the reasons set out in the disciplinary outcome letter.

118. Mr Gillies' genuine conclusion was that the sanction of summary dismissal was appropriate and that it was based on reasonable grounds.

119. Subsequently in **2023, Kearan McVey** was appointed to the role of Deputy CEO Aviemore.

120. From December 2022, the claimant carried out various job searches across Scotland including within a hotel-specific website and more generally, including in January 2023 making enquiries with a well-known hotel chain and online job searches, in February 2023 applying for a

General Manager role in Inverness without success and for financial reasons deciding not to apply for a role in London; he was unsuccessful in an application in April 2023 and made further enquiries including registering with a recruitment agency in May 2023 and has sought details including in June regarding a General Manager role in South West England and applied for senior General Manager role in Edinburgh. The claimant has not secured alternative employment. The respondent considers that that the claimant could have considered alternative lower-paid hotel roles including a Hotel Manager in Argyllshire, a Director of Sales in Ayrshire, and a General Manager in Edinburgh and Oban.

### Submissions

121. For the **respondent** written submissions were provided extending to 104 paragraphs with a document Appendix 1 setting out proposed findings in fact (for the claimant revisions were proposed to that Appendix1), supplemented by oral comments. It is not considered necessary in the interest of brevity to set out the submissions in full. It is however considered useful to note aspect of the submissions.
122. For the respondent, it was submitted that the respondent had a fair reason to dismiss, conduct or some other substantial reason and there was a fair dismissal. If not a fair dismissal, it is argued that the claimant would have been dismissed fairly and there should be a Polkey reduction or alternative a reduction contributory conduct / or alternatively a reduction for failure to mitigate. It was argued that a separate hearing on remedy was unnecessary.
123. It was argued that the chronology provided along with the claimant submissions was not accepted, and in oral submissions, the respondent focussed on disputed areas. For the respondent, while it was noted that the claimant continued to object to the SFRS August 2022 Letter, it was argued that it was clearly relevant as it revealed a serious dereliction of duty, the claimant gave clear evidence about the events and document and thus he suffered no prejudice in terms of fair notice, it was clearly relevant in terms of remedy and in oral submissions referred to a passage within **McPhail's Sheriff Court Practice (McPhail)**, although not

identified in submissions, which was understood to suggest the question was one of relevance rather than (pled) notice.

124. For the respondent the Tribunal was invited to make various Findings in Fact which, for the sake of brevity, are not repeated at length, in summary included in relation to the claimant's role, the appointment of the CEO Aviemore, what is described as the Campbell Family Dinner, un-serviced rooms in October, financial forecasts, Revinate scores, use of a written vehicle, the complaint from a Community Council and subsequent events, the Disciplinary including investigation, Disciplinary Hearing and outcome, the claimant's appeal, the appointment of Mr Stephenson, and subsequent matters (including the SFRS August 2022 Letter), together with mitigation and comment on witnesses.
125. For the respondent it was set out that, in terms of s94 of the Employment Rights Act 1996 (ERA 1996), a fair reason can relate to conduct or some other substantial reason (SOSR), arguing that the dismissal falls within conduct or SOSR and referenced the test set out in **British Home Stores v Burchell** [1980] ICR 303 [**Burchell**] his conduct and or SOSR so undermined trust and confidence in him so as to render his continued employment in his senior role untenable.
126. For the respondent, in respect that, the claimant argues the dismissal was procedurally unfair while conceding that there was no separate investigation officer, the respondent had carried out a reasonable investigation (reference made to para 5 of ACAS Code there will be some occasions where there is no investigatory meeting). It was reasonable for the disciplining manager, given the claimant's responsibilities as Managing Director of the Aviemore Resort, to hold the claimant responsible for the failing in respect of allegations 1, 3, 4, 5, 6 and 8 and further to find him responsible for allegation 2. Ms. Macholla demonstrated her impartiality and reasonable approach by not upholding allegation 7 and by concluding that allegations 4, 6 and 8 were more properly performance issues and that she approached matters with an open mind, was reasonable, objective and fair. Further, the decision to dismiss was only taken after the Disciplinary Hearing with the finding of gross misconduct and gross negligence in respect of allegations 1, 2, 3 and 5.

127. Similarly, it was argued that Mr Gillies was impartial and made his own decision.
128. There was no requirement (by reference to case law and ACAS code) for minutes to be provided in advance of a decision.
- 5 129. The respondent had a genuine belief and reasonable grounds upon which to sustain that belief.
130. In response to the claimant submissions was not accepted that Ms Macholla had conceded that she did not consider that the claimant had not done anything wilful, deliberate or dishonest.
- 10 131. The decision to dismiss and the procedure adopted fell within the range of reasonable responses (reference made to **Iceland Frozen Foods v Jones** [1982] IRLR 439 [**Iceland Frozen Foods**], the Tribunal should not substitute its own view **Foley v Post Office** [2000] 827 [**Foley**]).
- 15 132. In relation to conduct, Ms Macholla found that failures in respect of allegations 1, 2, 3, 5 and 9 amounted to gross misconduct and gross negligence and were sufficiently serious as to merit dismissal with Mr Gillies agreeing that allegation 2 was so serious that it would result in dismissal.
- 20 133. In relation to **SOSR** (98(1) (b) ERA 1996), in the alternative the reason was a lack of trust and confidence in the claimant, the claimant compounded the complaint (regarding refugees) by failing to follow protocol with what the respondent argues was serious consequences shown in press coverage. Further, the respondent lost faith due to lack of oversight in relation to staffing resulting in a large group of guest rooms being un-
- 25 serviced over 5 days, the way in which the claimant dealt with complaints concerning the Campbell family dinner, lack of quality at Dalfaber, having not taken action to ensure the van was not used on site, and his inability to respond timeously to requests for financial forecasts. The claimant knew the respondent viewed the conduct alleged as going to the root of trust,
- 30 the respondent had set out in the invite to the disciplinary hearing that should the allegations be upheld "*they strike at the root of trust in you as an employee and senior member of our management team*".



134. While the claimant refers, in the context of arguing that matters should have been dealt with as capability with warning, that Mr Ridout's draft email of 1 September 2022 was a positive comment, it was not and dealt with a number of failings. In any event, Ms Macholla had considered as set out in the Outcome Letter whether an allegation was a capability matter which would have resulted in a warning. The respondent argues in conclusion that the decision to dismiss was within the band of reasonable responses.
135. The respondent made further submissions, in relation to remedy arguing for a 100% reduction on Polkey, in relation to just and equitable reduction, if the Tribunal did not otherwise accept the respondent's position compensation should be reduced to 2 months to reflect when the period of time it would have to dismissal following January 2023 (in effect upon reliance upon the SFRS August 2022 Notice letter being notified).
136. In relation to contributory fault, it is argued that against what the respondent argues is blameworthy conduct, it is just and equitable that any compensation be reduced to nil.
137. Further, the respondent argues there was a failure to mitigate in that the claimant had only applied for 3 jobs and while the respondent argues that it had not breached the ACAS code, the code does not apply to SOSR dismissal (**Phoenix House v Stockman** [2017] ICR 84 [**Stockman**]) however if there was a breach it was minor and any uplift should be either zero or small.
138. **For the claimant**, in addition to the claimant's written submissions which extended to 75 paragraphs, revisions to the respondent's Appendix 1 were provided along with an outline chronology. It is not considered necessary, in the interest of brevity, to set out the submissions in full. It is however considered useful to note aspects of the submissions.
139. For the claimant it was observed the substantive issue is whether the respondent (on whom the burden lies) has proven there was a potentially fair reason, the respondent, it was noted, had pled 3 alternatives conduct, capability and SOSR. The claimant argues that it remains unclear what is the potentially fair reason, the respondent having reduced the reasons to

conduct and SOSR demonstrating, it is said, an uncertainty in the respondent's position.

140. The claimant set out that the Tribunal further requires to consider whether the decision to dismiss was substantively and procedurally fair having regard to s98(4) ERA 1996.
141. For the claimant comment is made on the evidence, inviting the Tribunal to prefer the claimant, the respondent's explanation and reasons were not credible or reliable. In particular, the Tribunal was invited to treat the evidence of Ms Macholla with real caution and care against a background that that she has never worked in hospitality or hotel industry, nor with the respondent prior to October 2022 and yet, it is argued, made assertions which were not made with actual knowledge or experience.
142. It is not considered necessary to set out the claimant's position in full however for the claimant it was observed that Ms Macholla referenced the claimant being in Italy in the context of mitigation and proposed that he was only fir for a lower role in a smaller hotel and on a lesser salary.
143. It is argued that she was appointed at the instigation of the founder Mr McDonald shortly after the June 2022 visit as someone with no knowledge and experience in the sector when she was known to the founder Mr McDonald. Further, Mr Davidson was criticised for response directly to the claimant's counsel which appeared to criticise the counsel as being naïve rather than responding to questions, and as being overly defensive and further disciplinary action being taken by Ms Macholla at the Hospitality Board meeting on 22 November 2022 while no notes beyond the agenda were provided.
144. For the claimant the respondent is criticised for the lack of documentation accompanying the disciplinary process and the late provision of the Fire the SFRS August 2022 Letter there being no notice of same. The claimant, it is argued gave evidence in a plain and straightforward, unlike Ms Macholla had substantial sector experience and indeed more experience than any of the alleged decisions and a further example of the respondent failing to recognise the managerial structure in place.

145. In relation to liability, the claimant sets out that the statutory right to be unfairly dismissed is different to the common law rights relating to termination of contract and referenced **Gisda Cyd v Barrett** [2010] IRLR 1073 [**Gisda**]; **Shevlin v Innotech Advisers** [2015] UKEAT/0278/14 [**Shevlin**]; **Rawson v Robert Norman Associates Ltd** [2014] UKEAT/0199 [**Rawson**]; **W Devis & Sons Ltd v Atkins** [1977] AC 931 HL [**Atkins**]; **Ezsias v North Glamorgan NHS Trust** [2011] IRLR 550 [**Ezsias**] summarised as Tribunal should be on the lookout for employers asserting to SOSR where conduct is in issue as they may be doing so to avoid ACAS, directing to the Tribunal to have regard to the ACAS Code of Practice on Disciplinary Practices and Procedures, further **Taylor v OCS Group Ltd** [2006] ICR 1602 [**Taylor**]; **Burchell; Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23 [**Hitt**] and again referencing **Atkins**; **W Weddel v & Co Ltd v Tepper** [1980] IRLR 96 [**Tepper**]; **Sillifant v Powell Duffryn Timber Ltd** [1983] IRLR 91 [**Sillifant**]; **John v Rees** [1969] 2 AllER 274 [**Rees**] and **Chamberlain Vinyl Products Ltd v Patel** [1996] ICR 113 [**Patel**].
146. For the claimant it was argued that the respondent had not proven a potentially fair reason, setting out that the Tribunal must first determine who was the decision maker (it being argued that it was in effect the founder Mr MacDonald, including noting that Ms Macholla deployed the word “*our*” repeatedly while Mr Gillies referred to “*the Company*” ) and what facts they had in their mind, referencing **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 [**Abernethy**], it being argued that both (alleged) decision makers were very new, the terms of the founder Mr MacDonald’s note to the Board and subsequent events, Mr Gillies (although it was conceded he sought to resile) indicated that the claimant was being investigated even before Mr Macholla’s appointment, further Mr Davidson was characterised as being within an inner circle of (or operated by) the founder Mr McDonald.
147. Further aspects of the respondent submissions were criticised in which it was described that it was not practicable in for a different person to be involved as it was necessary to keep the Board members available for the appeal and other Board members had been involved. This was said to, in

effect, support the primary position that Ms Macholla and Mr Gillies were not the true decision makers.

148. For the claimant it was further argued, in the alternative if Ms Macholla and Mr Gillies were the true decision makers the respondent failed to prove a potentially fair reasons noting that the respondent relies upon 3 alternative (pled) reasons, it was argued that that it was unclear from the dismissal letter evidence and appeal outcome letter what the reason for dismissal was.
149. The claimant argued that the dismissal was substantively and procedurally unfair and repeats the content of the ET1 paper apart (at paragraph 45 (j)) setting out 10 reasons it is said the respondent did not act reasonably including lack of training being provided as to how best to support refugees and /or long terms guests, housing and supporting refugees was not originally envisages to be part of the claimant's role.
150. The claimant argued that it was plainly predetermined including by reference to Ms Macholla prior held views. She was introduced to get rid of the claimant, taking over his role, she was a key witness, she decided to refer to disciplinary and dismissal, without, it was argued investigation, she was incapable to putting aside her own views.
151. Further and in relation to Mr Gillies it was argued from the minutes his comments showed a closed mind, he is the son of what is described as the inner circle of the founder Mr McDonald. In addition, it was argued Mr Gillies accepted, without evidence, that there were performance issues and he took into account his day-to-day dealings with the claimant rather than being impartial, he did not carry out any investigation beyond asking Ms Macholla whether she was impartial and accepted her response without challenge, the respondent lawyers wrote the letter of outcome and he repeatedly used the phrase "*the company view*" (as parallel to Ms Macholla repeated use of "we") which it was indicative that neither were expressing their own independent and impartial thought.
152. It was argued there was no genuine belief or reasonable grounds after a reasonable investigation, the respondent wanted the claimant out of the business following the founder's June 2022 visit, there was no reasonable

investigation (nor any investigation at all) and there were no reasonable grounds to uphold the allegation.

153. It was argued there was no reasonable investigation, nor indeed any actual investigation, further to admit a fact was not misconduct, Ms Macholla  
5 misconstrued concessions, the claimant was not provided with an opportunity to correct or clarify the minutes before her decision, there was no evidence presented to the claimant, absent documentation the claimant could not meaningfully and fully respond, there was a lack of specification in the allegations, Ms Macholla appeared to rely upon no evidence on the  
10 main allegations on which she relied to for her decision to dismiss, the claimant had not made the admission levelled at him.

154. It was argued there was no reasonable investigation, and no open minded and reasonable one taking a balanced approach arguing in support there was little to nothing down prior to the disciplinary, there was nothing  
15 presented to the claimant, including (as set out in the ET1 paper part para 25) copies of complaints, copy of the MSP email, evidence of alleged reputational damage and or exacerbation of reputational damage. Further while the claimant was naming relevant and obvious witnesses, the respondent did not investigate any of them. There was a complete  
20 absence of documentation, requested documentation was not provided, for the respondent to suggest the claimant knew of the matters misses the point, it is not for an employee to guess what may be referred to.

155. Further it was argued alternatively on to the lack of an investigation and or absence of reasonable grounds for a belief in a reason for dismissal, there  
25 was no documentation to support the allegations, the claimant had reasonable explanations. It was proposed that Ms Macholla accepted that she did not consider that the claimant had not done anything wilful, deliberate, or dishonest. Further it was argued that Ms Macholla did not look at all the circumstances including that the claimant was not trained in  
30 relation to looking after refugees.

156. In relation to the alleged breach of contract, it was argued that this is not potentially fair reason. Further the Tribunal should be cautious where an employer seeks to rely upon SOSR in a conduct or capability dismissal which otherwise engage the ACAS Code of Practice (ref again to **Ezias**

and **Governing Body of Tubbenden Primary School v Sylvester** [2012] UKEAT/0527 [**Sylvester**]). Further the allegation of breach of conduct was never put to the claimant prior to the dismissal letter and there were no reasonable grounds, the claimant was not suspended and trusted to continue in his role; the respondent did not have any evidence to reach a conclusion, it was argued that the local paper was copied into the email sent to the claimant and was likely to respond and it is argued that the claimant's response factually accurate, measured and supportive of the respondent.

5  
10 157. Further, it was argued that having regard to the respondent policies, the 2019 Agreement and natural justice the procedure and process was unfair. The claimant argues that ACAS Code paragraphs 4, 5, 6, 9, 11, 12, 18, 23 and 27 were breached, in addition to matters being predetermined there were no independent /impartial decision makers, no investigation, the  
15 postponement request was unreasonably refused (but no reason given for postponement request) Ms Macholla accepted in the hearing that there would have been no harm in postponing for one week.

158. It was argued that there was lack of any or any sufficient clarity of the allegations, there was not documentation, and the claimant was not  
20 provided with an opportunity to correct the Minutes of the Disciplinary Hearing, which was perpetuated in appeal when recording was refused, there are material disputes between the parties, any reasonable employer would have provided an opportunity to review the minutes. It is argued that Mr Gillies approached the Appeal with a closed mind, the appeal was a  
25 rubber stamp exercise, he was not independent or impartial, the claimant had been removed from the budget and it is argued someone appointed into a similar role the day after the claimant was dismissed.

159. Mr Gillies, it argued, did not properly understand the basis of the decision to dismiss nor what allegations or finding Ms Macholla referred, and Mr  
30 Gillies thus could not undertake a meaningful appeal. Mr Gillies did nothing to remedy what the claimant argues were obvious failing in the disciplinary stage, no additional documentation, no documentary evidence was obtained, no witnesses were interviewed, and there was no enquiry whether handwritten notes (of the Minutes) existed.

160. It was set out that the Tribunal is not tasked with making findings whether the claimant did or did not breach his contract and in any event, the claimant did not, and it is not sufficient to argue that the respondent believed that the claimant had done so.
- 5 161. For the claimant, it was argued that the decision to dismiss was outside the band of reasonable responses, Ms Macholla accepted that she had considered, when concluding that dismissal was appropriate, matters which would lead to a warning.
- 10 162. Further the claimant argued there was no reasonable basis to conclude gross misconduct, gross negligence or an irretrievable loss of trust and confidence, there was no indication that the claimant would not respond to warning, the respondent's own Policy says the point of disciplinary is to encourage and Ms Macholla did not reasonably consider a warning as opposed to a sanction of dismissal, performance issues were not  
15 addressed.
163. Further the claimant had a clean disciplinary record and was the subject of a positive comment in September 2022, the respondent did not reasonably consider alternatives to dismissal at all and in summary the dismissal was both procedurally and substantively unfair.
- 20 164. For the claimant submissions were further made in relation to remedy, including noting that consideration would require to be given to updating the calculations from (end of the) the original hearing date, there was no counter schedule from the respondent, the claimant set out the relevant statutory provisions and in relation to contributory fault set out the two  
25 different statutory tests for the purposes of the basic award and the compensatory award and referred to **Nelson v BBC (No 2)** [1980] ICR 110 [Nelson].
- 30 165. For the claimant it was argued that the claimant's evidence is to be preferred to that of the respondents which in many respects does not have direct evidence as to the allegations made against the claimant, there was no culpable or blameworthy behaviour, and it would not be just and equitable to make any deduction.

166. In relation to **Polkey v AE Dayton Services Ltd** [1987] UKHL 8 [**Polkey**] the Tribunal should not find that the claimant would have been dismissed it would not be just and equitable to make any deduction as the decision to dismiss was both substantively and procedurally unfair, with the procedural failings being argued to be so serious that that they go to the core of the whole procedure It is argued that with a fair and open minded process it is more than likely the claimant would have remained employed, and any deduction ought to be minimal, it being argued that Mr Gillies in relation to **Allegation 2** described that it may (rather than would) lead to dismissal and with open minded objective managers it apparent that there was a highly likely prospect the claimant would have remained employed.
167. The claimant maintained the objection to the SFRS August 2022 letter on grounds of unfair notice and relevance, it being noted that the claimant was not the Duty Holder, it being argued that the claimant had raised issues with his seniors previously with no action taken against him them and there was no investigation, further it was argued that Ms Macholla had allowed to the Ukrainian guest to stay in the hotel without telling them of the alleged fire safety issues, the claimant's evidence should be accepted including as there was no relevant contradictory evidence. Further, it was argued, there were apparent cost and investment issues from the SFRS August letter which were not the fault of the claimant.
168. In relation to mitigation, for the claimant it was set out that the burden is on the respondent to prove that the claimant had failed to the mitigate loss and the respondent failed to so. The claimant has taken reasonable (and numerous) steps to mitigate losses, roles which the respondent has referred to were not comparable not one which it would have been reasonable for the claimant to take.
169. Finally on behalf of the claimant and in relation to ACAS uplift it was argued that there should be a 25% uplift, there were it is said numerous breaches of the ACAS code, the respondent is a large employer with access to legal advice which was used throughout. In relation to the period for compensatory award this should run from the effective date of dismissal.

### **Witness evidence**



170. I was unable to accept the accuracy of the honest, but inaccurate, recall of the claimant when compared to those who gave contradictory accounts. The claimant's evidence reflected his inaccurate view of Ms Macholla and her role including what he regarded as her lack of relevant experience as compared with his own extensive experience within the hospitality and hotel sector. Further and while seeking to directing criticism from himself as the Managing Director, there is no evidence to suggest that he challenged Ms Macholla's description issued to him on 18 October 2022, shortly after she started that he remained accountable for all aspects of the managing director role.
171. It was suggested that witnesses for the respondents who gave evidence for the respondent were unreliable and or were acting for others. The Tribunal does not accept that Ms Natalya Macholla, Mr Jim Davidson and Mr Hugh Gillies untruthful in their evidence to the Tribunal. The Tribunal notes there were some apparent discrepancies, including in the context of seeking to recall when Mr Davidson was asked to be Notetaker, Mr Davidson did not disagree that this would have occurred on 22 November 2022 (the date of his attendance at Hospitality Board Meeting on 22 November 2022), however the Tribunal accepts Mr Macholla's recollection that there was no general discussion of discipline of the claimant at that meeting. The Tribunal accepts that with the passage of time, that no such general discussion of discipline took place, this being a general meeting largely of the claimant's peers.
172. While no minutes were provided of the Hospitality Board meetings on 7 September 2022 at which the claimant was present, nor on 22 November 2022 the Tribunal is satisfied that disciplinary action of the claimant was not the subject of general discussion at any Hospitality Board meeting. The Tribunal accepts Ms Macholla's recall this was broadly a meeting of the claimant's peers, focused on general areas there would have been no reason to discuss such an issue, Ms Macholla had arranged for the Discipline letter to be issued while she was in attendance at the meeting on 22 November 2022.

## Unfair Dismissal

### Relevant Law

173. Section 94(1) of the Employment Rights Act 1996 (ERA 1996) provides

*“An employee has the right not to be unfairly dismissed by his employer.”*

5 174. Section 98 ERA 1996 states

(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show*

(a) *the reason (or, if more than one, the principal reason) for the dismissal, and*

10 (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) *A reason falls within this subsection if it—*

15 (a) *relates to the capability or qualifications of the employee for performing work of the kind for which he is employed by the employer to do,*

(b) *relates to conduct of the employee,*

.....

20 (4) *In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

25 (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

(b) *shall be determined in accordance with equity and the substantial merits of the case.*

175. The employer requires to show a potentially fair reason within s98(2) of ERA 1996.
176. An employer need not have conclusive direct proof of an employee's misconduct, but a genuine and reasonable belief reasonably tested. In terms of the **Burchell** guidance it is appropriate to consider whether the respondent had a reasonable belief in the misconduct of the claimant so:
- a. did the employer believe it; and
  - b. did they have reasonable grounds upon which to sustain that belief?
177. If so in terms of s98(4) was the dismissal fair or unfair (that is
- a. was it reasonable to dismiss, or
  - b. can it be said that no reasonable employer would have dismissed - there is a band),
- having regard to the matters set out in s98(4) (a) and (b) – whether taking into account the size and administrative resource of the employer, it acted reasonable or unreasonably in treating the reason as a sufficient reason for dismissing the employee in accordance with equity and the substantial merits of the case.
178. It falls to the Tribunal to determine which, if any, of the potentially acceptable reasons the employer's factual reasons for dismissal falls. Further, the Tribunal is required to make findings as to the employer's own reasons (that is the reason which the Tribunal finds, as a matter of fact, led the employer to dismiss on the information available to the employer at the material time). The Tribunal should not substitute its own view as to the reason for dismissal.
179. When assessing whether the dismissal was reasonable, in all the circumstances, the Tribunal is required to have regard to the operative (actual/live) reason.
180. The burden is on the respondent to show the reason for dismissal and that it is potentially fair.

181. The Tribunal is alive to the caution expressed in **Ezsias**, referred to for the claimant in which the EAT (in 2011) accepted the Tribunal's finding that the employer had dismissed the employee because of a breakdown in relationship rather than conduct, and in which the EAT noted that Tribunals would be on the lookout for an employer using SOSR as pretext to conceal the real reason.
182. Further in **Lyfar-Cisse v Western Sussex University Hospitals NHS Foundation Trust & Ors** [2022] EAT 193 [**Lyfar-Cisse**] the EAT upheld a decision in which the Tribunal decided that the substantive reason could be a potentially fair one whether categorised as conduct, or as some other substantial reason.
183. Assessing the reason for dismissal involves considering the subjective state of mind of the employer.
184. Once the employer has shown the reason for dismissal, it is then for the Tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal.
185. That question is to be determined in accordance with equity and the substantial merits of the case and the circumstances to be taken into account include the size and administrative resources of the employer's undertaking. The burden as to fairness under s 98(4) ERA 1996 is neutral.
186. The Tribunal must assess the reasonableness of the employer's decision and must not substitute its view of the right course of action. There is a band of reasonable responses within which one employer might take one view and be acting fairly and another quite reasonably another view and still be acting fairly (**Iceland Frozen Foods Ltd**).
187. It is for the Tribunal to decide if the reason is both substantial and justifies dismissal.
188. The ACAS Code does not in terms apply to dismissal for some other substantial reason dismissals (**Stockman**).
189. While an investigation and hearing may not always be required, the importance of doing so normally in the case of alleged misconduct was set out by the House of Lords in **Polkey**, in which Lord Bridge made the

following comments: “Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by [ERA 1996 s 98(2)]. These, put shortly, are:

- 5           (a)           that the employee could not do his job properly;
- (b)           that he had been guilty of misconduct;
- (c)           that he was redundant.

10           But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as ‘procedural’, which are necessary in the circumstances of the case to justify that course of action. Thus.....; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation;...

15

20           If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness posed by [s 98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of [s 98(4)] this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under [s 98(4)] may be satisfied.”

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190. The approach to be taken to procedural questions is a wide one. A Tribunal should view it if appropriate as part of the overall picture, not as a separate aspect of fairness [Taylor].

191. While procedural defects are in principle capable of rendering the dismissal unfair as the EAT commented in **Whitbread & Co plc v Mills** [1988] IRLR 501 (**Mills**), “*not every formality of legal or quasi-legal process is required during the disciplinary and appeal procedures. Each set of circumstances must be examined to see whether the act or omission*”  
5 *has brought about an unfair hearing.*”
192. What is necessary is for the Tribunal to consider the disciplinary process as a whole when assessing the fairness of the dismissal.
193. The band of reasonable responses test does not solely apply to the  
10 decision to dismiss but also to the procedure followed by the employer [**Hitt**].
194. I directed myself to the following passage in **Hitt**, which I found to be relevant to this case: -
- 15 *“The investigation carried out by Sainsburys was not for the purposes of determining, as one would in a court of law, whether Mr Hitt was guilty or not guilty of the theft of the razor blades.*
- The purpose of the investigation was to establish whether there were reasonable grounds for the belief that they had formed, from the circumstances in which the razor blades were found in his locker, that there*  
20 *had been misconduct on his part, to which a reasonable response was a decision to dismiss him.*
- The uncontested facts were that the missing razor blades were found in Mr Hitt's locker and that he had had the opportunity to steal them in the periods of his absence from the bakery during the time they went missing.*  
25 *Investigations were then made, both prior to and during the period of an adjournment of the disciplinary proceedings, into the question whether, as Mr Hitt alleged, someone else had planted the missing razor blades in his locker. In my judgment, Sainsburys were reasonably entitled to conclude, on the basis of such an investigation, that Mr Hitt's explanation was*  
30 *improbable.*
- The objective standard of the reasonable employer did not require them to carry out yet further investigations of the kind which the majority in the*

*employment tribunal in their view considered ought to have been carried out.”*

195. I have reminded myself that the Court of Appeal identified in **Taylor** there is no rule of law that earlier unfairness can be cured only by an appeal by way of a rehearing and not by way of a review, because the examination should be the fairness of the disciplinary process as a whole.

196. Whether a procedural defect is sufficient to undermine the fairness of the dismissal as a whole is a question for the Tribunal. Not every procedural error will do so; the fairness of the whole process should be looked at. In **South Maudsley NHS Foundation Trust v Balogan** [2014] UKEAT0212/14 [**Balogan**], the EAT explained in paragraph 9: “*As this Tribunal has said countless times, the crucial thing is the statutory test in section 98(4) namely whether in all the circumstances the employer acted reasonably in treating its reasons for dismissing the employer sufficient.*

*A procedural defect is a factor to be taken into account but the weight to be given to it depends on the circumstances and the mere fact that there has been a procedural defect should not lead to a decision that the dismissal was unfair. The fairness of the whole process needs to be looked at and any procedural issues considered together with the reason for the dismissal, as the two will impact on each other.”*

### **ACAS Code and Process**

197. I have reminded myself of what is set out in the ACAS Code of Practice on Disciplinary and Grievance Procedures which came into effect on 11 March 2015: Code of Practice (Disciplinary and Grievance Procedures) Order 2015, SI 2015/649 provides:

1. *This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.*

- *Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of*

*fairness set out in this Code should still be followed, albeit that they may need to be adapted.*

...

- 5 2. *Fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear. Employees and, where appropriate, their representatives should be involved in the development of rules and procedures. It is also important to help employees and managers understand what*
- 10 *the rules and procedures are, where they can be found and how they are to be used.*
- 15 3. *Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.*
- 20 4. *That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:*
- *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.*

25

  - *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.*

30

  - *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.*

5. *It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*

6. *In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.*

7. *If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure.*

8. *In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.*

#### ***Inform the employee of the problem***

9. *If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*

10. *The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting.*

#### ***Hold a meeting with the employee to discuss the problem***

11. *The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.*

12. *Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.*

...

**Decide on appropriate action**

18. *After the meeting decide whether or not disciplinary or any other action is justified and inform the employee accordingly in writing.*

...

23. *Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.*

24. *Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination.*

25. *Where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available.*

**Provide employees with an opportunity to appeal.**

26. *Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.*
27. *The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.*
28. *Workers have a statutory right to be accompanied at appeal hearings.”*
- 10 198. I have reminded myself of the Court of Appeal decision in **Slater v Leicestershire Health Authority** [1989] IRLR 16 (**Slater**) that for some employers, it may not always be straightforward to avoid a situation where the same person carries out the investigation, discipline and the appeal and set out that *“it could not be held that because the person, conducting the disciplinary hearing had conducted the investigation, he was unable to conduct a fair inquiry. While it is a general principle that a person who holds an inquiry must be seen to be impartial, the rules of natural justice do not form an independent ground upon which a decision to dismiss may be attacked”*.
- 15
- 20 199. Further I have reminded myself of the comments of the EAT in **St Nicholas School (Fleet) Educational Trust Ltd v Sleet** UKEAT/0118/17 (**Sleet**) that at such an appeal, the focus is on the impartiality (or otherwise) of the decision-taker who *“might have a particular conduct issue in mind as the reason for dismissal, but dismiss unfairly because they have a closed mind to the possibility that the employee might be innocent, or that the conduct in issue might not justify dismissal.”*
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### **Gross Misconduct**

200. **Reilly v Sandwell Metropolitan Borough Council** [2018] IRLR 558 (**Sandwell**) sets out that what amounts to gross misconduct involves deliberate wrongdoing or gross misconduct and found that it involves deliberate wrongdoing or gross negligence.
- 30

201. I have further reminded myself that the courts have considered when ‘*misconduct*’ might properly be described as ‘*gross*’: **Neary v Dean of Westminster** [1999] IRLR 288 **Neary** (para 22). In **Neary**, Lord Jauncey rejected a submission that gross misconduct was limited to cases of dishonesty or intentional wrongdoing. **Neary** was considered more recently by the Court of Appeal in **Adesokan v Sainsbury’s Supermarkets Ltd** [2017] I.C.R. 590 (**Adesokan**) at paragraph 23, Elias LJ said that the focus was on the damage to the relationship between the parties; that some deliberate actions which poison the relationship obviously fall into the category of gross misconduct.
202. Gross misconduct means misconduct so serious that it breaches the contract of employment in such a way as to relieve the other party to the contract of being bound by it. Most such terms are implied. A classic formulation of the implied term of confidence and trust between employer and employee was set out in **Woods v PWM Car Services (Peterborough) Ltd** 1981 IRLR 347 (**Woods**) dealing with employer’s conduct, as that a party to the contract must not “*without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*”.

### **Allegations**

203. It is important that the employee knows the full allegations against him or her.
204. The Tribunal has reminded itself that the Court of Appeal set out in **Hussain v Elonex plc** 1999 IRLR 420, CA (**Elonex**) that where the employee is fully aware of the case and has a full opportunity to respond to the allegations and the obtained statements are peripheral to the decision reached, failure to disclose will not render a dismissal unfair.

### **Discussion and decision**

#### **Wrongful dismissal**

205. The right not to be wrongfully dismissed, unlike the right not to be unfairly dismissed, is not one which relies upon statute.

206. As the respondent set out in its submission no notice of wrongful dismissal claim is set out in the ET1. The claimant, at paragraph 49 sets out that it expressly reserves the right to rely on the findings in respect of this unfair dismissal claim to bring proceedings in the Sheriff Court for breach of contract. For the claimant no submission was made beyond the claim of Unfair Dismissal. No issue of wrongful dismissal is before the Tribunal and thus no determination is made in that regard.

## Discussion and Decision

### Fair Notice issues

207. **SFRS August 2022 letter.** The Tribunal did not find the reference, in the context of **the SFRS August 2022 Letter**, to McPhail to be of assistance, so far, the matter relied upon was not one which was a variation, modification or development of those matters of which notice was given. It was argued, and the Tribunal accepts that the respondent did not become aware of until January 2023, however, the ET3 was received on 4 April 2023. It is not clear why fair notice could not have been given of the argument that the claimant would have been dismissed in any event upon Ms Macholla becoming aware of the terms of the SFRS August 2022 Letter within the ET3 or otherwise at a date substantively in advance of the Final Hearing.

208. The Tribunal notes that the Employment Appeal Tribunal observed in **Khetab v AGA Medical Ltd** [2010] 10 WLUK 481 (**Khetab**) that the purpose of the ET1 and ET3 “...is so that the other party and the Employment Tribunal understand the case being advanced by each party so that his opponent has a proper opportunity to meet it”, and further in **Chandhok and Another v Tirkey** [2015] IRLR 195 (**Chandhok**) Langstaff J, commented at para 18 parties are expected to set out the essence of their respective cases in the ET1 and ET3 and “... a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it”.

209. The Tribunal concludes that the SFRS August 2022 Letter and any alleged actual or potential consequences arising from the respondent becoming aware of same including in January 2023 are not relevant.
210. **Assertion of a specific alternate decision maker.** In the course of the Evidential Hearing, it was suggested that the decision maker with regard to the dismissal of the claimant was not Ms Macholla (who attended as a witness), but rather Mr Donald MacDonald the founder of the respondent company. While at paragraph 24 it was suggested that Mr MacDonald was part of Donald MacDonald's inner circle and had worked for him for a lengthy period, this argument was not foreshadowed in the ET1, the claimant had made no application to require the attendance of Mr MacDonald at the hearing, despite the terms of paragraph 3 of the Tribunal's Letter 20 April 2023, in order to put the allegation to him.
211. **Job Profile.** For the claimant, in the Appendix to the submission's para **22/23**, it was argued that the Tribunal should draw certain inferences from the absence of a document setting out the claimant's "*job role*". The Tribunal notes that neither the respondent nor the claimant provided a separate document expressed to be a Job Role for the claimant. The Tribunal notes that Ms Macholla on 16 November 2022 asked Ms Chan whether she had "**any job profiles**" for the claimant and the then General Manager. No response was provided and no application to the Tribunal was made seeking recovery of response or a specific job profile. However, there was no contemporaneous documentation (such as a reply from the claimant contradicting the same) querying Ms Macholla's earlier email to the claimant on 18 October 2022 which described "*As per our discussions on Friday your role and responsibilities have not changed, and **you will remain accountable for all aspects of the managing director role.** My appointment will aim to provide strategic and operational support as we continue to grow and develop our Aviemore business.*"
212. In all the circumstances the Tribunal concludes that the claimant accepted from at least 28 October 2022 that his job profile was that he remained accountable for all aspects of the managing director role and that was his job profile.

## Unfair Dismissal

### Discussion and Decision

- 5 213. **Suspension:** The claimant was not suspended from his receipt of on 22 November of the Notice of Disciplinary Hearing letter to the Disciplinary Hearing Outcome Letter on 6 December 2022. During that time the claimant had full access in his capacity as Managing Director – Aviemore to emails and documentation.
- 10 214. The respondent's non-contractual Employee Handbook set out that the respondent may decide at any stage of the formal disciplinary procedure to suspend. They did not do so. In practice Ms Macholla during the period of the disciplinary process continued to seek management information from the claimant, had she suspended him that would not have been open to her. In particular and during this time Ms Macholla continued to seek managerial information from the claimant as she Ms Macholla had not reached any conclusion in relation to Disciplinary Hearing until issue of the Disciplinary Hearing Outcome Letter.
- 15
- 20 215. The absence of suspension, where management information continued to be sought from the claimant in his role as Managing Director, was not inconsistent with the Ms Macholla's conclusions following the Disciplinary Hearing.
- 25 216. **Extension/Delay to the date of the Disciplinary Hearing:** The claimant did not seek an extension to the notified date of the Disciplinary Hearing for around a week after notification of the Disciplinary Hearing, until 28 November 2022, 2 days before the notified date of the hearing. While the claimant referred to there being a number of allegations covering a number of different topics, he did not give specific notice of why he required one extra week, what that extra week would afford him the opportunity to do which he could not already have done.
- 30
217. The notice of hearing was greater than the period required within the Employee Handbook. Ms Macholla decided that it was not appropriate to

do so setting out in her email reply on 28 November 2022 that sufficient time had been provided and described that should any matter arise during the hearing that required further consideration the hearing would adjourn to ensure that she had the full picture.

5 218. Further and while Ms Macholla, fairly, accepted in cross examination there would have been no harm in delaying the Disciplinary Hearing that did not create a requirement to do so on the facts in this case.

219. Although Ms Macholla used the collective term Our and We, this reflected her practice, and that of others within the respondent to use such terms  
10 when referring to matters within the respondent, it was however her view and her decision. While she copied Mr Davidson into her response, this was as he was scheduled to act as the Notetaker. In the Disciplinary Hearing Ms Macholla concluded there was no matter which arose which required that it was necessary to adjourn.

15 220. While the claimant in his Notice of Appeal on 9 December 2022 set out that he was not given adequate time to prepare and again references that allegations covered a variety of issues he gave no specification as to what preparation he was unable to carry out absent the extension being granted.

221. The Tribunal concludes that the claimant was given adequate time to  
20 prepare for the Disciplinary Hearing.

222. **Allegations:** It is the Tribunal's conclusion that the claimant at all times understood the allegations. The claimant in his appeal while suggesting that most if not all the allegations should have been dealt with as performance issues, did not suggest that he did not understand the  
25 allegations themselves. While the claimant described at the appeal that, in his view, he did not consider the allegations could be considered gross negligence or gross misconduct that was his view as to how they ought to be characterised. He understood that they were characterised as gross negligence or gross misconduct, although he disagreed with that  
30 characterisation.

223. While no documentation was provided in advance of the Disciplinary Hearing, he was not suspended and continued to operate as Managing Director and was able to identify any document which he considered



relevant. The claimant only requested one document for the Appeal the Claimant's Response Email of 11 November 2022, which was provided.

224. With regard to the claimant's argument in the ET1, setting out 10 reasons why it is said the respondent acted unreasonably, the claimant had not argued that he had a lack of training or understanding, or required such training, in how to support refugees and or long term guest and had not argued that it was an unreasonable expansion of his role as Managing Director Aviemore which he was unwilling or was untrained to take on.
225. **Fair Notice of the pled position on reason for dismissal:** The Tribunal concludes that the respondent gave fair notice that the fair reason related to conduct and/or SOSR by reference to the ET3 paragraphs 3 and 4 of the Grounds of Resistance, while the respondent described conduct *and* capability, the claimant had fair notice that the respondent's position was that the claimant was dismissed for a fair reason, namely conduct and that further, or in the alternative that that the claimant was dismissed for some other substantial reason. While being alive to the concern expressed in in **Ezsias**, the pleadings fairly reflected a view that aspects of the allegations could be classed as conduct and/or potentially amounted to SOSR, including matters surrounding the issue of the Claimant's Response Email of 11 November 2022, including omitting to seek support, guidance and/or consent from Ms Macholla, the respondent Board, or the respondent's communication advisers before issue and further not identifying those to whom the claimant responded to.
226. The claimant was provided with a proper chance to refute the allegations including giving the claimant the opportunity to read a prepared statement at the Appeal Hearing.
227. Taking the process as a whole, it is the Tribunal's conclusion that, while it is argued that the characterisation of the allegations was unclear, the claimant knew and understood what was alleged in respect of acts and omissions before both the Disciplinary Hearing and the Appeal. He did not suggest otherwise during the process.
228. **Investigation:** There was no disciplinary-related investigation of the claimant prior to Ms Macholla's informal investigation, by or on behalf of

the Board and the founder Mr McDonald. While the founder Mr MacDonald had organised to circulate the June 2022 Dalfaber Note, his position in relation to the claimant was, as the claimant noted in his notes of the 4 June 2022 telephone call, that he was not willing to accept the claimant's offer to resign and he considered that the claimant should not be "defeatist" in response to facing operational challenges as the Managing Director.

229. Ms Macholla informally carried out an investigation as she considered was necessary to establish the allegations which she set out in the Notice of Disciplinary Hearing. That was not impermissible having regard to the respondent's non-contractual Employee Handbook

*Before a disciplinary hearing is arranged any **necessary** investigation will be carried out to establish the facts of the case.*

230. While on 29 November 2023 the claimant provided a list of 5 named individuals to Ms Macholla, he suggested be spoken to, he provided no specification as to the specific detail around what he considered Ms. Macholla ought to speak to them about nor their relevance to the allegations.

231. The Tribunal has taken into account the size and administrative resources of the respondent. It is perhaps surprising there is no separate HR department; equally, the claimant was the most senior person based wholly on-site which reflected in the claimant's decision not to bring a colleague to Discipline Hearing and the Appeal. In all the circumstances was a reasonable decision to keep the Board separate including having regard to members of the Board having received the founder Mr MacDonald's Note on 13 June 2022 and members of the Board having attended Hospitality Meeting with the claimant on 22 August 2022. In all the circumstances the Tribunal accepts it was not practicable, having regard to the possibility of an appeal, for a person other than Ms Macholla to conduct the Disciplinary Hearing, even after her informal investigation.

232. In the claimant's December Appeal Statement, the claimant listed 8 named individuals and the laundry van driver who he described were "relevant witnesses" who were not spoken to. The claimant including in his December Appeal Statement did not provide substantive reasons for the

named individuals to be interviewed. In relation to the laundry van driver the allegation was in effect that the claimant had not taken the key away until after the use of the laundry van was identified to him. That was not in substance in dispute.

- 5 233. The claimant's email of 21 December 2022 conceded that he had not given reasons for two individuals while describing in respect of the General Manager did not offer any specification beyond describing he could testify on "*various areas*".
- 10 234. So far as relevant to **Allegation 3**, the claimant, in his 21 December 2022 email, offered a view that, as he considered that no evidence had been provided that it was 85 rooms, he was unable to confirm the position. The claimant had, however, received Ms Macholla's email of 4 November, forwarding on email chain starting Saturday 22 October and which included the 28 October 2022 detailed email apology; and concluding on 15 Thursday 3 November. The claimant was able to articulate his detailed position that the General Manager and the Rooms Division Manager, who he described as responsible for Housekeeping, were very stretched, there was no Housekeeper for the few weeks prior to and during the October Film Crew's stay, the deputy housekeeper was on holiday, there was no 20 Front Office Manager, there was no Facilities Manager and a number two. Housekeeping was short of supervisors and the Front Office was generally short of staff and described that around this time Ms. Macholla had instructed the General Manager to dismiss the Executive Chef.
- 25 235. In the claimant's email of 21 December 2021, so far as relevant to **Allegation 6**, while the claimant proposed that the Financial Controller would be a relevant witness the claimant offering no specific detail beyond added workload, particularly relating to forecasts, and in respect of which Ms Macholla set out in her findings that if it was the only issue, she would have been inclined to issue a written warning for poor performance.
- 30 236. The Tribunal concludes that, taking the process as a whole, a reasonable investigation was carried out in all the circumstances.

237. While Ms Macholla had carried out an informal investigation and was a witness to a number of events, including the reporting the Laundry Van to the claimant, she approached the Disciplinary Hearing with an open mind.
238. Ms Macholla's email issued Wednesday 30 November 2022 prior to the Disciplinary Hearing, and which concluded "*please provide an update*" was issued because there was not predetermination either prior to or at the Disciplinary Hearing that the claimant's employment would be terminated.
239. The reasons for dismissal were clear, the claimant did not challenge at the appeal that reasons were unclear to him.
240. Ms Macholla did not uphold allegation 7, that was a demonstration of her open mind.
241. Ms Macholla having conducted the Disciplinary Hearing and considered the claimants responses, including as he subsequently summarised in his appeal that in many of the matters he was being blamed for circumstances which were the result of conduct of others, had formed a reasonable belief specifically in relation to Allegations 1, 2, 3 and 5 and further had reasonable grounds upon which to sustain that belief.
242. In particular Ms Macholla had reasonable grounds having regard to the Disciplinary Hearing for upholding Allegations 1, 2, 3 and 5 that is
- Allegation 1** – *The claimant had failed to properly oversee arrangements at Strathspey Hotel for a group of Ukrainian refugees placed with us under a contract with CTM have led to serious and damaging complaints to the local community council, Government Ministers and the main contract administrator, CTM. Ms Macholla set out her conclusion that all of these things happened.*
- Allegation 2** – *That, once the complaints had been received from government authorities concerning (the Strathspey Hotel) you took it upon yourself to respond to them without liaising with central management or MacDonald Hotels communication advisers. Ms Macholla set out her conclusion that both of those things happened.*
- Allegation 3** – *The claimant failed in his duty to oversee the operations of the Aviemore resort when, in early October 2022 during a visit by a film*

crew that has historically used the resort as a location for filming, 85 rooms went un-serviced over a period of 5 days. Ms Macholla set out her conclusion all these things happened.

**Allegation 5.** *The claimant failed, despite reminders and prompting to deal promptly following poor feedback to Mr MacDonald personally following the dinner held for the Campbell family at the MacDonald Aviemore Resort in early October of this year. Ms Macholla set out her conclusion that all these things happened.*

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243. Ms Macholla had considered what level of sanction was appropriate, including noting by comparison when reviewing the totality of the allegations that in relation to Allegation 6 and 8 if each had been the only issue, she would have been inclined to issue a written warning, the Tribunal concludes that this demonstrates Ms Macholla's open minded approach the Disciplinary Hearing.

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244. She had set out that the allegations struck at the root of trust in the claimant as an employee and senior member of the management team and had set out that outcomes ranged from a written warning to summary dismissal for gross misconduct.

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245. In upholding Allegations 1, 2, 3 and 5 Ms Macholla had had reasonable grounds for considering that the claimant had so undermined trust and confidence so as to render his continued employment in his senior role untenable.

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246. The claimant was dismissed for Some Other Substantial Reason in that the allegations upheld, struck at the root of trust and confidence in the claimant, so as to render his continued employment untenable. This was not a pretext to conceal the real reason.

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247. The claimant was provided with and took the opportunity to appeal. The claimant set out the grounds of his appeal in writing.

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248. The Tribunal concludes that the appeal was dealt with impartially. Mr Hugh Gillies approached the appeal with an open mind and in an honest way, in particular he was not acting as stand-in for an inner circle. While he had been in attendance at the Hospitality Board meeting on 22 August 2022

along with the claimant, he issued no requests or directions that the claimant should take any actions and had not material prior involvement.

249. **Recording and Notes of Disciplinary Hearing and Appeal:** The claimant elected not to have a colleague present at the Discipline and the Appeal as he was in such a senior position, he considered it would have placed that other person in a difficult position.
250. The respondent's selection of Mr Davidson as a note taker reflected the seniority of Mr Davidson and the extent to which he was trusted to provide accurate notes for the Board.
251. Mr Davidson was not in attendance as an undisclosed representative of the Board to oversee or otherwise check that Mr Macholla and Mr Gillies reach a predetermined and or correct decision for the Board or an Inner Circle. Neither the Disciplinary Outcome nor the Appeal Outcome decision was reached in any event in the presence of Mr Davidson.
252. Mr Davidson's honest position in relation to Board minutes was that he would not change the minutes for anyone and adopted that approach for the Disciplinary Hearing.
253. While the respondent intimated that they would have agreed to a recording of the Disciplinary Hearing, had such a request been made earlier that did not preclude their position changing by the Appeal so as they would not agree to a recording. No recording was made.
254. The Tribunal concludes that Appeal was as thorough and effective as was reasonably possible and was sufficiently comprehensive as to redress any earlier procedural defects, in so far as it is asserted that it was inappropriate for Ms Macholla to have heard the disciplinary hearing as she had carried such informal investigation as the respondent considered necessary and was a witness to events including the reporting the Laundry Van as set out above.

### **Termination**

255. The respondent terminated the claimant's employment without notice.

### **Summary**

256. It is the Tribunal's view that the whole procedure must be considered.
257. While it is now argued for the claimant that the respondent did not provide training in relation to the Government contract which culminated in a number of individuals being provided with accommodation at the Strathspey Hotel for an extended period of time, the claimant did not suggest to the respondent that in order to proceed with or otherwise operate the contract for the Ukrainian guests that he required further training.
258. Ms Macholla taking the process as a whole, after the disciplinary hearing, dismissed for some other substantial reason, being a breakdown in trust in the claimant. Ms Macholla had reasonable grounds on which to sustain her beliefs; and at the stage at which she formed the belief on those grounds had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.
259. The claimant was afforded the right to be accompanied at both the disciplinary hearing and the appeal.
260. While the Tribunal concludes that the dismissal was for some other substantial reason.
261. The process taken as a whole was compliant with **Burchell** and the **ACAS Code of Practice on Disciplinary and Grievance Procedures**, the claimant was provided with a fair hearing.
262. The claimant as the Managing Director was the most senior person based wholly on site. He was accountable for all aspects of the Managing Director Role. The dismissal of the claimant for some other substantial reason, namely the finding of loss of trust and confidence, fell within the range of reasonable responses of a reasonable employer in these specific circumstances. In particular the respondent acted reasonably in treating that some other substantial reason, being the finding of undermining of trust and confidence, as sufficient reason in all the circumstances including having regard to the size and administrative resources of the respondent, for dismissing the claimant. The dismissal was accordingly fair.

263. An issue for the Tribunal, if the dismissal was procedurally unfair, would be to consider what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed? (Polkey). There were procedural failings in that Ms Macholla, who chaired the Discipline Hearing was witness to some of the matters, including she reported the laundry van issue to the claimant, she had not however formed a view on the issue of responsibility and culpability, before chairing the Disciplinary Hearing. Nor had Ms Macholla formed a view on any of the other allegations before chairing the Disciplinary Hearing. Mr Gillies heard the appeal, he had not formed a view prior to doing so.
264. Taking the claimant's position that the process was unfair, regard would require to be given to **Polkey** in relation to compensation. It would have fallen to the Tribunal to assess the possibility of a fair dismissal, had the procedure adopted been fair. That requires an assessment of whether in all the circumstances a fair dismissal could have been decided upon by a reasonable employer.
265. ERA 1996 s 122(2) provides in relation to basic awards that *(1) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*
266. ERA 1996 s 123 (6) provides in relation to compensatory awards that *"(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*
267. In the Court of Appeal decision in **Nelson** LJ Brandon stated that *"an award of compensation to a successful complainant can only be reduced on the ground that he contributed to his dismissal by his own conduct if the conduct on his part relied on for this purpose was culpable or blameworthy"*.



268. In all the circumstances, it is the Tribunal's conclusion that, had the Tribunal concluded that the dismissal was procedurally unfair, the adjustment, if any, which should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed, would have been 100% having regard to the claimant's accountability as Managing Director in relation to the events which were the subject of the allegations, specifically in relation to allegations 1, 2, and 3 in respect each of which the claimant as Managing Director was accountable for and are each blameworthy.
269. It is the Tribunal's conclusion having regard to whether it would be just and equitable to reduce the amount of any claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to Section 122(2) ERA 1996; and if so to what extent, that it would in the whole circumstances be just and equitable to reduce the amount of the claimant's basic award because of blameworthy or culpable conduct before the dismissal by 100% and further in respect of any question as to whether the claimant by blameworthy or culpable actions, caused or contributed to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to Section 123(6) ERA 1996, it would be just and equitable to reduce the amount of any compensatory award by 100% having regard to the claimant's accountability as Managing Director in relation to the events which were the subject of the allegations, specifically in relation to allegations 1, 2, and 3 in respect each of which the claimant as Managing Director was accountable for and are each blameworthy.
270. The Tribunal accept that the claimant had mitigated his loss.
271. However, in all the circumstances no award of compensation falls to be made.
272. The role of the Tribunal is to weigh the evidence before it. This involves an evaluation of the primary facts and an exercise of judgment.

273. The Tribunal has done so applying the relevant law.

5 **Employment Judge: R McPherson**  
**Date of Judgment: 27 September 2023**  
**Entered in register: 28 September 2023**  
**and copied to parties**