



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr James Samuels

**Respondent:** Claritum Ltd

**Heard at:** Bristol conducted by CVP      **On:** 18, 19, 20 & 21  
January 2021

**Before:** Employment Judge Christensen

**Representation**  
**Claimant:** Ms Millin of Counsel  
**Respondent:** Mr Roberts of Counsel

## JUDGMENT

The claimant has been unfairly dismissed.

## REASONS

1. The claimant brings a claim for unfair dismissal. He was the Chief Executive Officer of the Respondent from January 2002 and until his summary dismissal on 19 July 2018. The respondent is an online procurement software business. He founded the company with Mr Paul Barker, he and Mr Barker were directors of the company and each held 50% of the shares. The claimant focused on sales and marketing and Mr Barker focused on the technical side.
2. It had been agreed that this hearing was limited to considering matters of liability.

### Issues

3. In discussion with the parties at the start of the first day I asked them to confirm that the liability issues arising were agreed. It became apparent that the issues were not agreed as they each provided me with separate lists of issues. The problem between them was the claimant had identified a number

of unfairnesses in the disciplinary process which had not previously been ventilated in case management.

4. The respondent objected to this on the basis that it had not been raised before and was an amendment to the claim. The respondent's concern was that the respondent's witnesses may not be able address the issues.
5. We agreed that the respondent's representative would discuss this further with his client whilst I was reading the witness statement and we would revisit the issue thereafter. I confirmed my initial view that, subject to the respondent being able to address them, a tribunal should not close its mind to potential issues going to unfairness. I indicated that it had been unhelpful of the claimant not to have raised them in terms before the morning of the first hearing, but nonetheless now that they had been raised a fair way forward needed to be found. The respondent agreed to take instructions.
6. When the matter was revisited in the afternoon of Day 1 and when I had finished my reading, the respondent's representative had helpfully provided a fresh and now agreed list of issues relating to the particular unfairnesses argued for by the claimant. The respondent did not continue to advance that I should not consider these issues but confirmed that he would wish to ask some supplemental questions of his witnesses to address these new issues. I agreed to this course of action as it created fairness to both parties.
7. The issues for determination are the standard ones for a conduct unfair dismissal with the added clarity of the particular unfairnesses argued for by the claimant.

(1) What was the reason for dismissal (S98(1)) – it is for the respondent to show the reason. Did the respondent have a potentially fair reason for dismissing within the meaning of S98(1)? The respondent asserts that it was a reason relating to conduct which is a potentially fair reason under S98(2) ERA.

(2) Was the dismissal fair or unfair within the meaning of S98(4)? Did the respondent hold a genuine belief in the claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden is neutral here but it helps to know the claimant's particular challenges to the fairness of the dismissal and they are identified as follows

(a) The following unfairnesses in the investigation process

- i. Not providing sufficient notice of the investigation meeting
- ii. Not providing the claimant with documents in advance of the investigation meeting on 11 July 2018
- iii. The '*wrong person*' carrying out the investigation as it should have been more senior to the claimant (Paul Barker, Ian Mackenzie or an outside person)

- iv. Not providing sufficient notice of the disciplinary hearing
  - v. A different person should have conducted the disciplinary hearing, given Professor Hillum conducted the investigation
  - vi. Providing extra documents to the claimant during the disciplinary hearing
- (b) Did the respondent make the decision to dismiss the claimant before the hearing?
- (c) Was the disciplinary process a sham, as it had already been decided to replace the claimant and to remove or reduce the value of his shareholding
- (3) Was the decision to dismiss within a reasonable range? Was the sanction disproportionate?
- (4) Did the respondent treat the claimant inconsistently with Paul Barker and if so was this unfair.

**Witnesses**

8. I heard evidence from the claimant. He (and his Co-Director Mr Barker) were founders of and employees of the respondent in their capacity as Executive Directors and were paid a salary for their services.
9. The claimant called Annamarie Angell as a witness. Mrs Angell provided bookkeeping services from 2004 to the respondent through Deadline Accounting Ltd. The claimant also called Angus Neil who is an accountant. He runs his own consultancy business (My Own FD Ltd). Mr Neil was engaged by the respondent from July 2013 to March 2015 as a part-time Head of Finance and assisted with forecasting, cash flow management, variance reporting, board packs and general technology start up advice and was available as a sounding board to the Directors in relation to financial matters.
10. The respondent called the following witnesses. Professor Richard Hillum: he was appointed as the respondent's Executive Chairman in February 2018 and had a place on the Board but no shareholding in the company. He had experience of assisting businesses to turn around when they are facing difficulties. Mr Ian Mackenzie: Mr Mackenzie invested in the respondent in 2006 and entered into an Investment Agreement with the claimant and Mr Barker at that time. He was at all times a non-executive Director and had a place on the Board. Ms Judi Ball: Ms Ball is a Management Development Consultant and provides her services on a consultancy basis. She was appointed by Professor Hillum in May 2018 to provide consultancy services to the respondent in relation to assisting with procedures and policies and to carryout a full business audit. She provided HR support to Professor Hillum in the conduct of the investigatory and disciplinary process.

**The claim**

11. The claim is one for unfair dismissal. The claimant was dismissed from the company in his position as Chief Executive following an investigation by the Executive Chairman Professor Hillum. The claimant remains a shareholder although he was served a deemed transfer notice for his shares shortly after his dismissal.
12. In broad terms the respondent's case is that the investigation supported a belief that the claimant was guilty of gross misconduct in seeking to fund his chosen lifestyle by benefitting from an interest free loan at the respondent expense, was enhancing his salary both through unauthorised pay rises and through salary payments to his wife and was putting personal expenditure through the business. The respondent's position is that he abused his position within the company and coerced subordinates to falsify paperwork.
13. In broad terms the claimant's case is that the investigation was a sham and without any proper basis, that its conclusions do not support a decision to dismiss him and that it was instead an attempt to remove him from the company to acquire his shares. The claimant's case is that he accepts that some mistakes and misunderstandings may have occurred in relation to the matters investigated by Professor Hillum, but that there was no proper basis to conclude that these amounted to gross misconduct.

**Witnesses, conduct of cross examination and submissions**

14. With the exception of Mrs Angell and Mr Neil I am satisfied that the claimant and all of the witnesses for the respondent obfuscated at times in answering questions in cross examination. I have therefore taken particular care to check my notes of evidence to ensure that, where there are conflicts of evidence, I have made findings of fact, on a balance of probabilities, based on the totality of the oral evidence and the surrounding documentation that I was referred to in the bundle.
15. In cross examination Mr Roberts put to Mr Neil that his evidence was partisan which I understood to indicate that I should approach it with caution. I can see no basis to consider Mr Neil 'partisan' such that his credibility should be in doubt. I found him to be an entirely straightforward witness who was credible as such and who had a clear recollection of relevant events.
16. My notes also record a number of interventions from each party's counsel when the other was cross examining. Having agreed a cross examination timetable with the representative I reminded them each on occasion to keep to the agreed issues to ensure that the timetable was achieved.
17. I thanked them both at the conclusion of the case for ensuring that the evidence and short oral submissions were achieved within the timetabled 4 days. Their brief oral submissions were then augmented by written submissions.

18. The hearing was conducted by CVP. The claimant's representative, Ms Millin, experienced problems with connectivity on her computer. When these occurred she resorted to joining the hearing on her mobile phone.
19. I was provided with a bundle of 584 pages of which I was taken to no more than 100 pages

### **Findings of Fact**

#### **Background**

20. The respondent is a relatively small company with a current turnover of about £500,000 per annum. It is an online software procurement business. It was established by the claimant and Mr Barker who both made investments into the company and were Directors and 50/50 shareholders in the company. No one person was assigned to be responsible for HR matters although the respondent did on occasion buy in specialist advice when that was needed. Neither the claimant, nor Mr Barker, operated under the terms of a written Service Agreement.
21. When the company was formed HSBC provided a £100,000 term loan repayable over 5 years and it was further funded by small seed investors. It ran along the lines that many small business do, with decisions being taken informally between the claimant and Mr Barker and trading at a modest profit. The claimant and Mr Barker took minimal salaries and worked long hours incurring personal debt to get the business off the ground. The claimant took responsibility for all matters relating to sales, marketing, finance etc and travelled extensively in this role. Mr Barker was more office based and dealt with the technical side of the development of business products. When Mr Mackenzie became an investor in 2006 he was appointed as a non-executive Director. He therefore became involved in decisions that required Board approval but was not involved in operational decisions. Those were left to the claimant as Chief Executive.
22. At the time of the tribunal hearing it had about 5 or 6 employees and also used the services of contractors. In total there were about 10 or 11 people working in the business.
23. The respondent ran into cash flow pressures as the business expanded and the Directors entered a Company Voluntary Arrangement (CVA) in 2005 which was successfully completed in 2008.
24. The respondent appointed Mrs Annamarie Angell as a book keeper in 2004. Mrs Angell managed all invoicing and credit control. She processed the expenses of all employees, provided management reporting and cashflow forecasts and handled all HMRC filings and year end reporting. The respondent appointed external chartered accountants for external oversight and compliance.

25. The respondent utilised the services of a part time Head of Finance to ensure robust financial processes.
26. Until the arrival of Professor Hillum in February 2018, all executive authority to run the business lay in the hands of the claimant as Chief Executive, subject to terms of Mr Mackenzie's Investment Agreement and the checks, controls and procedures that were in place. Operational decisions were made by the claimant and Mr Barker but as Mr Barker was on the technical side and office based it was the claimant who effected the exercise of executive authority. The Head of Finance maintained oversight over financial transactions, was a sounding board for the Chief Executive in relation to financial matters and where appropriate checked with the respondent's external accountants. That role was performed initially by Mr Bailey, then by Mr Neil and most recently by Mr Horrigan.
27. Until the arrival of Professor Hillum in February 2018, the claimant did not report to or seek authority from anyone in his capacity as an employee. Following the arrival of Mr Mackenzie in 2006 there were some financial matters referred to in his investment agreement with the respondent that required his prior approval. Upon his appointment in February 2018, the claimant as Chief Executive was required to report to Professor Hillum as Executive Chairman.
28. Shortly after his arrival in 2018 Professor Hillum introduced a new system for approval of expenses.
29. Consistent with its relative informality and small size the respondent company did not have a remuneration committee. Matters of Directors salaries were therefore agreed between the Directors. Until Mr Mackenzie's appointment in 2006 matters were decided by the claimant and Mr Barker. When Mr Mackenzie was appointed board, decisions were decided on a majority basis. The claimant and Mr Barker were not subject to the terms of a written Service Agreement that set out the basis for any pay reviews.

#### **System for the approval of expenses**

30. All employees claimed their expense claims through Mrs Angell. The claimant met with Mrs Angell once a month to give Mrs Angell copies of all receipts relating to expense claims for all employees, including himself.
31. Because the claimant travelled extensively in his role as CEO he gathered a greater number of receipts than his Mr Barker and other employees. The claimant's practice was to keep all his receipts (personal and business) together in his wallet and then hand them to Mrs Angell at their monthly meetings to sort out. The arrangement between them was that Mrs Angell would review all the receipts and then separate them into 3 piles – business, personal and query. Personal receipts were rejected by her in the sense that they were not reimbursed to the claimant or put through the accounts as an expense. Some receipts she queried with the claimant if she could not be sure if they were personal or business. If, after raising a query, she was not

satisfied that it was a business receipt she would classify it as a personal receipt.

32. Mrs Angell would then create two piles of receipts for each employee, including the claimant. She separated them with something like an elastic band or paper clip but did not otherwise mark them. She put them both into an envelope for each month with the name of the employee on the front and then placed the envelope into a folder in a cabinet marked 'Expenses'. Each employee's envelope contained two bundles of receipts that were not marked as such but were separated into business receipts and personal receipts. Only the former had been put through the accounts as a business expense and the employee had been reimbursed.
33. Some expenses that were personal had been put through the company credit card by the claimant and in that case the expense would be posted by Mrs Angell to the Directors Loan account for repayment.
34. Thereafter the envelopes in the cabinet would be put into a canvas bag by Mrs Angell when the paperwork went to the external Chartered Accountants for checking/compliance. When the external Chartered Accountants had completed their checks, Mrs Angell collected the canvas bags from the Chartered Accountants and brought them back and gave them to the claimant. The claimant then archived them in a locked cabinet on the respondent's premises.
35. The respondent's handbook [393] provides that in relation to business expenses all claims must be supported by receipts and that *"wherever possible you should obtain the prior approval of your line manager to incur business expense"*
36. As the claimant did not have a line manager prior to the arrival of Professor Hillum, there was no one within the company who could 'authorise' his expenses as referred to in the handbook. He therefore did not seek authorisation for his expenses. His practice had for years been to get Mrs Angell to perform the checks explained above for his receipts and expenses. The claimant would also on occasion use the Financial Director as a sounding board to discuss particular and more substantial expenses to sense check the financial state of affairs within the company and whether they were legitimate as a business expense. The Financial Director could not authorise expenses. The Shed is an example of such an expense and further findings are made in relation to this below.
37. The expense claims that form the basis of the disciplinary charge and the decision to dismiss all relate to expenses incurred in the period before Professor Hilum's appointment.
38. When Professor Hillum was appointed in February he brought in a new system for claiming expenses. This is shown in the minutes of the Board Meeting on 23 February 2018 [432N9]. This shows that any expense greater

than £100 would now need two signatures and any expense greater than £500 would require Board approval.

39. It is also recorded that Professor Hillum would now authorise management team expenses.

#### **Appointment of Ian Mackenzie 2006**

40. Mr Mackenzie invested £70,000 in the respondent company in 2006 and was issued with B shares to reflect that investment. New Articles of Association were drawn up to reflect the new class of shares and to protect his minority interest. He held B ordinary shares equal to 20% of the equity of the business. He entered into an Investment Agreement with the claimant and Mr Barker [329] which established him as a Non-Executive Director, set out the terms of the payment of his monthly fees and provided that he needed to provide consent to a number of high level matters. An example of this is that the respondent may not borrow in excess of £200,000 without his consent.
41. As a Non-Executive Director, Mr Mackenzie attended Board Meetings could vote on Board resolutions with the other two Directors. He was not involved in operational decisions and the day to day running of the company. That was left to the two executive Directors namely the claimant and Mr Barker.

#### **Appointment of Professor Hillum 2018**

42. The respondent experienced cashflow problems in 2017. These were discussed at a Board Meeting attended by the claimant, Mr Mackenzie and Mr Barker on 29 September 2017 [432C]. Management accounts were produced that showed a potential deficit and need for cash injection. Options included taking on more debt or some further equity investment.
43. Towards the end of 2017, the Directors had a discussion regarding the possibility of bringing in someone new to assist the claimant to grow the business and to enable him to focus on Sales and Marketing.
44. To address this issue, Mr Mackenzie introduced Professor Hillum and sent the claimant the CV of Professor Hillum at the end of January 2018. The claimant was unsure what process had been followed in relation to identifying Professor Hillum as suitable to assist the claimant to grow the business. Professor Hillum started to work within the respondent in early February 2018 and was appointed unanimously by the Board as Executive Chairman on 23 February 2018. [432N5]. The claimant had reservations about Professor Hillum's appointment but did not voice them at that meeting. He was concerned that the respondent could not afford Professor Hillum's salary and that Professor Hillum had told him that he had been promised shares in the respondent company. At that meeting Professor Hillum presented an organisation chart that was accepted by the Board showing a reporting line from the claimant as CEO to Professor Hillum as Executive Chairman.



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45. He was provided with a Service Agreement setting out the terms of his appointment, under that agreement he was entitled to a salary of £75,000 pa. His particular duties are likely to be set out in his Service Agreement but that was not in the bundle. On the basis of the evidence of Professor Hillum I find that his responsibilities were to prepare packages to present to investors and to assist the business in raising funds.
46. Part of the claimant's case is that Professor Hillum was an unemployed friend of Mr Mackenzie, was not of good character and had been appointed by Mr Mackenzie to ensure that the claimant was removed from office so that Mr Mackenzie and Professor could make a financial gain.
47. I am not satisfied that there is evidence to support that Professor Hillum was not of good character. There is a report in the bundle [432N1] commissioned by the claimant in February 2018 which confirms that an investigation agency could find no adverse information on Professor Hillum.
48. I find that Professor Hillum was appointed on the basis of an expectation of shares being assigned to him at some point. I make that finding on the basis of the evidence of the claimant. The claimant gave evidence that he was told this by Professor Hillum after he started work in the company.
49. Professor Hillum gave evidence that when he started work for the respondent it was two weeks away from bankruptcy. He asserted this to support the decision he made to conduct both the investigation and the disciplinary hearing. His evidence was that the company couldn't afford to bring in someone external to ensure a separation of responsibility in the investigation and disciplinary because it was close to bankruptcy. His evidence was that that necessitated him conducting both the investigation and the disciplinary process. He also asserted this to support his decision not to bring in the auditors to conduct an independent investigation into the various financial matters that he started to investigate in 2018.
50. Beyond his assertion of this possibility there is no evidence to support it. There are instead a number of factors that tend to point away from it. One of those is that he was employed on a salary of £75000 – if the respondent was that close to bankruptcy it would seem inherently unlikely that it had just agreed to take on a new employee at that salary level. Another factor is that shortly after joining the respondent, Professor Hillum invested the respondent's money into what he believed to be an investment scheme that ultimately turned out to be a scam and which lost the respondent a sum of about £37000. This did not cause the respondent to enter an insolvency procedure.
51. I am satisfied that Professor Hillum is someone who can tend to make statements which appear to exaggerate or mispresent a situation which are not supported by surrounding evidence. His statement that the company was 2 weeks away from bankruptcy when he started work is an example of this.
52. Other examples include

- His oral evidence that the claimant had only reduced his salary for 2 months in 2014 when in fact the document that he had produced established that he had reduced it for 12 months.
- His evidence (para 35) that he found no evidence in his investigation that the claimant's expenses had been authorised notwithstanding his accepting that all receipts under investigation pre dated his arrival and were therefore never subject to a system of 'authorisation'.
- His oral evidence that the claimant was asked in the disciplinary meeting to pay back monies owed in the same way that Mr Barker was and that this was recorded in the minutes. There is no record of such a question being put to the claimant in the meeting.
- His assertion that notes were taken of the further investigations he carried out with Mrs Angell and Mr Neil between the investigation and disciplinary hearing and yet having no plausible reason for those not being provided in the bundle.
- His evidence regarding his belief that he could not check the expense system with Mrs Angell but without providing a properly reasoned basis for this belief. His statement refers to his concern that he could not trust her, that she may not provide an accurate response but does not say why, other than that she and the claimant had a professional relationship.

### **Service Agreement**

53. There are a number of drafts of Service Agreements in the bundle. None of them are signed by the claimant and the respondent. An issue arises in relation to whether any of those were contractually in force and had application to the claimant in relation to salary review in the sense that they set out a mechanism for review and governed the contractual position of the Directors in relation to pay increases by reference to RPI or otherwise. This is relevant because the respondent's case is that the claimant improperly increased his salary as an abuse of process other than in accordance with his contractual terms and that supported the finding of gross misconduct.
54. Mr Mackenzie gave evidence that a Service Agreement was entered into 2009 [342C]. That is referred to in minutes of a Board Meeting on 15 April 2009 [343]. *"IM has provided Directors Service Agreements for JS (James Samuels), PB (Paul Barker) and MB to review and feedback. Intention is to put in place once SMART objectives have been agreed"*
55. The 2009 Agreement [342B-342AB] refers to the Executive having an agreed salary and a bonus and that the respondent *"shall review the Agreed Salary with effect from the Review Date in accordance with the provisions of Schedule 1"* Schedule 1 refers to the salary being revised in line with inflation and use of the RPI.

56. Two further Service Agreements are in the bundle dated 2011.
57. The first 2011 Agreement [375] states *“if at any review of the Executive’s salary under this Agreement, the latest figure available of the United Kingdom All Items Index of Retail Prices maintained by the Central Statistics Office (“CSO) (“the Index”) is greater than the figure of the figure of the index taken for the last review, the Company shall with effect from the review date increase the Executive’s salary by the same percentage increase in the index from the previous review”*
58. The second 2011 Agreement was prepared for the purposes of a potential external investor but in the event the investment did not proceed and the Agreement was not entered into. That Agreement [386A] provides that salary shall be reviewed on each Balance Sheet Date by the Non-Executive Directors of the Board and the representatives of the external investor. It confirms that they should take into account performance of the executive, performance of the company and the RPI.
59. When cross examined, the claimant obfuscated in his evidence regarding whether any of these Service Agreements were in force and had application to him. He gave evidence that he thought the first 2011 Agreement was in place but confirmed that he never signed it and thought that parts of it might apply to him. Mr Mackenzie gave evidence that he thought the 2009 Agreement was in force or should have been in force. Professor Hillum gave evidence that one was in force but gave no clear evidence on which Service Agreement he believed to be in force.
60. I find that none of these agreements were ever entered into and there was no proper basis to conclude that the claimant was subject to a written Service Agreement. Several had been suggested over the years but none implemented. There was instead no clarity regarding the terms under which the claimant served as Chief Executive and what mechanism should apply for a review and/or increase in salary for him and Mr Barker. There was nothing agreed in writing that set out what factors might be relevant to whether and when there should be an increase.
61. The claimant’s position as presented to the disciplinary process and in the tribunal was that, providing the respondent could afford it, he and Mr Barker had always had a legitimate expectation as founders of the company of a yearly increase in their salaries to at least represent RPI. The claimant took steps to effect those pay increases which were all properly reported in the accounts and agreed between himself and Mr Barker.
62. The claimant’s position is, and I find that, he brought figures to the disciplinary process [242/242] that established, broadly, that in the period under investigation his salary increased by reference to RPI. The figures he produced showed that in the period 2011-2018 his overall pay increases had slightly overt tracked RPI in the sum of about £3000.

63. The view formed by Professor Hillum in the disciplinary process was that the claimant's starting salary in 2011 was £60,000 and that any pay awards above that figure, including any pay increase to reflect RPI, for the entire seven year period to 2018 were improperly awarded and that his salary should in fact have remained at £60,000 for that entire period. On that basis Professor Hillum believed that the claimant had improperly awarded himself pay increases in the sum of about £79,000 and had improperly awarded pay increases to Mr Barker. The claimant produced his document [242] to the disciplinary process but it was not considered by Professor Hillum.
64. Professor Hillum gave evidence that Mr Barker had never agreed to his own pay increases. No evidence was provided from Mr Barker to support this assertion. I am satisfied that it is inherently implausible that as a Co-Director and Co-Founder of the respondent that Mr Barker received pay increases for 7 years or so against his will. He and the claimant had always worked closely as co-founders of the respondent's business. As between the claimant and Mr Barker I am satisfied that they both had always had an anticipation of RPI increases assuming always that the respondent could afford that. This is established on the basis of the claimant's oral evidence to the tribunal.

#### **Directors Salaries & Wives Salaries**

65. The claimant and Mr Barker were advised by the respondent's then external accountants, Robson Taylor, in 2009 to split their salaries with their wives to create tax efficiency. This did not relate to the wives being paid a salary for work undertaken but instead being assigned a portion of their husband's salaries to create tax efficiencies. This was reported to a Board Meeting in April 2009 [343] *"James Samuels and Paul Barker confirmed that partners were on payroll"*. At that Board meeting Mr Mackenzie was present and made a further suggestion to create a further tax efficiency. He suggested *"James Samuels and Paul Barker consider allocating shareholdings to partners to take advantage of entrepreneurs tax relief"*.

#### **2010 and 2014 discussions on Directors' Salaries**

##### **2010**

66. In 2010 the claimant and Mr Mackenzie had an email exchange regarding his wish to have a pay rise. [345-348].
67. On 24 February 2010 the claimant writes *"As we're getting to the new financial year I would like a pay rise to £64k. The impact on the business would be minimal (see Annamarie's calculations below). It's in the plan that's gone/going to investors. I'm the one driving the business and need some sort of differentiation from the rest of the team"*
68. Mr Mackenzie responds on 1 March 2010 to confirm that he is supportive of the pay differential. He confirms his understanding that in the past increases *"this has happened by default as we have agreed the business plan including the pay rises in the Board Meetings. It has not been an issue to Paul as he*

*has been rewarded equally with you....any approvals only need a simple majority [of Directors] so you and I could approve your increase. I don't think we can just quietly approve the increase and hope that Paul does not find out. He will see it in the business plans. We will have to grasp the nettle with Paul sooner or later and now is probably a good time since Paul has been struggling to perform. We will need to raise it with Paul prior to the meeting. We will need a Board meeting of just the three of us at which an increase in proposed"*

69. The claimant responds on 4 March 2010. *"Paul has always been on board with a pay differential and I've already discussed it several times recently. Clearly nothing would be implemented unless approved. I've included these differentials in the debt plus equity funded plans and used industry benchmarks for the CEO, COO and CTO roles which do provide a differential. The claimant argues that he needs to be remunerated properly for the role and that he has foregone salary to ensure that the shareholders benefit. He concludes "regarding affordability, I agree that if the company does not have the cash or has significant outstanding creditors this should not happen. We have nearly caught up with HMRC and should have made the first payment to you with others scheduled in March. I would like to see the increase in March but as currently would only take full payment for what the company can afford. As we do now, Annamarie pays any left over salary when we can afford it. Happy to discuss."*
70. There are no Board Minutes in the bundle which assist in understanding whether and if so how this matter was discussed further between the claimant, Mr Mackenzie and Mr Barker regarding the differential on pay or increases generally. The letter of 4 March confirms that Mr Barker is 'on board' with a pay differential. The increase needed to be approved by two directors and could therefore be approved by himself and Mr Barker, the two executive Directors. The claimant and Mr Barker had an understanding that RPI increases were to be awarded provided the respondent could afford to do so.
71. The claimant proceeded to effect increases to both his salary and that of Mr Barker which were reported in the normal way through the respondent's internal and external financial and accounting procedures.
72. The respondent's documents calculate what is referred to as an overpayment by reference to a position which is that there should have been no increase in the base £60,000 for the whole period 2010 to March 2018 and on that basis of a cumulative overpayment in that period in the region of £79,000 [247].
73. The claimant's document [242/243] sets out an RPI increase for each year of salary to March 2018 and then calculates an overpayment in the region of £3,000. This document was produced by the claimant at the disciplinary meeting but not considered by Professor Hillum.

74. At a Board Meeting in May 2014, a discussion took place regarding the remuneration package for the claimant and Mr Barker. The minutes record [418] that in discussion regarding remuneration packages "*it was identified that an unauthorised pay increase had been given to*" the claimant and Mr Barker. There is no discussion recorded regarding what pay increase this refers to. The claimant is given an action point to reverse the pay increases. He reports to the Board in September 2014 that the action has been completed.
75. The document prepared by Professor Hillum as part of his investigation establishes that in August of 2014 the claimant reduced his salary and continued to pay himself a reduced salary until August 2015.
76. Professor Hillum gave evidence that the salary had been reduced by the claimant for 'a few months'. But in questioning he accepted that was wrong and that the period of reduction was 12 months.
77. During this time the portion of his salary assigned to his wife stayed static. He reduced his from £4500 per month to £4083 per month. Hers stayed at £1832. In August of 2015 the claimant's salary went up to £4165 and that assigned to his wife went up to £1869.
78. The claimant's monthly salary then stayed at £4165 from September 2015 and until August 2017. It then reduced to £2932 for four months and then increased to £3665 for January and February of 2018 and then £5131 in March 2018. During that period the amount assigned to his wife stayed at £1869 until March of 2016 when it increased to £2170. Her portion of the salary then went up to £3000 in February 2017 and stayed at that figure until September 2017 when it reduced to £2300 for four months and then went back to £3000 for January and February 2018 and the final month in which salary was assigned to her was March 2018 when her monthly payment was £4400. The document at page 247 shows the claimant's overall salary rising from £65240 in the year to March 2012 to £79614 in the year to March 2018.
79. Similar patterns of variances are shown for the salary of Mr Barker and his wife [250] with increases and decreases over the years. Mr Barker's overall salary rose from £60000 in the year to March 2012 to £68556 in the year to March 2018.
80. Professor Hillum gave evidence that he believed that the claimant and Mr Barker could not agree a pay rise even though the evidence of Mr Mackenzie [346] was that a simple majority of directors could approve an increase.
81. Professor Hillum gave evidence that Mr Barker never agreed to a pay rise and that it was given to him instead by the claimant. There is no credible evidence before this tribunal that would support the possibility that Mr Barker did not know about and agree to these alterations to salary.

**Professor Hillum starting his investigation**

82. Shortly after Professor Hillum started to work for the respondent company he concluded that a new system for claiming of expenses should be implemented with financial authority limits in place. He therefore instituted the system already described above. At no point did Professor Hillum speak to Mrs Angell to understand the system that was already in operation relating to the claimant's expenses.
83. Under the new system, when the claimant submitted his receipts to Mrs Angell in the way already described, they were also now seen by Professor Hillum. Professor Hillum noticed a receipt from the claimant that related to expenses incurred on a weekend away that did not relate to business – it was a weekend trip to Lincolnshire to see the RAF memorial flight.
84. On that basis, Professor Hillum then started an investigation that led him to the cupboard in which the historic bags of receipts were stored, having been returned from the external accountants. There he found ten years of historic bags of receipts relating to the claimant that included receipts that appeared not to relate to business expenses. Professor Hillum has provided no credible explanation of why he had such a high level of mistrust and did not take the entirely reasonable investigatory step of checking with Mrs Angell, the claimant or the accountants, what expense/receipt system was in place to explain the presence of personal and business receipts. Instead he formed a belief that the personal receipts found in the claimant's historic receipts had been put through the business.
85. His oral evidence was consistently that he believed it was proper to conclude that they had all been put through the company accounts and that he did not know who to trust within the company and therefore determined that he would not speak to Mrs Angell as part of his investigation, to understand the information that he had found in the bags. His witness statement records "*I could not check with Ms Angell as I was aware that their professional relationship was such that I was concerned that she may not provide an accurate response*" His evidence was that he could not speak with the accountants because the company was 2 weeks away from bankruptcy.
86. Neither of these conclusions are based upon any tangible and properly reasoned basis and tend to show a closed mind in relation to the possibility that there could be a rational explanation for the personal receipts appearing in the historic bags of accounts. The respondent has advanced no evidence of any proper reason for Professor Hillum to have formed such a significant level of distrust. Mrs Angell was a very experienced book keeping professional who had a full understanding of the expense/receipt systems operated by the respondent and there is no evidence to suggest there was any proper reason for Professor Hillum could or should not trust her. The accountants were well used to the system of the bags being sent to them containing both business and personal receipts for the claimant. The claimant was a founder member of the respondent company and an experienced Chief Executive.

87. An exchange took place in cross examination which I record as it assists in understanding Professor Hillum's approach and belief.
88. When questioned about his investigation into the receipts Professor Hillum says this *"there were 10 bags of receipts – I was pulling out receipts that did not look as though they should have been incurred by the business"*
89. When asked what led him to conclude that the claimant had claimed them his answer was this *"it was in the company's account bags – I expected to find documents that related to the company's accounts"*
90. When asked how did he check whether they had been put through the company accounts and what was put through his answer was *"it was reasonable to assume that they are associated with the business"*
91. Professor Hillum's evidence in his witness statement is that it would have been ideal to appoint a forensic accountant to carry out the investigation into the receipts etc but he puts forward as a reason for not doing so, that the respondent could not afford to appoint such a person. Accordingly he determined that he would do so himself.

#### **Broadening the investigation**

92. Professor Hillum then started a process of investigating 10 years of the claimant's expenses, his Directors Loan Account, the salary that he had been paid and the salary splitting with his wife since 2010/2011. He was assisted in his investigation by speaking with Mr Mackenzie who brought to his attention the email exchanges with the claimant and Board Minutes in 2009, 2010 and 2014 referred to above.

#### **Salary Split**

93. As part of that investigation, Professor Hillum asked Mr Mackenzie whether he knew of the payments being made to the claimant's wife. Mr Mackenzie told Professor Hillum that *'as far as he could remember'* he was not aware of the practice. On that basis Professor Hillum stopped the practice of salary splitting between the Directors and their wives without any reference to the accountants, the Head of Finance, claimant or Mr Barker. He failed to find out from them that the practice had been adopted on advice from their then Accountants as a tax efficiency measure. From April 2018 onwards only the claimant and Mr Barker received salary and none was split with their wives.
94. On the basis of his investigation Professor Hillum became aware of Board Minutes in April 2009, at which Mr Mackenzie was present and in which the claimant and Mr Barker confirmed that their wives were on the payroll and in which Mr Mackenzie went on to suggest that they could be allocated shares to take advantage of entrepreneurs tax relief. Notwithstanding this he took no further steps to check this point with Mr Mackenzie and instead determined that there was never any proper basis for the salary splitting.



95. It is indicative of what appears to be a lack of care taken by Professor Hillum in his investigation that he failed to identify or to respond to this very obvious discrepancy in the information available to him in his investigation. Knowing that he was in possession of minutes that recorded that Mr Mackenzie was always aware that the wives were on the payroll he at no time sought to raise this with Mr Mackenzie in the light of the discrepancy as it was relevant to the matters he was investigating.

### **Salary increase**

96. Professor Hillum's evidence was that he had "*been led to believe*" that the claimant's salary was £60000 and his position at the conclusion of the disciplinary process is that it should have stayed at £60000 for the whole period from 2010 to 2018.
97. On the basis of the respondent's document [247], in the year to March 2011 the claimant's total salary (taking into account the split with his wife) was £54458, in the year to March 2012 it was £65240, in the year to March 2013 was £65968, in the year to March 2014 was £65991, in the year to March 2015 was £72658, in the year to March 2016 was £72120, in the year to March 2017 was £77680 and in the year to March 2018 was £79614.
98. On the basis of the emails and Board Minutes that Mr Mackenzie had provided him relating to discussions in 2010 and 2014 relating to the Directors Salaries, Professor Hillum concluded that the salary increases were unauthorised. He refers to this in paragraph 13 of his statement and this refers to his belief before he had suspended the claimant and called him to an investigatory meeting "*After a discussion with Mr Mackenzie it became clear that the salary increases and benefits were unauthorised.*"
99. On 9 July Professor Hillum emailed Mr Mackenzie to list some expenses for which he had found receipts in the accounts bags and he asked him "*can I ask you to confirm if you are aware of any of James expenditure – below*". R Mackenzie responds on the same day "*I was not aware of them or approved them in any way*"
100. This fails to address the reality of the situation which was known to Professor Hillum that there would be no reason for Mr Mackenzie to have any knowledge of the claimant's expenses nor indeed for him to approve them. This approach tends to indicate an investigation that does not sit with a range of reasonableness. Mr Mackenzie was a non-executive Director who was understood to have no involvement in the day to day operational running of the respondent. Professor Hillum also knew that until February 2018 the Directors did not seek approval for expenses and the expenses in question all related to period before February 2018. What he didn't know, as his investigation had failed to make any enquiry in this regard, was what system was in place for the claiming and recording of the claimant's business expenses and the procedure in place to separate his personal expense receipts to ensure that they were not repaid to him or put through the books.

Nor indeed did he know about the system that had been in place for the two categories of receipts to be put together in one envelope by Mrs Angell.

101. On that basis Professor Hillum and Mr Mackenzie agreed that the claimant should be suspended on the basis of disciplinary issues relating to expenses and salaries. The particular charges are never set out in writing.
102. Professor Hillum had appointed an external People Development Consultant to assist him with HR advice in this process. Professor Hillum knew of Ms Ball as he had worked with her before. She was asked to assist him in the analysis of the 10 years of data that he had gathered in relation to the claimant.

### **9 July letter calling to investigation meeting**

103. Professor Hillum and Ms Ball both gave evidence that the claimant was suspended on 4 July. However there is no evidence to support this in the bundle or otherwise and this anomaly is unexplained by the respondent. Both obfuscated when asked on what basis they gave evidence that he had been suspended on 4 July. The claimant's evidence is that he was suspended at the conclusion of the investigatory meeting on 11 July. I find that he was not suspended on 4 July. Ms Ball gave evidence that there was a meeting on 4 July but that her notes had been sent to the solicitors. This explanation lacks any credibility as I am satisfied that, if they had gone to the solicitors, they would have been disclosed as they are relevant to these proceedings.
104. He was written to on 9 July by Professor Hillum and informed that he is being called to a meeting on 11 July.

*"I am writing to inform you that the organisation has decided it is necessary to investigate your actions in relation to Financial Cost Control during your employment as CEO at Claritum.*

*We need to be able to gain an understanding of anomalies within the Companies Financial data and cost control.*

*The person in charge of the investigation will be myself as your Executive Chairperson and Judi Ball who will be present in her role as people Development and HR support.*

*The aim of the investigation is to establish the facts by gathering as much relevant information and evidence as possible.*

*Once the investigation had been formally completed you will be informed of the outcome.*

*If it is found that there is a case to answer you will be invited to attend a formal disciplinary hearing as noted in your Company Handbook 2011 and your Service Agreement.*

*In the meantime should you have any information that might be of assistance to the investigation please bring it along on the day or if you wish to discuss anything please do not hesitate to contact myself of Judi in the normal way”*

105. I regard it as entirely disingenuous of Professor Hillum to tell the claimant that he should bring any information with him on the day that is relevant. It is a further indicator that the investigation was not being operated within a range of reasonableness. It is consistent with his tendency to assert something without any proper basis and consistent with the tenor of the way in which the investigation and disciplinary process was conducted. It did not properly put the claimant in a position of understanding what was to be investigated as the letter gave him no inkling of what that was. On receipt of that letter the claimant had no way of knowing what charges he was facing and could not possibly be properly in a position to know what information might be of assistance to the investigation.
106. The claimant called Professor Hillum on receipt of the letter to ask for the evidence to be provided before the investigation so that he may review it and respond. He was told by Professor Hillum that that was not possible.
107. Prior to the investigation meeting and on 10 July, Professor Hillum called Mr Neil, the former Head of Finance regarding one of the receipts that he was investigating. This was a receipt relating to a garden shed in 2014 that appeared to have been claimed as a business expense. There is a differing account between Professor Hillum and Mr Neil regarding what was said in that conversation. I prefer the evidence of Mr Neil for the reasons already set out.
108. Professor Hillum has noted at the end of the notes of the investigatory meeting [474] that Mr Neil had “denied the recommendation” that the shed should go through the company. This was put to Mr Neil in cross examination. His evidence was very clear and I accept it. On the basis of that evidence I find that he did not tell Professor Hillum that he had denied a recommendation to put the shed through the accounts. I consider this to be another example of Professor Hillum asserting something without any proper basis.
109. Mr Neil told Professor Hillum in that conversation on 10 July that he remembered that the claimant had spoken with him in his time as Head of Finance to say that he was thinking of buying a garden shed to install at home so that he could create a quiet working space at home away from his family and wished to seek his advice on this being claimed as a business expense. Mr Neil told Professor Hillum that he remembered the conversation because he (Mr Neil) had been considering doing the same thing. Mr Neil confirmed

to Professor Hillum that as Head of Finance he could not authorise expenses and did not do so but instead was consulted by Directors and asked for advice on whether or not it might be proper to incur a particular business expense.

110. Mr Neil's evidence to the tribunal was that his approach to this was that if a Director had asked for his advice on a large expense (he referred to £100000) he would tell them to take it to the Board. When asked for his advice on smaller expenses his evidence was "*a few thousand pounds for a quiet place to work that seems a reasonable justification*"

### **Investigation meeting 11 July 2018**

111. Professor Hillum and Ms Ball had prepared a document to assist them in the investigation meeting [463]. Ms Ball told me that it had been emailed to the claimant in advance of the investigation hearing. I find that it was not sent to the claimant in advance of the hearing. The claimant was clear he had been given nothing in advance of the hearing and there is no email in the bundle to establish it had been sent to him.

112. The document is understood to be a script for Professor Hillum to use at the meeting as it starts "*apologies the letter should have said do you wish to bring someone in with you, a friend or a colleague*"

113. I regard that as another example of Professor Hillum's lack of respect for due process for him to tell the claimant at the start of the meeting that he should have been told he could bring a colleague with him.

114. He is told "*we have up with [sic] some concerns that have come to light as part of the DD and want to share these with you to help us out with these. I would like to assure you that this is not a witch hunt. It has been as a result of a spot check and not a full audit*".

115. It goes on "*you have copies of the immediate areas of concern please let us know if there is other material of information that you require and we will get it to you*" I conclude that this is another disingenuous attempt to create a semblance of a fair process. In fact the claimant had nothing before the meeting but was handed multiple documents in the meeting and asked to comment. Some of these went back to 2011.

116. The document has a number of headings and these formed the basis of the concerns being investigated by Professor Hillum

- Salary
- Hotels
- Meals and Drinks
- Children's Meals and meals for family and self
- Garden Building/Shed
- TVFreesat

- Car Tyres
- Cash
- Bath Spa
- DD Loan for car using Claritum Bank Account.

DD is understood to mean Directors Loan Account.

117. It concludes with a paragraph that lists 'overpayments assuming £60k salary as per 2010 Board' and records a total figure of £98538. This is understood to be Professor Hillum's calculation of overpayments to the claimant.
118. Minutes were prepared for the investigation meeting [468-474]. They are dated 10 July 2018 but this is understood to be a typing error. The minutes show some discussion in relation to the various matters under investigation and that Mr Samuels endeavoured to give some explanation for a number of matters
119. The claimant was presented with a number of photocopied receipts and invoices. He confirmed that he could not comment in any significant way as he didn't recognise many of the documents. Some of them went back many years and would need to check his diary and with Ms Angell in relation to them. The claimant was concerned that Professor Hillum had presented him with receipts that very clearly combined business and personal receipts and knowing that personal receipts would have been rejected by Mrs Angell. He was also concerned that he was shown receipts that clearly showed they had been paid by the claimant's personal credit card. One of the receipts related to a meal at Hotel du Vin which the claimant knew he had never visited.
120. In relation to the wives being on the payroll the claimant was told by Professor Hillum that the practice was illegal and that it could result in a lengthy prison sentence. The claimant explained to Professor Hillum that this had been recommended by the company accountants, Robson Taylor many years previously and that the Head of Finance knew of this arrangement as did several firms of accountants who had raised no concern about this in 8 years.
121. The claimant was shown documents relating to his Directors Loan Account [239] and told that he had a secret company car (a VW Up) being paid for under his Directors Loan Account. The claimant explained that the car was owned and paid for by him. He was concerned that Professor Hillum had not checked whether the information being presented was correct.
122. The claimant was presented with some handwritten figures relating to his salary in the period 2010-2018. Professor Hillum put to him that this established that he had taken pay rises without approval. The claimant denied this and explained that he and Mr Barker had taken pay rises in line with the cost of living and that as Executive Directors they could between themselves authorise pay rises and pay cuts.
123. The claimant was not asked in this meeting whether he would be prepared to pay back to the respondent any monies owing.

124. There was a break in the meeting during which Professor Hillum called Mr Mackenzie to discuss matters arising in the meeting.
125. After the break the claimant was told that he was being suspended and that there would be a disciplinary meeting on 19 July. It was agreed that he could meet with Mrs Angell in advance of the meeting to let him investigate the allegations further. His laptop, credit card and building keys were removed from him.
126. Professor Hillum wrote to the claimant on 12 July to confirm that he had been suspended in relation to *“anomalies within the financial cost controls during your employment as CEO of Claritum”*. He was told to attend a disciplinary meeting on 19 July and he is told that Professor Hillum will be attendance with Ms Ball. He is told that he may be accompanied by a work colleague in the disciplinary hearing.
127. There is no document sent to the claimant that records the charges being put to him.

**Professor Hillum continues to take responsibility for the disciplinary meeting**

128. One of the issues for determination is whether a different person should have conducted the disciplinary hearing, given that Professor Hillum conducted the investigatory meeting. Paragraph 6 of the ACAS Code of Practice is relevant *“In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing”*
129. The respondent has argued that there were only two people (Professor Hillum and Mr Mackenzie) within the respondent company that were suitable to conduct the three stages of investigation, discipline and then any possible appeal. On that basis the respondent argues that it wasn't practicable for a different person to take responsibility for the investigation and then the discipline. Professor Hillum needed to conduct both the investigation and the discipline to ensure that Mr Mackenzie could be kept available for any appeal.
130. The respondent has further argued that it could not afford to appoint an external independent person to conduct any of those three stages. On that basis the respondent argues that it wasn't practicable for a different person to take responsibility for the investigation and then the discipline.
131. The rationale behind keeping Mr Mackenzie uninvolved in the investigation and discipline was to ensure that he remained independent to ensure that he could address any appeal.
132. Mr Mackenzie was in fact involved in Professor Hilum's decision making at every stage of the investigation and discipline meeting.
133. There are email exchanges on 18 July between Professor Hillum, Ms Ball and Mr Mackenzie [482A-482E]. These establish that Professor Hillum had

further discussions with Mr Mackenzie on the day before the disciplinary hearing regarding what the outcome would be the next day. The exchanges indicate that Professor Hillum and Mr Mackenzie had formulated three options which were all premised upon the ending of the claimant's employment with the respondent.

134. Email 18 July – Professor Hillum to Ms Ball

*"I have just been having a discussion with Ian and formulated the three options below: Thoughts!*

*We agree in a letter that we won't sue him for the money of inform HMRC, we don't dismiss him but he agrees to leave immediately with one months pay, he agrees to change the articles and he won't try to take the business to court*

*We dismiss him for Gross Misconduct with no pay, but agrees a mutual no action approach and he agrees to change the articles*

*We dismiss him for Gross Misconduct, Ian will sue him personally for being in breach of the shareholder agreement, the company will sue him for possible miss use of company money, he leaves with no pay, we notify HMRC."*

135. Mr Mackenzie emails on the same day and comments *"Options 1 and 2 would require legal severance agreements. Option 3 also means he has to pay back the funds."*

136. In her response at 17.26 Ms Ball counsels Professor Hillum not to involve Mr Mackenzie at this stage to ensure that he can properly address any appeal. As an HR professional Ms Ball will have understood the importance of this issue in accordance with the principles of fairness in the ACAS Code.

137. She also counsels him in the same email *"this should be looked at clearly and calmly as he is a CEO = employee in a position of trust...with company shares"*

138. However her counsel regarding not involving Mr Mackenzie, is by that stage ineffectual and otiose. By the evening of the day before the disciplinary hearing the evidence establishes that Mr Mackenzie had already been involved in discussion and decision making with Professor Hillum at both the investigation and discipline stage regarding the charges against the claimant and what response should be offered.

139. Professor Hilum's evidence in his witness statement is that *"the options set out in the e-mail [referring to that above of 18 July] were not the only ones I was prepared to consider and I had made no decisions prior to the hearing"* I regard this evidence as another example of the disingenuous nature of some of Professor Hillum's evidence and his tendency to assert something that is not supported by any of the surrounding facts. Beyond Ms Ball's counsel to him to look at things clearly and calmly after she had seen

Professor Hillum's three 'options', there is no evidence that tends to suggest Professor Hillum and Mr Mackenzie had not together reached a settled view on 18 July that the claimant's employment would end the next day. I find that they had reached a predetermined and settled view on this as it is consistent with the email of 18 July and consistent with the way in which the Disciplinary Hearing was then conducted.

### **Further investigation between investigation and discipline hearings**

140. Professor Hillum and Ms Ball met with Mrs Angell on 18 July to conduct some further investigation. Mrs Angell had had no forewarning of the meeting and described it in her oral evidence as feeling like an ambush. Ms Ball asked most of the questions and made notes. Mrs Angell answered the questions to the best of her ability but was unable to provide practical replies as she had had no time to prepare for the meeting and did not have the necessary information to hand to address the variety of questions. She told Professor Hillum that she and the claimant met monthly to go through the accounts.
141. The respondent did not provide any notes of that further investigation meeting to the claimant to let him know what it had established. None have been provided to this tribunal.
142. I make no findings regarding what further information that interview with Mrs Angell produced that assisted the investigation as I am unable to do so on the basis of the evidence. There is no clear account from either Professor Hillum or Ms Ball of what information they found out from speaking with Mrs Angell that was relevant to the investigation. Further there is no written note produced recording what Mrs Angell was asked about and what information she provided that was relevant to the investigation.
143. The respondent has not disclosed the notes taken by Ms Ball as part of the investigation even though I am satisfied that that she did make notes. I regard the explanation for this to lack credibility. The explanation from Professor Hillum is that after Ms Ball had backed the notes up they were sent to the police but not returned to the respondent. This is another example of Professor Hillum asserting something that appears to have no proper basis. If it is right that Ms Ball backed up her notes before sending them to the police that does not provide a proper explanation for the failure to have disclosed them as part of the disciplinary process. His explanation for the lack of any notes is also not consistent with that provided by Ms Ball; she gave evidence that they had been sent to the solicitors.
144. I make findings on Mrs Angell's understanding of the matters under investigation. I found Mrs Angell to be an entirely straightforward and credible witness. Mrs Angell confirmed that her understanding was as follows
  - Family Expenses. The family expense receipts found in the bundle of paperwork by Professor Hillum had either been paid using Mr Samuel's personal card and therefore didn't go through the



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respondent's books at all, or, if paid from the Claritum business card were posted to the claimant's directors loan account as money he owed to the respondent.

- The receipts were present because the claimant would give her all of his receipts, whether business or personal and she would then sort them into 'business', 'personal' or 'query'. Depending on the claimant's response the receipts were then put into the batch of either personal or business receipts. The batches were then separated by a paperclip or elastic band.
- Shed. That it was her understanding that the shed had been purchased following a discussion with Mr Neil who did not see it as an issue.
- Tyres and Oil. No claims for tyres or oil had been paid to Mr Samuels. Each transaction for tyres and oil that had been entered into the books had been coded to the claimant's loan account.
- Cash Withdrawals. Most of the cash receipts represented withdrawals from the claimant's personal bank account and where cash was withdrawn from the respondent's bank account it was coded to the claimant's director's loan account.
- Purchase of Audi A4. The company accountants Robson Taylor had agreed that as long as the net effect to the respondent was zero that the claimant could put the finance for a new car in the name of the company. This was understood to be because the claimant had a poor credit score created by the debt that he had incurred in setting up the company. An arrangement was set up so that when the respondent's bank account was debited with £272 on 26<sup>th</sup> of each month that figure was posted to the claimant's director's loan account and then deducted from his salary on the last working day of the month.
- Directors Loan Accounts. This was cleared down either with a payment/deduction through payroll or by offsetting expenses owed/disallowed.

145. In relation to the issue of the Directors Loan Account, Mr Neil was asked about this in cross examination. I make some findings based on the answers given by Mr Neil when he was being cross examined because it assists in understanding how such a practice might reasonably operate in a small company such as the respondent. Mr Neil's evidence was that in his professional experience carrying a Directors Loan Account at a reasonable level was a normal practice. That he uses a Directors Loan Account in his own business and his understanding was that they should be paid back within a reasonable time frame but carrying a small directors loan account year on year is not unrealistic. He believed there might be a threshold which, if breached, could have adverse tax consequences. He was unsure what that threshold might be.

146. The claimant also met with Mrs Angell in the period between the investigation and disciplinary hearing. She provided him with a response in relation to each of the 33 expense transactions that had been presented to him in the investigation meeting. She also provided him with a comparison of salaries paid to him and his wife and to Mr Barker and his wife.

147. From that the claimant prepared a document [483/484] that he wished to argue established that

- 24 transactions (£2,821.75) were incorrect as they had been paid by him on his personal credit card and had not been paid by the company and that these had not been checked by Professor Hillum
- 1 transaction (£276.92) was a payment made by the company on his behalf for the preparation of Director's Tax Returns by the company accountant and then debited from his net salary on the basis that this was a pre-agreed and perfectly normal practice.
- 7 transactions (£3799.90) were perfectly legitimate business expenses as confirmed by Ms Angell when he discussed them with her.
- 1 transaction (£1292.80) was for a large monitor screen used in the claimant's home office for client presentations. Claimant's position on this in the schedule is that this had been paid in error.

148. The document at 483/484 was commenced by the claimant before the disciplinary hearing but completed by him after the disciplinary meeting. At the time of the disciplinary hearing it included his response to all the expense allegations that he was aware of from the investigation meeting. As it appears in the bundle, it includes the claimant's response to the additional 7 expense allegations (totalling £650) that were put to him in the disciplinary meeting. Those entries were not included in the version of the document that the claimant prepared for the disciplinary hearing as the claimant only became aware of them during their disciplinary hearing.

149. The claimant asked Professor Hillum if Ms Angell could accompany him to the disciplinary hearing as she could assist him in presenting his response to the matters under investigation. This request was denied by Professor Hillum.

### **Request for Documents 17 July**

150. The claimant emailed Professor Hillum on 17 July to request a number of documents to assist him to prepare for the disciplinary hearing. At that stage his laptop and access to the company records had been removed from him. These are

- The document inviting the claimant to the investigation meeting
- Copy of Ms Ball's notes from the investigation meeting

- Board Minutes that record the instruction to reverse the pay increases
- Board Minutes from each subsequent board meeting to date
- Email relating to an earlier offer to buy shares from Improva
- Directors Service Agreements for Professor Hillum
- Monthly view of the claimant's calendar since 2012
- Joint and Several Guarantees for the Funding Circle Loan

151. Professor Hillum forwarded the email to Ms Ball and told her they were not reasonable. I asked Professor Hillum whether any of these documents had been provided to the claimant and if not why not. His response to me was that he considered the request for the guarantee relating to the Funding Circle Loan to be irrelevant but was not certain if the other documents had been provided. He suggested that perhaps they had been provided by Ms Ball. I find that none of these documents were provided to the claimant.

### **Disciplinary hearing 19 July 2018**

152. Professor Hillum and Mr Mackenzie had an email exchange on 18 July regarding the three options available to Professor Hillum at the disciplinary hearing as set out above. Findings of fact have already been made on this exchange.

### **Salary**

153. There was discussion around the issue of the salary paid to the claimant and the allocation of part of that to his wife. There was some discussion that included reference to Board Minutes from May 2014 and the increases and decreases to the claimant's and his wife's salaries.

154. That included considering an email sent by the then Head of Finance to Mrs Angell in February 2017 authorising an increase in the salary paid to the claimant's wife. [482].

155. The claimant advanced his view that his salary was index linked and he produced a document [242] that showed his salary broadly tracking RPI and with a payment in excess of RPI from 2010-2018 in the sum of about £3000. There was a discussion regarding whether private medical insurance formed part of the claimant's service agreement. Ms Ball made reference to the terms of the 2011 agreement in relation to pay increases. There is no evidence that reasonably makes it possible to determine that the terms of that, or any other, Service Agreement had application to the claimant. Professor Hillum's belief was the claimant had been paid unauthorised salary in the sum of about £79000.

156. The claimant explained to Professor Hillum that adding spouses to the payroll had been proposed by the respondent's then accountants in or around 2009.

157. Professor Hillum expressed his view that the salary could only be increased after a successful performance review and with board approval and for no

other reason. I am satisfied that there was no information available to the Professor Hillum that reasonably put him in a position of concluding that a successful performance review was a precondition of a salary increase.

158. The claimant's view was that it was always understood by him and Mr Barker that their salary would be increased by reference to RPI, if the respondent could afford that and that as two Directors of the company they could authorise increases with a simple majority.
159. That view in relation to decisions on directors' pay being agreed by a majority, is consistent with the contents of Mr Mackenzie's email of 1 March 2010 [346] *"approval of directors pay does not come under the class rights provisions of the Mem and Arts so any approvals only need a simple majority. So you and I could approve your increase"*

### **Expenses**

160. There was some discussion regarding the various items of expense. I do not make findings in relation to each of them.
161. In relation to the garden shed the notes record that the claimant told Professor Hillum *"I needed a quiet space to work at home. It was agreed by GN [Gus Neil] and AMA [Annamarie Angell]. It was delivered to my home and allows me to work and take calls"*. Professor Hillum responds *"We called GN and he does not remember in fact he thinks he left the company by then"*
162. Pausing here I note that the explanation provided to the claimant in the disciplinary hearing is different to that noted by Professor Hillum in the section of the investigation meeting notes that were completed after that meeting ended [474]. There it states not that Mr Neil had told Professor Hillum that he can't remember, but instead that Mr Neil told him that he *"denied the recommendation of the cabin to go through the company"*. Professor Hillum's evidence is not internally consistent on this point and I regard this as another example of Professor Hillum's tendency to assert a fact that is not supported by surrounding events. There is no contemporaneous note made of the discussion he had with Mr Neil regarding this issue as part of his investigation. I make findings based upon the evidence before me. That includes the internal inconsistency in Professor Hillum's evidence and the oral evidence from Mr Neil.
163. I am satisfied that in fact Mr Neil told Professor Hillum when he called him as part of the investigation, that he remembered the claimant had called him as Head of Finance to say that he was thinking of buying a garden shed to install at home so that he could create a quiet working space at home and wished to seek Mr Neil's advice on this being claimed as a business expense. Mr Neil confirmed to Professor Hillum that as Head of Finance his role was not to authorise expenses but instead that he was consulted by the Directors to seek advice on such matters.

164. It is also relevant to the matters under investigation, that Professor Hillum was reasonably in a position to know that at the time that the expenses under consideration were incurred, there was no system in place for the authorisation as such of director's expenses. This is because there was no one who could authorise their expenses as they did not have a line manager to provide the approval as per the Company Handbook. [393]. Instead there was a system in place for the Directors to be able to sense check items with the Head of Finance to ensure that expenses met the criteria for expenses to be reasonable and wholly and necessarily incurred for business purposes.
165. A specific system of authorisation of Directors expenses was only created after Professor Hillum joined the respondent company in or around February 2018.
166. Notwithstanding this Professor Hillum provides a note in the minutes of the disciplinary meeting that *"not covered in the board minutes and not covered by email. No authorisation"*
167. In relation to some of the expense items it is recorded in the minutes either *"not in the accounts now"* or *"not in the accounts"* It is not clear on what basis this is written in the minutes or what the wording tends to indicate.
168. Although the respondent's submissions invite me to conclude that, in relation to at least some of these, (submissions paragraph 11) Professor Hillum had concluded they were 'not proved' I do not reach such a conclusion as there is no reliable evidence to support such a possibility. Professor Hillum does not give evidence that he was satisfied that these expense allegations were not proved. The claimant was not told such and I do not make a finding that he had reached such a conclusion.
169. The minutes do show continuing concern from Professor Hillum in relation to these *"if the documents did not go through the accountants as stated why have we still got all the receipts"*
170. Ms Ball comments *"if you know you can't claim for certain things, why did you give them to AMA to input causing confusion and mistrust?"* The claimant explained that he would give Mrs Angell all his receipts.
171. I am satisfied that this indicates that Professor Hillum either did not understand the system that was in place in relation to the division of personal and business receipts or, to the extent that he did, he continued to believe that there was something improper with it.
172. That is also consistent the respondent's closing submissions (paragraph 25.3) which are that items had 'inexplicably' removed from the accounts and that the respondent was entitled to be concerned by this change.
173. By the date of the disciplinary hearing, there was no evidence that anything had in any sense been removed from the accounts, inexplicably or otherwise, such that any impropriety was established. There is instead only evidence

that, having found the bags of combined business and personal receipts and started an investigation into these, it wasn't until the day before the disciplinary hearing Professor Hillum spoke to Mrs Angell to seek her account of the system in use.

174. The claimant endeavoured to present his document [484/484] to Professor Hillum during the disciplinary hearing to show that Professor Hillum had not understood matters properly. This set out the claimant's understanding of each expense under investigation and categorised them into incorrect accusations, paid in error (for one expense) and legitimate expenses. However, when the claimant endeavoured to present his document Professor Hillum waved his arms and said that he wanted to move on. He did not consider the document that the claimant had prepared.
175. The claimant explained to Professor Hillum that it was possible that some of his personal expenses may have been paid in error on the basis of the system that he operated with Mrs Angell.
176. I am satisfied that these findings indicates that Professor Hillum's mind was closed to the possibility of explanations that pointed away from a finding of guilt for any of the receipts that he was investigating. It is also consistent with the emails exchanged between Professor Hillum and Mr Mackenzie on the 18 July. It is also supported by Professor Hillum's refusal to let the claimant have sight of documents he had requested before the disciplinary meeting [480].
177. Professor Hillum took a break in the meeting and consulted with Mr Mackenzie. It was agreed that
- It was not reasonable to conclude that expenses had gone through in error.
  - That the claimant was aware that his pay increases were unauthorised
  - In relation to the directors loan account, that the claimant was seeking to fund his chosen lifestyle by benefitting from an interest free loan at the respondent expense, using the respondent's money to buy personal items and enhancing his own salary through unauthorised pay rises and salary payments to his wife
  - That although the claimant had an otherwise clean service record that it was proper to conclude that he had abused his position in control of the respondent's finances
  - That the claimant had not shown remorse nor offered to pay back any of the monies owed.
178. Professor Hillum reconvened the meeting and then put a further 7 receipt items totalling £650.13, to the claimant as part of the charge against him. These all related to receipts for restaurants and hotels. He asked the claimant to comment. The claimant was not properly in a position to do so,

he explained to Professor Hillum that without access to his diary and further checks he could not comment on these further receipts.

179. This is a further example of the lack of a fair and reasonable process that characterised Professor Hillum's handling of the investigation and discipline process.
180. It is relevant that putting fresh matters of discipline to an employee during a disciplinary hearing but then not giving the employee any opportunity to properly comment on them before determining whether they are properly made out and deciding on a sanction, is inconsistent with the principles set out in the ACAS Code of Practice. *"Employers should inform employees of the basis of the problem and given them an opportunity to put their case in response before any decisions are made"*
181. The expense claims covered a range of dates going back for some years. The claimant did not even have access to his diary in the meeting to check his movements on the dates in question and to assist with whether they might be personal or business receipts. Further he was not given an opportunity of checking those with Mrs Angell to see if (as with the batch put to him in the investigation meeting) any of them came into the category of receipts for personal expenses that had not in fact gone through the accounts but had simply been stored in an envelope in the claimant's expense folder.
182. The claimant was dismissed at the conclusion of the meeting. Professor Hillum read him a prepared script that said this.

*"after our lengthy investigation into this case and taken into account all the information that we have received you have left the company with no alternative but to dismiss you from your post as CEO and Director of Claritum.*

*As the CEO of the company we have relied on you to take control of the companies' finances, it would seem that you have coerced your subordinates at Claritum to amend or falsify paperwork some of which was for your personal gain.*

*As you are aware the actions you have condoned is illegal accounting and in breach of the law.*

*Therefore we are dismissing you from the company for Gross Misconduct on 19<sup>th</sup> July at 15:15 for serious incompetence which could have brought the company into disrepute and led to the business being prosecuted and as a result its closure"*

### **Dismissal Letter 20 July 2018**

The letter states this.

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*“This letter is to confirm your dismissal from the company for Gross Misconduct on 19 July 2018 at 3.15pm for the following reasons Serious Misconduct and Breach of Trust.*

*As the CEO of the business we have relied on you to take control of the companies’ finances, during our investigation you admitted that you personally coerced your subordinates at Claritum to amend or falsify Company accounts and paperwork.*

*You admitted to us that you allowed claims to be processed and paid to you directly for your own personal gain which is an illegal action*

....

*As an employer we feel that the trust that must exist between employee and employer has irrevocably broken down which has resulted in your dismissal”*

183. The claimant is told that he has a right to appeal within 72 hours of receipt of the letter of dismissal.
184. The claimant responded on 7 August 2018. He confirmed that he did not wish to appeal and explains that *“I and the other directors have been pulling in opposite directions as the future of the company for some time now”*
185. His letter states that he wishes to put on record that he disagrees that he admitted that expense claims could be processed for his own personal gain or that he admitted to coercion of subordinates.
186. He confirms that he agrees that *“trust that existed between myself and the company has broken down and attribute this in part to the manner in which this matter has been handled, bearing in mind existing custom and practice in relation to expenses claims and failure to take action against director Paul Barker in relation to past remuneration awards. The directors’ remuneration packages and pay awards to myself and Paul Barker have been completely transparent over the years and visible on the monthly management accounts as scrutinised by the shareholders, Directors, finance director and accountants, and yet it is only now that the company chooses to take issue about this, and only in relation to myself”*

### **Investigation into Mr Barker**

187. Part of the claimant’s case is that unfairness was created because the respondent treated the claimant inconsistently with his Co-Director, Paul Barker.
188. The respondent’s case is that Professor Hillum became aware that Mr Barker’s salary had also been increased and that part of his salary was also assigned to his wife and that she also did not carry out any work for the



respondent. On that basis Professor Hillum considered that allegations could also be made against Mr Barker.

189. The respondent's case is that when Professor Hillum investigated this matter, Mr Barker said that the claimant had told him that the increase had been authorised by the Board and that he (Mr Barker) did not know he had done anything wrong. Professor Hillum's evidence was that was told by Mr Barker that he was given a pay rise by the claimant but that he (Mr Barker) had never agreed to it. Professor Hillum's evidence was that Mr Barker agreed to pay back the sums owing in relation to his salary. There are no minutes of any investigatory discussions with Mr Barker to confirm what he told Professor Hillum. Mr Barker did not give evidence to the tribunal.
190. After the claimant had been dismissed, Professor Hillum wrote to Mr Barker on 8 August 2018 [526] to confirm that he was being investigated in relation to historic expenses and salary matters. In that letter he confirmed that he had 'found nothing in breach of the companies expense policy'. Mr Barker is told that the respondent will complete an audit of his past salary for him and his wife and 'once reviewed will create a to be agreed re-payment plan for you to play [sic] back to the Company the over historical over payments [sic].'
191. There is no evidence before the tribunal of what that repayment plan was or whether or when it was implemented.
192. I consider it inherently implausible that Mr Barker told Professor Hillum that he thought the pay increases had been authorised by the Board. I reach this conclusion as he (Mr Barker) was a member of the Board, was present at Board meetings and would have known if this had happened and this would be recorded in the Board minutes.
193. I consider it inherently implausible that Mr Barker told Professor Hillum that the claimant had given him the pay increases without his agreement. I reach this conclusion as the claimant and Mr Barker were co-founders of the business operated by the respondent and had worked closely together for some years – they were both Executive Directors of the respondent.
194. I reject Professor Hillum's account of what Mr Barker told him for the reasons already given. It is inherently implausible, there is nothing in writing to record it, Mr Barker has not given evidence to support it. Instead it appears consistent with Professor Hillum's tendency to assert something which is not supported by the surrounding facts.

**What did Professor Hillum believe when he dismissed the claimant?**

195. When Professor Hillum had concluded his evidence I indicated that I wished to ask him some questions to ensure that I had properly understood the respondent's case in terms of which of the various expenses and receipt items Professor Hillum believed had been made out at the conclusion of the disciplinary hearing. He told me that he thought that matters had been

narrowed down between the investigation and the disciplinary hearing. He told me that he thought he had found a document that set this out but then indicated that the document he had found had been prepared by him after dismissal.

196. We took a lunch break to enable Mr Roberts to take instructions. After the break it was confirmed that the document was a privileged one and could not be disclosed. This was accepted by Ms Millin.
197. Professor Hillum then endeavoured to assist me to understand as between the document at page 463 (prepared by him prior to the investigation meeting but not shared with the claimant), the minutes of the investigation meeting [468 +] and the minutes of the disciplinary hearing [488+] which of the various charges he believed were made out at the conclusion of the disciplinary process and whether any had been found by him to be not proven.
198. He was unable to provide me with a clear account of this and whether any part of his belief was that any part of any of the items put to the claimant were not made out. His witness statement provides no assistance in understanding whether he believed that any of the charges were not made out at the conclusion of the investigation and discipline process. Neither do the minutes of the investigatory or disciplinary meeting or the letter sent to the claimant before the disciplinary meeting. That letter gives no details relating to the particular charges, it instead makes only vague reference to 'anomalies within the financial cost controls. Further there is nothing that assists on this point within letter of dismissal which is also vague and generic in terms of the reasons for dismissal.
199. In submissions (para 11) the respondent has argued that the evidence establishes that items 2 and 3 were not proved and that items marked as 'not in the accounts' in the disciplinary meeting indicate that the respondent was satisfied that those were not proven. An example is given of item 9 which is understood to be a receipt for 2 people at Bath Spa.
200. The respondent argues (para 14) that the investigation initially considered a fourth matter (Audi loan issue) but that ultimately that issue was not held against the claimant. This is understood to be the car that the respondent had originally referred to as a VW in the investigation meeting. The respondent submits that this demonstrates the respondent was acting fairly, that they accepted that he was paying the loan each month and that, even though that then increased the respondent's creditor liability, this was not taken into account by the respondent.
201. I reject the respondent's submissions in this regard as my findings do not support them. There is no contemporaneous account during the investigation of the respondent concluding that any of the charges or concerns set out originally in the note prepared for the investigation meeting [463] and then discussed further at the investigation meeting [468] and the disciplinary hearing [488] relating to expenses, receipts, salary, directors loan account were found not proven or dropped. Having given Professor Hillum every

opportunity to help me understand whether any had been narrowed he was unable to do so.

202. I consider it relevant that there is never anything put in writing to the claimant setting out the considerable breadth of charges against him. There is nothing before his investigation meeting or his discipline meeting that sets out either the original charges or that any had been narrowed by the time of the disciplinary hearing. The dismissal letter fails to make any reference to any specific charges and does not in any sense indicate that any of the original charges have been found not proven and were not being relied upon. That refers only in broad terms to 'serious misconduct and breach of trust' and 'coercing subordinates to amend or falsify company accounts and paperwork'.
203. If the details of the documents are examined by reference to the items referred to by the respondent in submissions, namely 2,3,9 and the car, are considered it assists in understanding why I reject the respondent's submissions.
204. Item 2 relates to a stay in the Marriot hotel in 2010. It appears in the note prepared for the investigation meeting.
205. Item 3 related to a meal at the Hotel du Vin in 2017 and a meal at Turtle Bay in 2014. These appear in the note prepared for the investigation meeting.
206. At the investigation meeting these are put to the claimant. He believes it is being put to him on the basis that it had gone through the accounts.
207. For item 2 he comments "*can I get back to you with this one? I am unsure why that has gone through the accounts*". At the discipline hearing there is one line recorded on this "*is not in the accounts according to AMA*"
208. For item 3 he comments "*can I check my calendar for the dates for meetings to see if they coincide?*" At the disciplinary meeting there is one line that states "*(Hotel du Vin) is not in the accounts not him*". There is no reference to the Turtle Bay receipt.
209. For item 9 (Bath Spa) the investigation meeting records the claimant asking whether this receipt had gone through the accounts. Professor Hillum confirms that it had gone through the accounts. At the disciplinary hearing it is recorded "not in the accounts"
210. Another example relates to items 7 & 8. These relate to car tyres and cash withdrawals. In the investigation meeting Professor Hillum showed the claimant receipts for tyres for item 7. The claimant said that he would need to look into that. At the disciplinary hearing there is no note of any discussion on tyres. For item 8 at the investigatory meeting the claimant is shown receipts for cash withdrawals.. The claimant explains that these relate to his personal card to which Professor Hillum responds "*why would you hand in receipts for payment if it was not relevant to the company?*" At the

disciplinary hearing there is no discussion recorded for item 8. A slightly different phrase is used for items 7 & 8 – *“not in the accounts now”*.

211. The minutes of the disciplinary hearing record comments made by Professor Hillum and Ms Ball regarding issues of trust surrounding the receipt/expense system operated. After the discussion on items 2 & 3 Ms Ball asks the claimant *“do you trust AMA?”*. He responds *“I have been working with her for 15 years and I believe she is good”*. Ms Ball continues *“so who booked the Hotel du Vin in Bristol? How did it get into the accounts?”* The claimant responds *“it was not me”*.
212. Pausing to consider this exchange it follows a statement recorded in the minutes that the respondent argues goes to show that this item was considered not proved by them. The statement in the minutes in relation to Hotel du Vin is *“not in the accounts not him”*. However this further interrogation by Ms Ball is inconsistent with the possibility that *“not in the accounts not him”* in fact establishes that at that point that is what the respondent believed. If so there would be no basis to further question the claimant on the receipt from the Hotel du Vin.
213. Another example of this follows discussion on 7,8 and 9. In the minutes those all have entries of *“not in the accounts now”* or *“not in the accounts”*. Notwithstanding that on this occasion Professor Hillum continues his questioning of the claimant. *“if the documents did not go through the accountants [sic] as stated why have we still got all the receipts?”*. Ms Ball follows this up with a further question *“if you know you can’t claim for certain things, why did you give them to AMA to input causing confusion and mistrust”*
214. This further interrogation is inconsistent with the possibility that there is any proper basis to conclude that at that stage Professor Hillum believed some matters were not proven. Had he done, particularly given that he was being advised by an HR professional, it seems proper to conclude that he would have at least told the claimant of this fact that and further recorded that in writing to make it clear that some of the totality of the composite offences had fallen away.
215. Instead it seems proper to conclude that the statements in the minutes of the disciplinary meeting (*not in the accounts*) records either what the claimant told Professor Hillum in the disciplinary meeting after he had gathered information from Mrs Angell on 14 July and/or reflects what Mrs Angell may have told Professor Hillum when he spoke to her on 18 July. As there are no minutes of that meeting I have been unable to make any findings on what he was told.
216. The continuing questioning on these points are consistent with an underlying mistrust that Professor Hillum had in Mrs Angell which appeared to have had no proper basis. In his evidence and in relation to the period in which he was starting up his investigation into the bags of receipts that he had found Professor Hillum says this *“I could not check with Ms Angell as I was aware*

*that their professional relationship was such that I was concerned that she may not provide an accurate response to avoid getting the claimant into trouble”* Professor Hillum has been unable to explain what caused him to doubt Mrs Angell’s integrity at the outset such that it was not proper to have spoken with her at the earliest stage in his investigation to understand why he had found what appeared to be personal receipts in the accounts bags.

217. The further questions asked by Professor Hillum and Ms Ball satisfy me that Professor Hillum continued to distrust the account provided in relation to personal receipts not being in the accounts and continued to believe that some form of impropriety had been established. Professor Hillum had a fundamental misunderstanding and mistrust of the book keeping and accounting processes operated by Mrs Angell in relation to the claimant’s expenses and receipts, arising from his failure to reasonably investigate matters at the outset of the investigation.

218. I find that by the conclusion of the investigation Professor Hillum believed that every one of the charges originally set out in the list prepared for the investigation meeting had been proven as some form of misconduct and further that the fresh 7 charges put for the first and only time to the claimant in the disciplinary hearing were also proven. Together these created the composite charges that comprised the totality of the reason for dismissal.

### **Submissions & The Law**

219. There is clear and settled case law that sets out the principles applying to judging a claim for unfair dismissal where the employer asserts that the reason for dismissal is misconduct. Both parties refer to these in their submissions and I summarise those principles.

#### The Claimant

220. The claimant’s submissions take me to the law and go through each of the alleged unfairnesses in the investigation process and refer me to points in the evidence that are relevant. I don’t recite them here as it does not assist.

221. The claimant submits that the case of *A-v-B 2003 IRLR 405* is relevant. That case establishes that the gravity of the charges will be relevant when considering what is expected of a reasonable investigation. Serious criminal allegations must always be carefully investigated and the investigator should put as much focus on evidence that may point towards innocence as on that which points towards guilt. Claimant provided me with a copy of the case of *Sainsbury’s Supermarket- -Hitt 2003 IRLR*

#### Respondent

222. The respondent’s submissions take me to the law and go through each of the alleged unfairnesses in the investigation and refer me to points in the evidence that are relevant. I don’t recite them here as it doesn’t assist. I

have already made reference to some of those submissions in the paragraphs above.

223. Respondent has provided me with copies of *Mackellar-v-Bolton* 1979 IRLR 59, *International Paint Company-v-Cameron* 1979 IRLR 62, *Tiptools-v-T W Curtis* 1973 IRLR 276, *Springbank Sand & gravel -v- S Craig*, *Taylor-v-OCS Group* 2006 IRLR613, *Rowe-v-Radio Rentals* 1982 IRLR 177 & *Lavery-v-Plessey Telecommunications Ltd*.
224. *Taylor* is relied upon to establish that a tribunal should not consider procedural issues separately from other issues and that instead they should be considered together with the reason for dismissal.
225. *Linfood* is relied upon to establish that the relevant question is whether an employer acting reasonably and fairly in the circumstances could have properly accepted the facts and option which it did.
226. *Mackellar & Tiptools* are relied upon the importance to illustrate the importance of taking into consideration an employer's size, when judging whether an employer acted reasonably and fairly in the circumstances.
227. *Rowe* is relied upon to establish that there is no requirement that the appeal officer should insulate themselves from the dismissal officer.

### **Determination of Issues**

What was the reason for dismissal? (S98(1))

228. The respondent has satisfied me that the reason for dismissal was misconduct. That is a potentially fair reason. Professor Hillum relied upon all of the 10 matters listed at p463 and the additional 7 matters that were put to the claimant in the disciplinary hearing. He believed that they were all made out as some form of misconduct.
229. Did the respondent hold a genuine belief in the claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? (S98(4)).
230. On the basis of a neutral burden of proof my determination of this issue is that Professor Hillum did not have reasonable grounds to hold that belief; the investigation he conducted did not sit within a range of what was reasonable in all the circumstances. In reaching this conclusion I have taken into account all the circumstances including the size and administrative resource of the respondent.
231. The issues surrounding the reasonableness of his investigation appear to start at the very outset. Professor Hillum formed an early view, on no properly reasoned or explained basis, that having found a personal receipt submitted by the claimant to Mrs Angell, that he could not trust her or the claimant to

explain why this receipt had been included within his business receipts. I am satisfied that Professor Hillum held an unusual and unexplained index of suspicion in the very early stages. Having then found bags containing 10 years of historic receipts, of which some appeared to be personal and some were business, Professor Hillum concluded that there was something very untoward taking place involving the claimant's expenses. This is consistent with his description of the claimant using the respondent to fund his personal lifestyle. On that basis Professor Hillum expanded his investigation to include salaries and directors loan accounts going back some 10 years. His investigation revealed some anomalies that reasonably needed to be understood but his investigation did not reasonably put him in a position to have formed the belief that he did.

232. An enquiry of Mrs Angell and/or the claimant in the early days of his investigation to understand why the claimant's personal receipts might be being handed to Mrs Angell would have shown the character of a reasonable investigation as that lay at the heart of Professor Hillum's early concerns. Such an enquiry would have produced the explanation that Mrs Angell provided to the tribunal.
233. The particular receipt/expense system that had been operated by Mrs Angell for many years lay at the heart of Professor Hillum's concerns and yet he never took steps to properly understand it. In turn the unexplained suspicion that he had of the claimant and Mrs Angell appeared to then close his mind to the basic principles of fairness that characterise a reasonable investigation. He did finally speak to Mrs Angell on the day before the disciplinary hearing but whatever he was told by her in that meeting did not allay his concerns because the tenor of the disciplinary meeting conducted the next day continued to show a high level of suspicion regarding why he had found personal receipts in the account bags.
234. The concerns that Professor Hillum had were serious enough for him to conclude that criminal activity had taken place. He makes reference to the possibility of a lengthy prison sentence in his conversation with Mr Mackenzie during the investigatory meeting on 11 July and he tells the claimant in his dismissal letter that what he has done is illegal accounting that could lead to the business being prosecuted. He also referred the matter to the police for investigation after the claimant had been dismissed.
235. In light of the seriousness of the allegations, to be characterised with reasonableness, Professor Hillum's investigation needed to take care to ensure that he kept an open mind and that he focused on evidence that might tend to indicate innocence as much as evidence that might tend to indicate guilt. *A-v-B*. In fact he did the opposite. His investigation appeared instead to be focused on finding information that tended to confirm the claimant's guilt whilst closing his mind to lines of enquiry or information that might mitigate matters or establish innocence and making it difficult for the claimant to fairly defend himself. Examples of this are the failure to interview Mrs Angell until the day before the disciplinary hearing; that he refused to provide the claimant with documents that he had reasonably requested; that he failed to consider

the document that the claimant had brought to the disciplinary meeting setting out his understanding of how his salary had tracked RPI, or the document the claimant had brought to the disciplinary meeting setting out his explanation for the various expenses under investigation. His seeming wish to establish guilt, without considering any explanations that might mitigate or exonerate are further illustrated by his putting 7 fresh allegations to the claimant in the disciplinary meeting without any forewarning and without putting the claimant fairly in a position to respond to those fresh allegations.

236. There is no explanation provided by the respondent for its failure to have ever set out the charges against the claimant in writing so that they were clearly understood by him and so that he could then reasonably defend himself. That failure does not give the investigation the characterisation of one that falls within a range of reasonableness. The letter calling the claimant to the investigation meeting referred only to wishing to *“investigate your actions in relation to Financial Cost Control during your employment”*. The letter calling the claimant to his disciplinary hearing made reference to the same phrase. The letter of dismissal also fails to set out the charges for which he is dismissed. It refers to *“serious misconduct and breach of trust”*.
237. That Professor Hillum’s mind was closed to the possibility of anything other than the claimant’s guilt is illustrated by the email exchange between him and Mr Mackenzie on 18 July. Notwithstanding that his HR advisor counsels him, in light of those emails, to ensure that he looks at everything clearly and calmly at the disciplinary hearing, particularly as the claimant is the CEO of the respondent company, Professor Hillum appears to pay no heed to this advice in the disciplinary meeting. Instead of looking clearly and calmly at the totality of the information before him, he ignores the information that the claimant wished to present in relation to salary and expenses and proceeded to charge him with a further 7 matters of which the claimant had had no prior warning.
238. Whilst acknowledging that the respondent is a small organisation, without any dedicated HR resource, I consider it relevant that Professor Hillum had specifically appointed an HR advisor to provide advice to him in the process. He was therefore properly in a position to understand the principles that govern fair procedure which are codified in the ACAS Code of Practice. I am also satisfied that he chose to ignore advice given by Ms Ball to ensure adherence to those principles. He knew from Ms Ball’s email of 18 July, that it was important to ensure that Mr Mackenzie was not involved in the decision making leading up to the conclusion of the disciplinary process. This was because a decision had been made to keep him properly available to deal with any appeal. Notwithstanding this advice he chose to ignore it and instead adjourned the disciplinary meeting to agree the disciplinary sanction with Mr Mackenzie. He also failed to heed Ms Ball’s counsel in the same email to ensure that matters were looked at clearly and calmly the next day; he refused to consider information that the claimant had brought to establish innocence and brought fresh charges against the claimant. Those actions tend to show both a closed mind and a predetermination of guilt and do not



give his investigation the character of one that is reasonable in all the circumstances.

239. Further examples of his failure to conduct an investigation that lay within a band of reasonableness include.

- Failure to have investigated the anomaly in relation to the knowledge regarding the salary split with the directors wives. Having been told by Mr Mackenzie that as far as he could remember he wasn't aware of the practice of splitting salary with wives, Professor Hillum became aware that there were minutes of a Board Meeting in 2009 that established the opposite. This was never followed up with Mr Mackenzie.
- Proceeding on the basis that one of the various Service Agreements was in force such that the mechanism for review had contractual effect and that any other basis for review was improper. His investigation did not reasonably put him in a position to reach such a conclusion. Notwithstanding this he concluded that the salary increases were unlawful as they did not follow the process in any of those agreements. I am satisfied that his investigation only ever put him in a position to conclude that different versions had been discussed over the years, there was no proper basis to conclude that any had ever been put into force.
- Refusing to let the claimant have sight of documents that he requested in his letter of 17 July. The majority of these documents appear to have direct relevance to the matters under investigation. His blanket refusal appears consistent with his failure to follow due process and his wish to establish guilt but not to investigate any possible innocent explanations.
- Concluding that the claimant had claimed expenses without 'authorisation' knowing that his investigation had no basis to conclude that there was any system of authorisation for Directors' expenses at the relevant time.
- Misrepresenting to the claimant in the disciplinary process, what Mr Neil had told him (Professor Hillum) regarding his memory of the claimant speaking with him about the possible purchase of a shed
- Refusing to consider the salary and receipt documents prepared by the claimant for the disciplinary hearing.

240. The particular unfairnesses argued by the claimant. Not providing sufficient notice of the investigation meeting + not providing the claimant with documents in advance of the investigation meeting on 11 July.

241. The claimant was disadvantaged by having only 2 days notification of a meeting but more significantly by not knowing that the meeting wished to investigate possible multiple and historic serious wrongdoing by him in

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relation to 8 years of impropriety in relation to salary, multiple improper expense claims going back some 7 years and the operation of his Directors Loan Account. The notification that the claimant received gave him no forewarning of these matters and instead referred rather opaquely only to 'anomalies within the companies financial data and cost control'. This is inconsistent with a process operating within the range of reasonableness.

242. The fact that the respondent chose to tell the claimant nothing about the particular charges against him in the letter calling him to the investigation meeting and yet to tell him in the same letter that he should bring information with him that is relevant is indicative that the process being operated by Professor Hillum did not sit within the range of reasonableness. Professor Hillum was being advised by an HR professional and was reasonably in a position to understand that fairness and due process should ensure that the claimant had a proper understanding of the nature of the charges against him to enable him to prepare to defend himself.
243. Given the respondent's belief in the potential criminal nature of the matters under investigation the response of a reasonable employer would be to set those charges out in terms, with supporting evidence and in advance of a meeting that wished to discuss them. The charges themselves were never laid in writing before the claimant. Although the claimant discovered at least the gist of the charges against him from what he was told and given at the investigation meeting, he was not properly in a position to understanding the specific charges. I am satisfied that the detail of these were unclear to the claimant at the outset and remained unclear to the claimant by the time he was dismissed – he was never properly in a position to understand the specific charges against him. This did not put him properly in a position to defend himself against those charges. This is inconsistent with the ACAS Code of Practice which states that *“employers should inform employees of the basis of the problem and given them an opportunity to put their case”*.
244. I have found that Professor Hillum believed that the matters originally listed in the document prepared for the investigation meeting were all made out such that he believed that gross misconduct had been established out but I am also satisfied that he reached that belief other than on the basis of an investigation that sat within the range of reasonableness in all the circumstances.
245. The wrong person carried out the investigation as it should have been more senior to the claimant (Paul Barker, Ian Mackenzie or an outside person).
246. I reject the possibility that the identity of Professor Hillum as the person who conducted the investigation creates some unfairness to the claimant in the sense that it sat outwith the range of reasonableness. I consider the small size of the respondent to be relevant and the fact that the claimant had become accountable to Professor Hillum in February 2018. It was eminently within a range of reasonable responses to put Professor Hillum in charge of the investigation. It was not incumbent upon the respondent to appoint someone from outside for the investigation to sit within a range of

reasonableness. In my judgment that would put too high a burden on such a small employer and would not sit within a range of reasonableness.

247. A different person should have conducted the disciplinary hearing given Professor Hillum conducted the investigation.

248. I reject the possibility that in and of itself, the fact that Professor Hillum conducted both the investigation and the discipline sits outside the range of a reasonable process. Case law acknowledges that it is not always possible for small employers to create a fully effective separation of responsibility for decision making at the potential three stages of a disciplinary process. The respondent's position is that there were only two people (Professor Hillum and Mr Mackenzie) within the company who could take responsibility for up to three roles – investigation, discipline and appeal. That, on its face, is a reasonable position to take. Mr Barker was not suitable to take any of those roles as he was implicated in the potential wrongdoing. It does not sit within a range of reasonable responses to require an employer to appoint an external person to conduct one of those roles. Some employers might but I am satisfied that the decision in principle to divide the 3 roles between 2 people in the way that they did sits within a range of reasonableness.

249. Professor Hillum has explained the need to keep Mr Mackenzie free to hear the appeal. In principle that would create a reasonable response to the position. However the evidence is that in fact at every step of the way that Professor Hillum and Mr Mackenzie made a joint decision on next steps. Professor Hillum knew from the advice of Ms Ball that it was important to keep Mr Mackenzie independent to hear an appeal and yet he failed to adhere to that advice. This is another factor that satisfies me that Professor Hillum paid little heed to the principles of fairness that characterise an investigation that falls within a range of reasonableness.

250. Professor Hillum has explained that the respondent could not afford to appoint an external person to assist with the process. Whilst there is no evidence to support this proposition in and of itself, that such a small employer decides not to spend money to appoint an external person does not sit outside a range of reasonable responses.

251. The significance of this in terms of reasonable response is that given the respondent's decision that one person would conduct both the investigation and the discipline process it created a particular focus on the importance of due process. My findings indicate that there are multiple failings in terms of fair and due process and that Professor Hillum failed to heed HR advice that he was given.

Not providing sufficient notice of the disciplinary hearing

252. In and of itself I can discern nothing in the shortness of the notice that creates any particular unfairness to the claimant. It was short but he was given a

week to prepare, was given copies of the various receipts and was enabled to speak to Mrs Angell.

Providing extra documents to the claimant during the disciplinary hearing

253. This directly offends one of the basic tenets of fairness and the ACAS Code of Practice. *“Employers should inform employees of the basis of the problems and give them an opportunity to put their case in response before any decisions are made”*

254. The claimant was effectively ambushed with fresh charges at the disciplinary hearing and was never able to put his case in relation to them before he was dismissed. Such actions do not sit within the range of a reasonable investigation.

255. The reason for the dismissal was the totality of all the charges against the claimant, including the fresh ones laid at the disciplinary hearing.

Did the respondent make the decision to dismiss the claimant before the hearing?

256. I am satisfied that Professor Hillum and Mr Mackenzie made a decision the day before the disciplinary hearing to terminate the claimant's employment. That would appear to be consistent with Professor Hillum's unseemly rush to conclude that meeting without considering the documents that the claimant had prepared to defend himself in relation to the salary position and in relation to expenses. It would also appear consistent with the decision by Professor Hillum inexplicably and in contravention of any semblance of a reasonable process, to put fresh charges to the claimant in the disciplinary hearing without giving him an opportunity to properly respond.

257. This is not consistent with a process that sits within the range of reasonableness and is incompatible with the ACAS Code of Practice.

Was the disciplinary process a sham, as it had already been decided to replace the claimant and to remove or reduce the value of his shareholding?

258. I am satisfied that there was proper cause for Professor Hillum, as the claimant's line manager, to have some level of concern and curiosity regarding why the claimant had submitted a receipt for expenses that clearly did not relate to business activity. That concern was legitimate and was not a sham. Professor Hillum did not start the process intent on removing the claimant.

259. His unexplained failure at that early point to take investigatory steps consistent with a range of reasonableness by speaking with Mrs Angell or the claimant to understand what receipt/expense system was in place led to a level of mistrust in the claimant that had no proper basis on the evidence of his investigation and that ultimately led to the claimant's dismissal.

260. From the way in which Professor Hillum proceeded to conduct the investigation I am satisfied that he closed his mind to the possibility that there may be matters he had not properly understood or that provided innocent explanations or mitigation for events under investigation. That is not consistent with an investigation that sits within the range of reasonableness. Even with the support of an HR advisor, the process became a sham which paid little heed to the principles understood to underpin fair process, in which Professor Hillum closed his mind to anything other than wishing to establish the claimant's guilt sufficient that he could dismiss him. He moved the claimant through a process with unnecessary haste, never told him in terms what the charges against him were, denied him documentation that he had reasonably requested, told him that things had been said to him by Mr Neil that were untrue, failed to check matters relating to wives' salaries with Mr MacNeil, refused to consider information that the claimant had brought to the disciplinary hearing that the claimant wished to argue established his innocence and put fresh evidence to him at the disciplinary meeting. Then he dismissed him at the conclusion of the meeting. Those events do not give the character of a process that sits within the range of reasonableness.

261. I have already indicated in my findings that from his evidence Professor Hillum appears to be someone who is prone to overstating, exaggerating or mispresenting situations without any proper basis. What the claimant is told at the conclusion of the disciplinary meeting and in his letter of dismissal is consistent with this tendency. The claimant was told by Professor Hillum at the conclusion of the disciplinary meeting that it appears he has 'coerced' subordinates at Claritum to amend or falsify paperwork.

262. There is nothing in any of the evidence gathered by Professor Hillum in his investigation that could support a belief of any form of coercion.

Did the respondent treat the claimant inconsistently with Paul Barker and if so was this unfair?

263. I am satisfied that there was no inconsistent treatment as between the claimant and Mr Barker such that any unfairness is established. Mr Barker is distinguishable from the claimant as on the facts Professor Hillum was not concerned about historic expense claims in relation to Mr Barker. Professor Hillum's concern in relation to Mr Barker was limited to salary increases and salary splits.

264. As a matter of fact and for the reasons already set out, I have not accepted Professor Hillum's evidence that when he investigated Mr Barker in relation to his salary that he (Mr Barker) told Professor Hillum that (a) he thought the pay increases had been authorised by the Board nor (b) that Mr Barker told him that the claimant had given him a pay increase without his agreement.

265. The significance of Mr Barker is more in relation to the fact that the respondent produced no evidence from him to establish what he did tell

Professor Hillum in relation to the historic salary matters under investigation and relevant to the decision made in relation to the claimant.

Was the decision to dismiss with a reasonable range?

266. I find that it was not. Notwithstanding Professor Hillum's belief that all matters of misconduct had been proven I am satisfied that he did not have reasonable grounds to hold that belief following an investigation that sat within a range of reasonableness and was fair in all the circumstances. I have taken into consideration the relatively small size of the respondent in terms of the challenges that created in assigning different people to perform investigation and discipline. I have taken into consideration that Professor Hillum was advised by an HR advisor throughout the process.
267. Professor Hillum approached the matters under investigation as one composite set of charges and dismissed on that basis. By the end of the investigation his approach was not that some had been made out and some had not and that on the basis of those made out he was going to dismiss. I have found that he believed that all the charges originally put in the investigation meeting and the additional 7 added at the disciplinary meeting were all proved. I am satisfied that he did not have reasonable grounds to hold that belief. The investigation he carried out did not reasonably put him in a position to hold such a belief, it did not fall within a range of reasonableness for all the reasons already set out.
268. The decision to dismiss the claimant was therefore not within a range of reasonable response. The dismissal is unfair.

Employment Judge Christensen

Date 23 February 2021

Judgement & Reasons sent to the parties: 26 February 2021

FOR THE TRIBUNAL OFFICE