



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr. Joe Lorrio  
(aka Jose Luis Lorrio Mardel)**

**v**

**Grayson Insurance Consultants  
Ltd.**

**Heard at:** Watford via CVP

**On:** 20 – 23 March 2023

**Before:** Employment Judge Coll (in person)

## **Appearances**

**For the Claimant:** no representation

**For the Respondent:** no representation

## **JUDGMENT**

The claim for unfair dismissal does not succeed.

The claim for holiday pay succeeds. The respondent's counter-claim, for set off against ex gratia payments made to the claimant, does not succeed.

The respondent is ordered to pay the gross sum of **£1,032** to the claimant in respect of holiday pay. This holiday pay arises from his period of service for the holiday year 2020/2021 and has been agreed as eight days.

The claimant is responsible for any income tax and employee national insurance contributions due.

The claim for failure to provide written reasons for dismissal does not succeed.

## **REASONS**

1. Mr. Joe Lorrio as claimant and Mr. Nathan Bird, as a director of the respondent and the dismissing officer, attended the hearing remotely via CVP. Mr. Lorrio represented himself. Mr. Bird represented the respondent. There were no other witnesses.

### **The hearing**

2. The claimant made an application to strike out the response principally on the basis that he had not been sent the bundle, amongst other failures to comply with directions. I heard the application and Mr. Bird's objections and decided that the claimant had been sent (and had received) the bundle sufficiently in advance of the hearing and in compliance with the date in the directions. I therefore refused the application and the hearing proceeded. I

was emailed a digital copy of the bundle because one was not available on the tribunal digital file before the hearing. The joint bundle of documents totalled 647 pages in the hard copy and 656 digital pages. Page numbers in these reasons refer to digital pages.

3. I was at the same time emailed audio and video recordings made by the respondent. Mr. Lorrio made an application to exclude these audio and video recordings. On further discussion, Mr. Lorrio agreed that his objection was to only one of these recordings; an audio recording. I heard from Mr. Lorrio and from Mr. Bird who opposed this application. Mr. Bird referred me to a transcript of this audio recording in the bundle, which Mr. Lorrio accepted as accurate. Having made this concession and being unable to specify how the audio recording differed from the transcript, Mr. Lorrio agreed that it was admissible. In other words, it could form part of the evidence before me.
4. I adjourned for 30 minutes to read the witness statements and bundle, having asked Mr. Lorrio and Mr. Bird for suggestions of essential reading in the bundle.
5. There was a list of issues (see below). I asked Mr. Lorrio and Mr. Bird to specify more particularly respectively on unfairness/fairness of the procedure and why they said the actions/decisions fell outside or within the range of reasonable responses. This was very helpful in focussing everyone's minds on the facts which I needed to find.
6. It was agreed that contributory fault was relevant (as per the list of issues). I explained that this meant I would need to make a finding as to whether Mr. Lorrio had misrepresented any of his overtime claims, if were to find the dismissal unfair.
7. Given that both parties were unrepresented, I explained that we should work out a timetable at the outset. The hearing had been listed for four days by Employment Judge Lewis to allow for both liability and remedy, if required, to be decided. We made a timetable together, based on predicted length of time for cross examination and preparation time required to write and deliver closing submissions. By this stage, it was the end of the morning session.
8. Due to Mr. Lorrio's making a number of references to his mental health at the start of the hearing, to his feeling of being ill-prepared and to his diagnosis of depression in the fit note of 1 February 2021, I allowed him to take the afternoon of 20 March 2023 to finish his preparation of cross-examination. Mr. Bird had no objection.
9. When cross examining Mr. Lorrio, Mr. Bird made a number of references to the involvement of the police. I confirmed with Mr. Bird that no criminal proceedings had been started and therefore I did not need to stay these proceedings. I also reminded myself about self-incrimination and that I should not encourage Mr. Lorrio to answer any questions which he did not wish to answer.

**The issues**

10. The respondent had made an application for strike out and if that failed, for a deposit order. A preliminary hearing took place on 4 April 2022 by telephone, the record is at [41 - 47]. Both parties were represented by their solicitors (respectively Mr. Hurst and Mr. Legister). They had drafted a list of issues. Employment Judge Lewis struck out some claims after hearing from the representatives. The list of issues had been subsequently amended to show which claims were left [39 – 40].
11. *Unfair Dismissal Section 94 Employment Rights Act 1996 (“ERA 1996”)*
  - 11.1 Was there a dismissal?
  - 11.2 Was there a potentially fair reason for dismissal?
    - 11.2.1 The respondent relies on the potentially fair reason of misconduct (s98(2) ERA 1996)
    - 11.2.2 The claimant says that there was no potentially fair reason for dismissal and that it was pre-determined.
    - 11.2.3 If the dismissal was not pre-determined, was it fair in all the circumstances?
  - 11.3 If the claimant was dismissed for the potentially fair reason of misconduct, did the respondent have a reasonable belief in the claimant’s guilt?
  - 11.4 If so, did the dismissal fall within a band of reasonable responses?
  - 11.5 Was the dismissal fair in all the circumstances? (s98(4) ERA 1996)
  - 11.6 If the claimant was dismissed for a potentially fair reason, but the dismissal was procedurally flawed rendering the dismissal unfair, would the claimant have been dismissed in any event? (See *Polkey v A E Dayton Services Ltd.* [1987] IRLR 503).
  - 11.7 Did the claimant contribute to his dismissal?
  - 11.8 Did the respondent fail to follow the ACAS guidelines in dismissing the claimant and, if so, should any award of compensation awarded by the tribunal be increased and if so, by how much?
12. *Holiday Pay: Regulation 14 Working Time Regulations 1998 (“WTR 1998”)*
  - 12.1 On the date on which the claimant’s employment was terminated, was the proportion of leave taken by the claimant in the leave year less than the amount accrued in the leave year? (Reg. 14(1)(b) WTR 1998)?

- 12.2 If yes, did the respondent fail to make a payment in lieu in respect of any accrued but untaken leave? (Reg. 14(2) WTR 1998) and if so, how much?
13. *Failure to provide written reasons for dismissal (Section 92 ERA)*
- 13.1 Did the respondent fail to provide written reasons for the dismissal to the claimant?
14. It was agreed by the parties at the outset of the hearing before me that the list of issues remained correct.

**Law applicable to the issues in dispute in the Unfair Dismissal Claim**

15. The relevant law is encapsulated in the list of issues set out above.

**Findings of fact on credibility and liability**

16. I make my findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral which was admitted at the hearing. I do not set out in this judgment all of the evidence which I heard but only my principal findings of fact, those necessary to enable me to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts, I have done so by making a judgment about the credibility or otherwise of the witnesses I have heard based on their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

**Witnesses**

17. My impression of the witnesses was as follows.
18. The credibility of Mr. Lorrio's evidence was mixed.
- 18.1 There were instances where Mr. Lorrio could not remember things which would have been important. For example, he said he could not remember in what way the contract of employment sought to be introduced on 1 September 2019 was different from his previous contract. Yet the changes in that contract were clearly labelled. Section 5, headed salary and overtime rate, was dated 1 September 2019. No other sections had that date.
- 18.2 At other times, Mr. Lorrio was vague or evasive. For example, he was asked to look at the entry for 14 August 2014 from the SAP system. This showed a claim for 15 minutes of overtime from 6 am to 6.15 am. Mr. Bird said he had no problem with that overtime claim. Yet Mr. Lorrio would not confirm the accuracy of that entry.
- 18.3 Some of what Mr. Lorrio said was implausible.
- 18.3.1 For example, he said that the hospital had prescribed antidepressants. I did not mention this earlier in the hearing, but I am

a judge also in the Social Entitlement Chamber where I have to deal with volumes of medical evidence from GP records including GP consultations and specialist letters. It is unusual from my experience for the Accident and Emergency department (“A & E”) of a hospital to prescribe antidepressants. Instead, they may recommend that the GP do this. It is the domain of the GP to decide what to prescribe and starting dosage. It was also implausible that there was no letter or summary from the hospital to the GP from Mr. Lorrio’s visit on 1 February 2021. Even if that document was sent to the GP after a delay, there was no explanation why there was still nothing from the hospital to support Mr. Lorrio’s account.

18.3.2 In addition, in making his application for strike out at the start of the hearing, Mr. Lorrio claimed that he had not received emails from Mr. Bird. He said that after ceasing to instruct his solicitor in April 2022, he had barred Mr. Bird’s telephone number. According to him, this meant that Mr. Bird’s emails automatically went into Mr. Lorrio’s email bin. A document in the bundle indicated, however, that Mr. Lorrio had read an email sent by Mr. Bird in November 2022. When I asked about this inconsistency, Mr. Lorrio revised his evidence to say that he had received emails up to and including November 2022. He said there must have been a software update after that, which put all Mr. Bird’s emails into the bin.

19. Mr. Bird’s oral evidence was consistent with his witness statement, with his letters and minutes of meetings with Mr. Lorrio and with data in the bundle showing Mr. Lorrio’s times of logging on and logging off the computer at work. His explanations were plausible.
20. Having made those general observations, I find the evidence of Mr. Bird to be more credible than that of the claimant because of his internal consistency and the consistency of his evidence with the contemporaneous documents. Where there is a dispute on the facts, I have therefore relied on the evidence of Mr. Bird in preference to that of the claimant.

*Background – the respondent’s business and staffing*

21. The respondent was founded in 1964. Mr. Bird had been a director since 2005 and Mr. Jon Bird since 2007. The respondent provides insurance for drivers leasing and hiring taxis.
22. From 23 March 2020 (the start of the first lockdown) to 3 February 2021 (the date of the dismissal letter), there were about 950 clients. Mr. Jon Bird had developed a product which gave them a unique competitive advantage. This was a system based on an analysis of behavioural traits called New Way. It enabled the respondent to reduce the number of claims by about 50% and consequently secure a much better premium for each client.
23. The intellectual property in New Way was not protected. I accept Mr. Bird’s opinion that any employee would be able to use the product under a

different guise if they joined a competitor. Mr. Bird was very worried at various times about losing this product and their competitive advantage.

24. As at 23 March 2020, five people worked for the respondent which included Mr. Bird, Mr. Jon Bird and Mr. Lorrio. Mr. Jon Bird had been historically responsible for finance, the ordering of supplies and staffing whilst Mr. Bird was more customer facing with expertise in product development and data analysis. Mr. Jon Bird had been diagnosed with a condition some years before which the doctors had said would be terminal. At that time, he entered the terminal phase. Although the respondent remained open (on restricted hours) during the first and subsequent lockdowns, Mr. Jon Bird had to shield himself and work from home. Due to his deteriorating health, he passed responsibility for staffing matters to Mr. Bird.
25. Ms. Zoe Solanke, had worked for the respondent as a cleaner since 2013. She had been Mr. Bird's partner for 18 years. She did not come into the office during the first lockdown. A fifth employee also had to work from home during the pandemic. He ceased to work for the respondent during the period 23 March 2020 to 3 February 2021 because his wife, a nurse, was required to work full time.

Background – Mr. Lorrio's role, hours of work and overtime

26. Mr. Lorrio was an old friend of Mr. Bird and Mr. Jon Bird, having known them for about 30 years. He approached Mr. Bird to ask for a job. He started at the respondent in 2009. After a few years, Mr. Lorrio's job settled into being focused on taxi insurance renewals. This was a task previously done by Mr. Bird and certainly still in 2009 after Mr. Lorrio joined. He was pleased at Mr. Lorrio's arrival because after a while it meant that he could focus on the New Way product. Mr. Lorrio was contractually required to work 35 hours. This had been from 9 am to 5 pm but changed over time to be from 9.30 am to 5.30 pm.
27. From 2012, Mr. Lorrio was allowed to do overtime on a discretionary basis. The contract of employment in 2012 stated that overtime was not a contractual obligation. If the opportunity came up, he would be paid at an hourly rate of £30. The respondent sought to change this subsequently to £16.50 per hour in the new contract of employment dated 1 September 2019 [259 - 261] which was not accepted by Mr. Lorrio.
28. From its inception, the respondent had generally employed family or friends. The respondent prided itself on creating a family environment at work. Mr. Bird and Mr. Jon Bird's approach to Mr. Lorrio's overtime was motivated by their wish to foster this family atmosphere. The process for authorizing overtime was consistent with a family orientated climate. Mr. Lorrio was to fill in the overtime calendar after doing overtime. I have seen how this works in one of the video recordings. He was permitted to complete the calendar in advance, having predicted that he would be doing overtime. Mr. Jon Bird (as well as Mr. Bird) had access to the overtime calendar. Mr. Jon Bird would take in on trust that the calendar had been correctly filled in and authorise the overtime payment.

29. In 2019, Mr. Jon Bird realized that Mr. Lorrio was working a considerable amount of overtime. He began to develop concerns about the impact on Mr. Lorrio's health since he was working in excess of 48 hours per week. As a result, Mr. Jon Bird with Mr. Bird's full support, sought to change the contract of employment to protect Mr. Lorrio with effect from 1 September 2019. Mr. Bird wrote to Mr. Lorrio setting out their concerns about overtime and the proposed future restriction of overtime to one hour per day [257 and 263]. Mr. Lorrio did not accept the new contract, refusing to sign it and made it clear that he would continue to work overtime on the previous scale [264]. There were meetings with Mr. Lorrio on 19 November 2019 to find a way forward [265 – 266] and a list of questions [267 – 268] pinpointing concerns and on 20 November 2019 [270]. There were however no concerns about the genuineness of his overtime claims.
30. From 23 March 2020, working hours were initially 10 am to 2.30 pm because the volume of business had dramatically reduced. Only Mr. Lorrio and Mr. Bird were in the office. This was later extended to 3 pm. Even when working hours were restricted, Mr. Lorrio was always paid as if he had been working his full contractual hours i.e., 35 per week.
31. In July 2020, Mr. Jon Bird raised concerns with Mr. Bird about the level of overtime [271 – 272]. He did not understand why overtime was necessary. Mr. Bird agreed with him. Mr. Bird told Mr. Lorrio that he was not to work overtime. He was paid as if he were doing overtime. Mr. Jon Bird and Mr. Bird did not suspect any fraudulent misrepresentation of overtime but nevertheless, they wanted to change the overtime position.
32. There were discussions between Mr. Bird and Mr. Lorrio about overtime. Mr. Lorrio noted his response to one such discussion [273]. They asked Mr. Lorrio to enter into a new contract of employment dated 1 October 2020. Mr. Lorrio was not to work overtime but he would be paid a monthly payment for 3 months to reflect what he would have earned if he had been doing the same level of overtime as he had been claiming. First, to compensate Mr. Lorrio for money which he felt he would lose, Mr. Bird and Mr. Jon Bird offered him the chance to get new business when the office closed at 3 pm after the office closed to customers. He was to call prospective new clients on the telephone from 3 pm to 5 pm. He would be rewarded for new business through a bonus scheme. Secondly, he was allowed to work overtime from 5 pm to 6 pm on the leads he had generated; this was effectively described in the new contract of employment as a second incentive/bonus scheme [275]. This was explained again in a letter dated 13 November 2020 [277].
33. Mr. Lorrio objected to this new contract of employment dated 1 October 2020 and refused to sign or accept it. He continued to work under protest and continued to work overtime [274]. Mr. Lorrio deleted overtime calendar entries for October 2020, stating that these recordings were no longer necessary [276].

Background – the system to obtain renewal quotes

34. The majority of insurance providers were on a system called SSP. This was used to obtain quotes. The number of alternative viable providers had reduced from 9 to 5 to 2. This was because some had gone out of business and others had a poor rating. It was only necessary at most to get one alternative provider. It was rarely necessary to look at an alternative provider who was on their own system, not SSP.
35. One of Mr. Lorrio's arguments about why the level of overtime claimed was necessary was that he had to obtain at least five alternative quotes and so leave SSP and spend time on another system. He told the investigating officer this in his investigation interview and it appears in the report. He repeated this view through his cross examination and his own oral evidence.
36. I do not accept Mr. Lorrio's argument and prefer Mr. Bird's account. First, given the number of clients, there would be a need to look at the renewals of no more than 3 – 4 clients per day. There was no need to do the renewal invitations in advance of 21 days before the expiry of the existing insurance. If Mr. Lorrio chose to process more than 3 – 4 per day, there would be fewer to do on another day. Mr. Lorrio had said that there was a need for 25 renewals a day. Secondly, the processing time was not 20 - 40 minutes as suggested by Mr. Lorrio. Mr. Bird had undertaken renewals in August 2019 whilst Mr. Lorrio was on holiday. He therefore had a relatively recent experience of processing times. It had taken him a few minutes to do one. This was because the process consisted of taking down details over the telephone, putting them into SSP, getting a printout and talking to the client about it. On rare occasions e.g. a driver was over 70 or it involved a bus, it would be necessary to obtain a quote from an alternative provider. There was also little need for alternative quotes because one main provider had an increasing share of the respondent's business.

Background – were there any non-computer related tasks in Mr. Lorrio's role?

37. Mr. Lorrio also said that his job required him to look at paper files. I accept that paper files existed as this was a convenient way to store items which needed to be in hard copy such as a taxi driver's driving licence. Mr. Lorrio however said that he had to check back through files which were often unwieldy. He said some of them had been pruned and tidied up but he could not give me a date. Even if the files were bulky or untidy, I do not accept the need to go back many years to look at the history of the insurance, premiums and claims. I asked Mr. Lorrio why it would be necessary to go back more than the previous year and he did not give me any answer. I prefer Mr. Bird's account that there was little or no paper element to the role.
38. It follows from this that I find that the vast majority of the work had to be done on the computer on SSP and that therefore computer log in and log out times showed actual hours of work.



39. I also do not accept that Mr. Lorrio had responsibilities such as cleaning, opening and allocating of post and ordering of office supplies. As I understand it, his argument was not that these activities had to be done outside working hours but rather that doing them during working hours meant he had to spend time on renewals outside working hours.
40. Cleaning was done by Ms. Solanke. I accept that during lockdown, he cleaned his own workstation but this would not have taken more than a few minutes.
41. Opening and allocation of post and ordering of supplies were not part of his job.
42. I accept Mr. Bird's assessment based on timing himself that it would have taken 10 minutes on average to come into the office, turn on the computer and make a cup of tea.

### **Conclusions about the issues**

#### **Was there a dismissal?**

43. It is not disputed that there was a dismissal.

#### **Was it for a potentially fair reason?**

44. The reason for the dismissal was misconduct. Nothing Mr. Lorrio has written or said has undermined the fact that the evidence points overwhelmingly to this being a dismissal on the grounds of misconduct. There were three grounds given all of which relate to misconduct:
  - 44.1 Fraudulent misrepresentation of overtime
  - 44.2 Failure to follow instructions to generate new business
  - 44.3 Dishonesty in failing to admit that he had not generated the expected new business.

#### **Did the respondent have a genuine belief on reasonable grounds of Mr. Lorrio's guilt?**

45. I am satisfied that Mr. Bird undertook a reasonable investigation because:
  - 45.1 He had asked SSP whether he could analyse login and logout times and found out how to operate that function. He had therefore obtained login and logout times which he could compare to the times on the overtime calendar. This produced about 1.5 million lines of data. It was not necessary to analyse all of this which took Mr. Bird until Spring 2021. In the extensive analysis carried out, he had found many and many significant discrepancies although he accepted that two thirds of overtime was not fraudulently misrepresented. Mr. Bird examined a number of periods of data including August 2014 and 2018 – 2019. I was shown

these two periods during cross examination and the data was set out clearly.

- 45.2 Mr. Lorrio had claimed overtime on 21 and 22 October 2020. Mr. Bird was not in the office for most of the day but came by in the late afternoon. He found that Mr. Lorrio was not in the office and he video-d his absence. This video can be accessed via a video link sent in an email on the first day of the hearing to the clerk. Mr. Bird found that Mr. Lorrio had claimed overtime for times when he was not in the office on those days. This happened on several other days in October 2020. Mr. Bird asked Mr. Lorrio for an explanation shortly afterwards but Mr. Lorrio had not offered any explanation.
- 45.3 Mr. Bird obtained telephone logs of calls made by Mr. Lorrio in pursuit of new business (from 1 October 2020). His analysis showed him that very few calls had been made during the period of 3 pm to 5 pm when Mr. Lorrio should have been making many calls. He asked Mr. Lorrio to explain this but Mr. Lorrio was not able to explain why he had told Mr. Bird a number of times that he was making a volume of calls and was good progress. I was shown these telephone logs during cross examination and the data was clearly set out.
- 45.4 By 16 November 2020, Mr. Bird had obtained and analysed sufficient data to cause him to be very worried about the overtime claims, pursuit of new business and dishonesty about progress with getting new business [278 – 279]. He therefore sent Mr. Lorrio a letter dated 26 November 2020 advising him that there would be a disciplinary investigation [113 – 119].
- 45.5 Mr. Bird had recognised his lack of experience in staffing matters and sought advice from an employment law specialist, Mr. Peter Radelat. He turned to this advisor again to find him someone experienced to undertake an investigation. Mr. Radelat identified Ms. Pauline Wilkes on 15 December 2020 [121]. Ms. Wilkes was briefed and told that Mr. Lorrio was a friend and this must be borne in mind during the investigation [122].
- 45.6 Mr. Bird provided Ms. Wilkes with everything which she would need to prepare her for an investigation meeting including data from the SSP logs, telephone logs and the overtime calendar on 12 January 2021 [see list at 299 - 300]. The SPP data was thorough and showed log on and log off times categorised by before working hours, after working hours and during weekends. The SPP data also showed the amount of time spent processing each insurance claim. I have been taken through these during the hearing and they are set out clearly. The evidence used for the investigation is in the bundle at [293 – 331]
- 45.7 Mr. Lorrio has questioned the choice of investigator. I therefore have to ask myself whether using Ms. Wilkes was an option open to a reasonable employer. I am satisfied it was because:

45.7.1 There was no-one within the company who could have done this. There were only two people in managerial positions; Mr. Jon Bird (who was at home and ill) and Mr. Bird.

45.7.2 Ms. Wilkes was recommended by Mr. Radelat, a local employment law advisor as being suitably experienced and suitable.

45.7.3 Mr. Bird had relied on Mr. Radelat and found his advice to be helpful.

45.8 The investigation report [141 – 146] shows that Mr. Lorrio was given a fair opportunity to challenge this data and any conclusions drawn by Ms. Wilkes. He was asked questions about his responses. The investigation report was thorough and set out why Mr. Lorrio's explanations were not accepted as plausible.

45.9 Mr. Bird relied on the investigation report to decide that there should be a disciplinary hearing.

46. I am satisfied that Mr. Bird, having relied on a reasonable investigation, had a genuine belief in Mr. Lorrio's guilt.

Choice of investigating officer as chair of disciplinary hearing – within the range of reasonable responses?

47. Mr. Lorrio has questioned the choice of Ms. Wilkes as chair. I therefore have to ask myself whether appointing Ms. Wilkes as chair was an option open to a reasonable employer. I am satisfied it was because:

47.1 The ACAS code of practice allows for the investigating officer to be the chair of the disciplinary hearing, depending on the circumstances.

47.2 The respondent is an extremely small company. At the date of the disciplinary hearing, there were only four employees: Mr. Jon Bird, Mr. Bird. Mr. Lorrio and Ms. Solanke. Mr. Jon Bird could not take any part due to his illness. Ms. Solanke as a cleaner would not have been suitable to chair the disciplinary hearing. Mr. Bird did not have the experience to feel confident to be the chair.

47.3 By this stage, Mr. Radelat, due to illness, was no longer available to assist Mr. Bird. Mr. Bird turned to a different employment law advisor who told him that it was acceptable for Ms. Wilkes to chair the disciplinary hearing.

47.4 Mr. Bird's intention was that Ms. Wilkes would chair the process but he would make the decision.

Failure to postpone disciplinary hearing – within the range of reasonable responses?

48. Mr. Lorrio said that the disciplinary hearing should have been postponed because he could not attend due to illness (his mental health). I therefore

have to ask myself whether going ahead in his absence was an option open to a reasonable employer. I am satisfied that it was because:

- 48.1 I have to bear in mind what was known to or before Mr. Bird at the time
- 48.2 Mr. Bird would have known that it was the 3<sup>rd</sup> lockdown on 1 February 2021, the day before the hearing. He would have been aware of the difficulty of accessing medical documentation.
- 48.3 On receiving a request for a postponement on 1 February 2021 [149], Mr. Bird asked for advice from his employment law advisor and he followed that advice which was to request medical evidence.
- 48.4 Mr. Bird emailed Mr. Lorrio on the same day asking for medical evidence stating that he was unable to attend the disciplinary hearing (via Zoom) scheduled for the next day (2 February 2021). [150].
- 48.5 Mr. Lorrio responded by emailing a fit note on 1 February 2021 without any text [151 – 152]. This stated depression. A fit note is about fitness to work not fitness for anything else e.g. attendance at a disciplinary hearing via Zoom.
- 48.6 Mr. Lorrio did not mention anything further e.g. about treatment. He now says he was already on anti-depressants but he said nothing about this when he emailed his fit note.
- 48.7 Also on 1 February 2021, Mr. Lorrio given feedback that this was not sufficient [153].
- 48.8 Mr. Bird made the assumption that Mr. Lorrio had obtained the fit note in person from the GP surgery. He said that in his mind at the time, he did not understand why Mr. Lorrio could not have obtained something more relevant, as he had seen the GP.

Was the choice of (summary) dismissal within the range of reasonable responses?

49. Mr. Lorrio considered that a lesser sanction or no sanction should have been chosen. I am satisfied that dismissal was an option open to a reasonable employer because:
  - 49.1 There was irrefutable evidence from the SSP logs, the telephone logs and Mr. Bird's observations that Mr. Lorrio had engaged in fraudulent misrepresentation of overtime claims
  - 49.2 This misrepresentation had been carried out for many years.
  - 49.3 The losses to the respondent arising from this misrepresentation were very substantial (about £22,000) by the date of the disciplinary hearing (2 February 2021).

- 49.4 Mr. Lorrio had offered no plausible explanations.
- 49.5 Mr. Lorrio had maintained a denial of any fraudulent misrepresentation.
- 49.6 Mr. Bird said that there had been a breach of trust which could never be restored. This was especially difficult because Mr. Lorrio had been a long standing friend. Mr. Bird did not feel that he could ever trust him again.
- 49.7 The telephone logs showed clearly that very few calls had been made to new clients.
- 49.8 Mr. Lorrio had been asked about new business generation in a number of conversations which had been noted down. He had presented a false picture.

Fairness of the Procedures

50. Mr. Lorrio clarified during the hearing that in his view there was procedural unfairness because:
- 50.1 The investigating officer did not have an open mind.
- 50.2 The disciplinary hearing should have been postponed. It should not have gone ahead in Mr. Lorrio's absence, which was due to mental health.
- 50.3 The investigating officer should not have chaired the disciplinary hearing.
51. I find that there was no procedural unfairness because:
- 51.1 The investigation and subsequent steps complied with the ACAS code of practice.
- 51.2 Mr. Lorrio was sent letters informing him of what was happening and why at each stage. This included the letter setting out the rationale for an investigation, the possible grounds of misconduct to be investigated, an invitation to the investigation meeting and an invitation to the disciplinary hearing again setting out the grounds of misconduct being considered. Both invitations referred to the right to be accompanied. In sum, the letters contained what would be expected to enable Mr. Lorrio to prepare and generally to achieve fairness [113 – 119, 126, 128 – 129, 134, 135 – 136, 147 – 148, 150].
- 51.3 The investigation meeting was postponed at Mr. Lorrio's request for more time.
- 51.4 Mr. Lorrio chose Mr. Jon Bird as to accompany him to the investigation meeting. This was refused for fair reasons. First, Mr. Jon Bird was too ill to do this. Secondly, Mr. Jon Bird was part of senior management and had been the first of the directors to suspect that

something fraudulent was going on with overtime claims. He would have had a conflict of interest. I note that Mr. Lorrio did not raise this as an issue at the hearing, when asked to specify, although he had raised it previously.

51.5 When asked why he said that Ms. Wilkes did not have an open mind, Mr. Lorrio repeated the same answer. This was because he would not agree to the new contract of employment with the incentive schemes (new business generation bonus) and removal of discretionary overtime. Mr. Lorrio could not point to anything in Ms. Wilkes' emails or her investigation report to show a pre-determined bias. I have examined Ms. Wilkes' correspondence and report carefully. I can find no evidence of such bias. For example, she probed his answers to check her understanding and to give Mr. Lorrio an opportunity to explain his position fully. She based her conclusions on the hard data provided to her and Mr. Lorrio's answers.

51.6 The disciplinary hearing satisfied the ACAS code of practice.

51.7 Turning to the specific point raised by Mr. Lorrio, he was given an opportunity to obtain medical evidence and told exactly what it needed to show as to why he was not fit to attend a virtual hearing. He provided a fit note stating depression. He was emailed on the same day explaining why this was not sufficient. Mr. Lorrio did not respond. Apart from the fit note, he gave no information. Mr. Bird did not know anything about the severity of his depression. There is no evidence that he told Mr. Bird (as he said at this hearing) that he had been to the hospital at 5 or 6 am and had been prescribed anti-depressants by the hospital.

51.8 I am satisfied that Ms. Wilkes' role was facilitator to enable Mr Bird as a senior manager with little or no HR experience:

51.8.1 To discuss the report, including that Mr. Lorrio had given answers to Ms. Wilkes which Mr. Bird found implausible with his knowledge of the industry

51.8.2 To discuss the significance he wished to attach to the fact that Mr. Lorrio had always denied the allegations.

51.8.3 To discuss the significance of Mr. Lorrio failing to offer any mitigation. Mr. Bird had hoped for some mitigation to enable him to consider a different sanction..

51.8.4 Mr Bird had this discussion on 2 February 2021 at the disciplinary hearing. He waited until he had received her summary of this discussion on 3 February 2021 to make his decision. He made the decision on his own.

52. Mr. Lorrio did not raise any points in writing or orally concerning the appeal. He asked no questions in cross-examination about the appeal. I conclude therefore that the appeal process was fair.

### **Summary of Conclusions on Unfair Dismissal Claim**

53. The dismissal was fair in all the circumstances. In making this decision, I have taken all of the above into account, the size of the company (4 people)

and the fact that loss of their unique system would have been very difficult. Mr. Bird repeatedly stated that the respondent could not trust him not to divulge this to a competitor.

**Written reasons for dismissal**

54. I find that Mr. Lorrio was provided with written reasons for the dismissal because:

54.1 The dismissal letter written on 3 February 2021 explained that he had been summarily dismissed for gross misconduct.

54.2 The dismissal letter referred back to the letter inviting Mr. Lorrio to a disciplinary hearing for more details of the grounds. That letter and the prior letter explaining that there would be an investigation set out clearly the three grounds upon which he could face a disciplinary sanction, including dismissal.

54.3 All the letters were clearly written.

**Holiday Pay**

55. Mr. Lorrio made a claim for holiday pay for 10 days under the Working Time Regulations (“WTR”). During the hearing, Mr. Bird put forward arguments why this should be 8 not 10 days. Mr. Lorrio accepted this. The rate for a day of holiday was also agreed. The sum for 8 days, if awarded, was agreed to be £1,032 gross.

56. The respondent submitted that these 8 days should be set off against payments made in 2020 under a new contract of employment dated 1 October 2020. That contract of employment sought to take away any right to discretionary overtime payments in return for which two types of bonus payment were available and a short term 3 month top up to reflect the lack of overtime payment. A letter explained that the respondent would pay this top up for October 2020 in November 2020’s pay, for November 2020 in December 2020’s pay, and for December 2020 in January 2021’s pay [277]. It was the short term top up which the respondent said should be set off against holiday pay.

57. There is no dispute that Mr. Lorrio registered his objection to this new contract and did not sign or accept it. Nevertheless, the respondent made these payments at the end of each month in order to ensure that he was not disadvantaged financially. On the respondent’s case, set-off would have meant that Mr. Lorrio would receive a minimal sum for holiday pay (£12). Given that the contract had not been accepted by Mr. Lorrio, the respondent was under no legal obligation to make these payments. For this reason, the payments were ex gratia.

58. Set off occurs against losses arising from unfair dismissal in that if there is a loss of salary etc, any benefit must be set off against it to calculate net loss. That is the accepted principle of assessing loss in an unfair dismissal claim.

59. Here we are talking about applying an accepted principle of loss to something different, to a claim under the WTR. The character of a payment under the WTR is different to that of a salary loss or other losses arising in an unfair dismissal claim. I have examined the following legal cases to find an authority to do this. I can find no authority which means that there is entitlement to set holiday pay off against ex gratia payments. I summarise below the cases looked at.

59.1 Where an employee received an ex gratia payment from their employer following their dismissal, this can be looked upon as compensation for the losses suffered, advanced payment of any liability caused by the dismissal or as a payment unrelated to the dismissal. A claimant will normally be required to give credit for such an ex gratia payment (see *Digital Equipment Co Ltd. v Clements (No 2)* [1998] IRLR 134 (CA)). The ex gratia payments made by the respondent did not follow the dismissal so are different.

59.2 Where the employee receives an ex gratia payment that he would have received had he not been unfairly dismissed, it will not factor into reducing losses suffered by the claimant (as a result of being dismissed) (see *Babcock FATA Ltd. v Addison* [1987] IRLR 173 and *Roadchef v Hastings* [1988] IRLR 142). Even though these cases are about losses arising from an unfair dismissal, they can be applied to Mr. Lorrio's case. There will be no set off where the ex gratia payments not connect to the dismissal.

60. It may have been different if the respondent had pursued set off on the basis of the fraudulent overtime claims (which stood at £22,000 at the date of the disciplinary hearing) but Mr Bird made it clear that this was not the basis. For that I would have had to analyse whichever contract of employment could be said to have been accepted by Mr. Lorrio and any relevant case law.

**I confirm that this is my Reserved Judgment with reasons in Lorrio v Grayson Insurance Consultants Ltd. Case No: 3310146/2021 and that I have approved the Judgment for promulgation.**

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Employment Judge Coll

Date: 24 April 2023

Sent to the parties on: 26.4.2023

For the Tribunal Office: GDJ