EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107288/2019

Held in Dundee on 20 September 2019

Employment Judge I McFatridge

Mr D Brock	**Claimant** **Represented by** **Mr D Strang** **Solicitor**
Aros Holdings Limited	**Respondent** **Not represented** **(no ET3 lodged)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is

(1) The claimant was unfairly dismissed by the respondent. The respondent shall pay to the claimant compensation therefor in the sum of Ninety Four Thousand, Three Hundred and Fifty Pounds (£94,350).

(2) The respondent shall pay to the claimant the sum of Seven Hundred and Eighty Three Pounds (£783) in respect of annual leave accrued but untaken as at the date of termination of employment.

(3) The respondent unlawfully discriminated against the claimant on ground of disability. The respondent shall pay to the claimant the sum of Six Thousand Pounds (£6000) as compensation therefor. Interest on the said payment shall run from 7 February 2019 to the date of payment. The interest due for the period from 7 February to the date of promulgation of this decision is Three Hundred and Twenty Two Pounds and Twenty Pence (£322.20).

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unfairly dismissed by the respondent. He also claimed that he was due holiday pay. He claimed that he had been unlawfully discriminated against on grounds of disability. The respondent did not submit a response within the statutory period. An Employment Judge decided that it was not appropriate to issue a judgment under Rule 21 without a hearing. A hearing was fixed and took place on 20 September. The claimant was put on oath and gave evidence. He adopted a witness statement provided in advance of the hearing as his evidence in chief. A copy of his witness statement is annexed hereto. Although there was no appearance by the respondent, who had not submitted an ET3 I felt it appropriate to ask the claimant certain questions in connection with his witness statement and the documents. The claimant indicated in his witness statement that he had continuity of service from 2004. The executive service agreement which he produced (pages 32-51) stated on page 33 that the commencement date was 4 February 2016 and stated at section 3 on page 36 that

> "The Executive's continuous period of employment with the Company will commence on the Commencement Date and no previous employment

with the Company or any other employer will count towards that continuous period of employment."

The claimant's position was that although the service agreement had been completed by lawyers at the time that this section was in error. He stated that he had set up a company called Warranty Logistics Management in 2004 and that this company had acquired a company called MBG in 2016. There was a need for a holding company and Aros Holdings became the holding company for Warranty Logistics Management Limited and other companies. All were part of the same group. He maintained his position that he had continuous service from 2004 and I accepted this on the balance of probabilities. He confirmed that he had been unable to attend the disciplinary meeting in February due to his ill health but that he was getting better at that stage. He confirmed that he had attended the appeal meeting in April. He considered that April was the earliest he could have attended a disciplinary hearing. With regard to his remuneration he indicated that he was unsure what the current position was with regard to the historic arrangement whereby some of his remuneration was paid in cash as a salary and some paid as a dividend. He indicated that his understanding was that the business had decided that it was not appropriate to continue with this arrangement and there was no particular pressure from HMRC. His understanding was that there was a well established principle concerning this arrangement and the company had set up various classes of shares (A, B, C, D etc) which had similar voting rights but differential entitlement to dividends and this was how the matter had been dealt with. He also clarified that previously Warranty Logistics Management Limited had owned all of the other companies in the group and the service agreement basically showed Aros Holding Limited taking over that role of holding company.

Observations on the evidence

2. Clearly there was a limit to the extent to which the claimant's evidence could be tested given that the respondent was not present and had not entered appearance in the case. I found the claimant's explanations for the various

matters I raised to be credible and overall was prepared to accept his witness statement and the oral evidence given as being credible and reliable.

Discussion and decision

3. Given that the claims were not resisted I only required to consider the question of remedy. The claimant's representative had produced a schedule of loss. I generally accepted the figures in this. With regard to the unfair dismissal claim I accepted the claimant's evidence that his gross annual remuneration was £100,000. I considered that this was the appropriate figure to use for calculation of the basic award. It is clear that this was money the claimant was contractually entitled to. I did have some hesitation as to whether the fact that the claimant arranged for this to be paid in a way which minimised his tax liabilities altered the position. At the end of the day whilst, on paper, the claimant was entitled to payment of dividends given his shareholding in the company rather than in exchange for any work he did it appeared to me on the basis of the evidence that this was simply a fiction to allow the claimant to reduce his tax liability. The actual position was that the claimant had a service agreement entitling him to be paid £100,000 per annum and that this was the remuneration he was entitled to in terms of his contract of employment. It appeared to me that if the dividends were not paid then the claimant would be entitled to sue for the balance of his remuneration and on this basis the total amount of remuneration of £100,000 should be used for the calculation of basic and compensatory award. The statutory maximum for a week's pay at the relevant time was £508. The claimant was entitled to a basic award of 21 weeks' pay amounting to £10,668. With regard to the compensatory award I accepted the figures provided by the respondent. From the termination date to the hearing the claimant had lost net pay at the rate of £1305.33 per week including benefits. In the 32 weeks to the hearing he had lost £41,760. From this falls to be deducted his actual earnings from alternative employment during this period amounting to £1848. His loss to the hearing was therefore £39,912. With regard to future loss I accepted the claimant's evidence that he will have serious difficulty obtaining another job paying the same amount. He has obtained temporary employment on a zero hours' contract with UHI. He

anticipated earning £15,000 in the coming year and perhaps £20,000 the year after. I considered these figures to be realistic. I considered that in all the circumstances it was realistic and reasonable to award the claimant wage loss for the next two years given his age and work situation. This gives a wage loss of £51,844 for the first year and £47,684 for the second year. The claimant claimed £500 in respect of loss of statutory rights and I accepted this sum. This gives the claimant's total wage loss as £139,940. The claimant sought an uplift of 25% in terms of the respondent's failure to follow the ACAS Code. Whilst I accepted the sequence of events set out by the claimant in his witness statement this did not appear to me to be a case where it would be just and equitable to make any uplift to compensation. The respondent did invite the claimant to a disciplinary hearing. The respondent did invite the claimant to an appeal hearing which he attended. The claimant makes various criticisms of the documentation with which he was provided and at the end of the day the claimant himself accepts that he bore some responsibility for the state of affairs in which the company found itself albeit he denies the culpability attributed to him by the company. I would not therefore have awarded any uplift for a failure to follow the ACAS Code. The issue is of course academic in any event since the sum I would award in respect of wage loss (excluding any uplift) is already more than the cap on the compensatory award of £83,682. I would therefore award compensation up to the cap of £83,682. The total compensation for unfair dismissal is therefore (83,682 + 10,668) 94,350.

4. With regard to the claim of disability discrimination the claimant places his claim at the lower end of the middle Vento band. The medical evidence which was provided essentially shows that the claimant's medical condition pre-dated his dismissal. The report lodged at page 25-26 states

> "As he reported some progress at the end of February 2019 it is possible he may have felt strong enough to attend work related investigation or disciplinary meetings, but it is also true that by the middle of April when I reviewed him next, he was sleeping poorly again because of the stress he was under and he remained anxious at times such that a further prescription for Diazepam was issued (to be taken if necessary)."

It was noted that the claimant had not attended the practice since the middle of April and his GP indicated that he would infer from this that he was feeling a little better although he states he has not examined him.

5. In all the circumstances I consider that this is a case which falls within the lower Vento band. The claimant was part owner as well as an employee of the business. It is clear that the events which led up to his dismissal would have caused him a certain amount of stress and anxiety in any event. I would award the claimant damages in the lower Vento band as extended in the Presidential Guidance issued on 5 September 2017. Taking all matters into consideration I would award the claimant £6000 for injury to feelings. The claimant also sought loss of earnings for the two month period during which he indicated the disciplinary hearing ought to have been postponed. I declined to make such an award since it is already covered by the unfair dismissal award. In addition there was insufficient medical evidence to say that he was unable to attend in February or that April was the earliest he could have attended. I refer to the excerpt from the medical report mentioned above. It may be that with suitable adjustments (breaks etc) he could have attended in February.

6. The claimant seeks interest on the disability discrimination award. I calculate that the period from which interest requires to be calculated runs from 7 February which is the date of dismissal following the rescheduled disciplinary hearing fixed for 4 February which the claimant did not attend. Interest runs at the statutory rate of 8% from 7 February to 10 October (date of promulgation) (245 days) in the amount of £322.20. Interest continues to run until the date of payment at the same rate.

Holiday pay

7. During the course of the hearing the claimant's representative accepted that in fact the claimant was not entitled to claim in respect of the 2018 holidays which were untaken. It was the claimant's position that the holiday year was the same as the calendar year and that the claimant was entitled to 28 days' paid leave in a full year. Having been dismissed on 7 February 2019 he was entitled to three days' holiday pay which ought to have been paid at the time of dismissal.

This had not been paid and I accepted that the claimant was due three days' pay in respect of this. This amounts to £783.

Employment Judge:	**Ian McFatridge**
Date of Judgment:	**10 October 2019**
Date sent to parties:	**10 October 2019**

ANNEXE – Copy of claimant's witness statement

1. I was employed by the Respondent (of which I remain a part owner) as Group Managing Director from January 2016 following a management buyout, with continuous employment since 2004, until I was summarily dismissed with effect from 7 February 2019. My work for the Respondent included work for a number of subsidiary companies.

2. My contract [DOC 4] states – clause 5 - that my place of work is my home address in Comrie. In practice I worked mostly from home or from office premises in Newcastle.

3. The Respondent operates in Scotland. It has clients here, and its sales people travel and attend meetings in Scotland.

4. Based on the above, the Scottish tribunal has jurisdiction in relation to my claim.

5. The contract states – clause 7 – that my remuneration is £100,000. It states that I can elect whether that is processed as salary or dividends. In the past this was paid part as salary and part as dividends (latterly £680 per month or £8160 per annum as salary and £7653.33 per month, £91840 per annum as dividends). We had specific accountancy/tax advice that this was an entirely legitimate way of paying my overall remuneration and it was all sorted out when I did a tax return each year.

6. I refer to my bank statements in relation to the payments. [DOC 5]. The P45 issued at the time of dismissal [DOC 5] shows the payroll payments only; the other payments need to be accounted for in my tax return

7. My total employment remuneration was £100,000 as stated in the contract. As at my date of termination, the company apportioned both the salary and the dividend element, see bank statement [DOC 5] and have since made no further payment of dividends despite the fact that I remain a shareholder as before. It is clear therefore that the full £100,000 was remuneration for my

employment. At any time I could have asked that the full £100,000 remuneration be processed as salary.

8. I understand however that for the most recent tax year, 2018/19 (the year in which I was dismissed) it may not be the same approach. My fellow director Mr Smith has stated that the previous approach to remuneration is ending. I did receive the salary and dividend payments in the usual way though (as per the bank statements DOC 5). My tax return has not yet been done for that year (my accountant is also the company accountant) but it is possible that all my remuneration may be retrospectively be treated as salary and subject to PAYE. I just don't know how the tax will be assessed and the accountant does not know either. In order to assess what my net income would be I have worked out using an online ready reckoner that for a salary of £100,000, all subject to PAYE tax, the weekly net income after tax and NI would be £1244. This is the figure I use for my claim for loss of earnings.

9. There were no pension contributions by the employer.

10. Additional benefits included:

    a) Private healthcare for me and my wife (cost £2741 per year)
    b) Additional life insurance (value up to £200k) for me (cost £1392 for the year)
    c) Carlton Club membership (London) for me (cost £1200 per year)

Health

11. I have a history of mental health issues, namely Asperger's Syndrome with associated depression. I have been on high dose anti-depressants for well over 7 years. It was while dealing with my depressive illness that the Asperger's diagnosis was given. I am susceptible to anxiety and can find social interaction difficult. I find interaction in all social groups difficult, but large ones are torturous, the feeling of losing control is just too much. I have taught myself strategies to make smaller groups and one-to-one interaction reasonably acceptable, but it doesn't really work in larger groups, and I would struggle when work involved larger group meetings. For work purposes, such as trade

shows and business events, I have strategies that get me through, but the after-effects are damaging, and I am often quite physically ill. My inability to cope with large social events causes deep depression and has at times put pressure on my marriage. If I was not taking anti-depressant medication the symptoms would be far worse. If the medication is not at the correct level I become severely depressed. My feelings of self-worth are severely limited and self-motivation is really quite poor. This affects both my social and work life, which in turn creates further depression. It impacts on every aspect of my life. I have great difficulty with social situations, and the depression affects confidence, energy, etc. I refer to the GP letter [DOC 2]

12. This is a disability in terms of the Equality Act.

13. Over the course of 2018 I was experiencing particular ill health due to pressures at work, my mother's death (on 31 August 2018) and the fact that my son was also suffering serious mental health issues related to his own Aspergers Syndrome difficulties. I was able to keep on working however.

Company background

14. The other directors/owners of the Respondent are Rob Clark, Nick Howard, Murray Shand, and Paul Smith. These 4 directors also are owners/directors of another company, not a Group Company - Genesis Special Risks Ltd (hereafter "GSR"). I was not owner or director of GSR.

15. The issues resulting in my dismissal relate to a subsidiary of the Respondent, Mechanical Breakdown and General Insurance Services Ltd ("MBG").

16. MBG operates in the insurance industry. MBG's role is to contract with clients to arrange and manage insurance (generally motor vehicle extended warranty claims). MBG has close links with GSR as broker. The broker's role (GSR) is to place the business with an insurer. MBG, in effect, ***must*** use GSR as a broker. This is a requirement of the mutual directors Clark, Howard, Shand and Smith. By insisting that MBG use a particular broker which is owned by them, these directors acted in a conflict of interest situation and did not act in the best interests of MBG.

17. Aros and MBG do not have written protocols as to how any particular business should be arranged. I was allowed considerable discretion as MD to pursue opportunities. I worked closely with Mr Howard, as representative of the broker GSR, to discuss all business opportunities and GSR's ability to place business with an insurer. Mr Howard and I regularly attended client meetings together.

Bassadone contract

18. I proposed that MBG enter into a contract with a client, Bassadone Group (BG), to provide services in connection with extended motor vehicle warranties for a number of manufacturers. This would be a valuable contract for MBG and discussions with the client took place over an extended period of time from around May 2017. Both Mr Howard and I were closely involved in these discussions

19. An insurer would need to be found to cover the extended warranty, and it was GSR's role to find an insurer. It should have been readily achievable to find an insurer, and during the negotiations with the client, GSR represented to MBG and I that an insurer was lined up in principle. I had extensive discussions with Mr Howard about how GSR, the broker, would place this business with an insurer. UKG was the preferred insurer for an extended period and although they expressed some concerns, Mr Howard was always positive that these could be addressed.

20. Around late March / early April 2018 we were coming under pressure from the client to sign the contracts. At that time, no insurer had been confirmed by GSR, but there were discussions ongoing with UKG who had initially agreed to provide the insurance. GSR were keen to use UKG due to the long term and almost exclusive relationship between that insurer and GSR, and declined to look more widely to find other potential insurers, which would have been prudent.

21. I intended that MBG enter into contracts with BG, which would oblige MBG to find an insurer to provide insurance to meet the client's needs. It was not the intention to state that an insurer already was in place, as clearly there was not

one confirmed yet. It was not unusual to enter into a contract before the insurer was confirmed and this had happened before, to the full knowledge of the Respondent's directors.

22. Mr Howard stated to me by email on 5 March 2018 [DOC 6] that the contracts should be *conditional* (or "contingent") on an insurer being found, as there was no confirmed cover in place. A contingent contract would mean that MBG could pull out of the contract without obligation if an insurer could not be found. I believed that the client would not accept a conditional contract which MBG could pull out of. I replied to Mr Howard to that effect, stating that the deal would be "dead" if we could only contract on that basis, and asking my fellow directors to consider and either approve or withhold approval, stating "You guys are shareholders the same as me so if you want me to cancel the deal I'll inform the client".

23. I then had several discussions and further emails with Mr Howard over the next 2 weeks. Mr Howard verbally agreed that the contract could be signed on the basis proposed by me – not contingent on finding an insurer but obliging MBG to do so. He said I could "go ahead" and it was "not a problem". He stated to me that the CEO of the proposed insurer UKG was comfortable with me doing so.

24. It is not unusual that there is no written record of that agreement from Mr Howard, as many important discussions between us were verbal-only, as acknowledged in one of the Company's subsequent reports [DOC 21 page 112] .

25. The first contract with Bassadone was signed on 20 March 2018 and a second contract on 3 April, backdated for a short period of time to assist the client. See example contract in the Bundle [DOC 7]. The contract states (clause v) that MBG "will arrange" an insurance scheme. It is not stated that an insurer is already in place, and no insurer is named.

26. The client began making payments to MBG. We were obliged to find an insurer. GSR as broker sought to finalise arrangements with an insurer and

there was ongoing correspondence and discussion between the directors about that but it became problematic and UKG were less enthusiastic about being the insurer.

27. At a meeting with the Bassadone directors on 26 April 2018 Mr Howard represented to the client that there was already an insurer in place. He knew that there was not. Mr Howard stated for the record that the agreed insurers wanted to attend the meeting, but had other commitments and would be coming to see Bassadone as soon as possible. He also confirmed the insurers would be more than happy to provide all of the reports and forms of contract sought by Bassadone in relation to this deal. Other employees and managers of MBG were also told by Mr Howard that there was insurance in place for Bassadone. Under questioning in an open office by three managers, Mr Howard repeatedly assured them there were no problems and that an insurer was in place.

28. There were extensive discussions about these issues at Board meetings including on 25 April and 11 July. All directors were aware that a) the client was making payments to MBG b) there was no insurer in place and c) the contract required us to find an insurer. There was no suggestion that I had acted improperly or contrary to instructions.

29. Mr Howard continued to try to place the insurance with UKG – see for example emails dated 17 May, 19 and 20 June. [DOC 8-10]. On 29 June UKG indicated their final decision that they could not get involved with the Bassadone project.

30. Due to significant deficiencies of GSR, GSR struggled to find an insurer. Their efforts to do so became increasingly urgent. Given the importance of the matter it was agreed at the Board meeting on 11 July that Mr Howard would (for GSR) contact lower-rated insurers to place the BG business. I believe this was not done.

31. See my report for Board meeting on 11 July 2018 [DOC 11]. The overview refers to the income from Bassadone and the lack of underwriting in place. The minutes of the Board meeting [DOC 12] show that the issues were openly

discussed – and Mr Smith emphasised that “adequate protection” needs to be put in place i.e. an insurer needs to be found. He was aware that the contract was live as he stated that we are effectively “self-insuring” until an insurer is found. In other words he knew that we had assumed an obligation that we were not currently able to comply with.

32. During this time, certain addendums to the initial contracts were entered into with the client. The addendums were simply adjustments of the contracts to reflect the changing needs of Bassadone and to restrict certain claims that would otherwise have been likely to cause excessive costs. These were all quite standard.

33. Entering into these addendums was done on the basis that MBG continued to expect, with GSR’s assurances, that GSR would ultimately find an insurer and place the business. GSR had a long history of such delays and it was expected this would be resolved in the normal way. These addendums were agreed by virtue of Mr Howard's assurances to the client on 26 April 2018. Mr Howard fully understood and agreed with what was being proposed.

34. Efforts continued to find an insurer. In August 2018 I visited another potential insurer with Mr Howard. I also had a discussion with Mr Smith where matters were discussed in full and Mr Smith was asked to impress upon Mr Howard the importance of finding an insurer. Mr Smith agreed to do this, but I believe this was not done.

35. I was at this time under a lot of stress due to issues in my personal life.

36. I had a discussion with Mr Smith on 10 September which he followed up with an email on 11 September [DOC 13]. In that email he refers to us holding “contingent commission” from Bassadone. I believe that this was a “back covering" email trying to suggest that he thought we had a contingent contract with Bassadone, when he knew that was not the case.

37. I had further detailed discussions with Mr Howard and Mr Clark on 20 September regarding concerns being expressed about the level of payments being received from the client and the difficulties finding an insurer. Mr Smith

decided that the client should be informed of the issues and we discussed how that should be done.

38. I emailed the client on 21 September [DOC 14] suggesting the insurance would be moved from UKG to Canopius (another insurer). The company now alleges that this was a deliberately untrue and misleading email, but we had agreed in their discussions to "downplay" the issue with the client in terms of communication, as arrangements should very soon be in place with the alternative insurer (I understood that we were almost in a position to finalise the contract with the other insurer Canopius). My communication was consistent with my discussions with Mr Clark and Mr Howard (and did not contradict the statements made to the client by Mr Howard a few months earlier that an insurer was in place).

39. A further email was sent to Bassadone by me on 24 September [DOC 15] clarifying matters following further discussion with Mr Smith and Mr Clark, and advising that in fact UKG had never been signed up formally, albeit we had initially had a very clear indication that they would agree. That had not come to fruition.

40. Mr Smith advised the client that there was no insurance in place and the client demanded the return of all sums paid to MBG.

41. In my report for the Board meeting of 27 September [DOC 16] I repeated that the company's biggest concern was the lack of an underwriter for Bassadone.

Investigation

42. Mr Smith arranged for the FCA to be advised of these issues probably in October 2018 when I was on holiday.

43. At the Board meeting on 27 September I was asked to provide a chronology of events relating to recent discussions with Bassadone, which I did on 28 September [DOC 17]. A further, more-detailed timeline was produced by me around 3 October [DOC 18].

44. I was the only person asked to provide a written statement in relation to these issues but I was not advised what this statement was to be used for. It quickly became clear that I was to be scapegoated over these issues. It suited the Respondent to be able to blame one individual and be able to advise their client and the FCA that the guilty party had been removed. This disregards the fact that all directors had been aware of what was happening, Mr Howard had agreed that I could enter into the contract with the client, and Mr Howard had taken the very serious step of advising the client that there was an insurer in place, when he knew that was not the case. It also suited the other directors to avoid any blame falling on GSR, their other company, despite the fact that GSR had failed to take proper steps to find another insurer, and that they were instructed following the board meeting on 11 July to investigate other options. I was the only Aros director who was not also a GSR director.

45. Following the Board meeting on 27 September Mr Smith avoided me. I was then suspended by email dated 13 October 2018 from Mr Smith . Through subsequent correspondence we were not able to agree what duties I should carry out and the suspension was confirmed by email of 15 October. We then agreed that this should be treated as some additional days holiday (i.e. in addition to my normal annual leave entitlement). [DOC 19]

46. Colleagues were wrongly told on 29 October that I had resigned when I had done no such thing. I was advised of this by four of my management team. It was clear to me that the directors had decided I was on my way out. This was before any proper process had been followed or any proper investigation.

47. A further letter was issued on 31 October [DOC 20] again stating my suspension.

48. The feeling that I was being scapegoated, taken with the other issues in my personal life (my mother died on 31 August, and my son was having serious issues with his mental health) had a very bad impact on me. I became very unwell with anxiety and depression. As an Aspergic, work is one of my comfort zones because it is something I'm good at. To be suddenly excluded from work was extremely damaging to my personal confidence. The position was

made worse by the fact the fellow directors - my long-term friends most of whom I'd helped repeatedly over the years with their own problems, and with whom I'd been running Aros for all these years - had seemingly abandoned me.

49. A long letter was issued to me by Mr Smith dated 7 November 2018 [DOC 21] setting out many issues/questions that the company wished me to answer and inviting me to attend an investigation hearing on 15 November but due to illness, which was exacerbated by this letter, I could not attend. I felt the letter was hugely biased and ignored key facts and was basically "stitching me up". I was signed off by my GP on 9 November as being unfit for work and was not well enough to attend any meetings. I was then unfit for work until my employment ended [see fit notes DOC 3] although latterly my health was improving. I was not well enough to provide a detailed response to the letter at that time. This ill health was directly related to my underlying mental health condition.

50. I had difficulties concentrating and would get very tired, but struggled to sleep at night. I had stomach problems and lost 1.5 stone from November to February. I could not drive anything other than a short journey due to poor concentration and some coordination issues.

51. My solicitors BTO advised the company's lawyers [DOC 22] that I did want to fully respond to the letter, but was currently unable to do so. They asked that the meeting be postponed. The meeting was postponed once and rescheduled (by letter of 7 December – DOC 23) for 20 December. My solicitors BTO again requested (email of 11 December – DOC 24) that it be further postponed due to ill health.

52. While awaiting a reply to that further request, I received intimation on 13 December [DOC 25] of a Board meeting to take place on 21 December, to discuss the investigation, which had apparently concluded (without my knowledge or indeed involvement). A 2 page "investigation report" was sent with that invite, recommending disciplinary action [DOC 26]. I believe that a more detailed investigation report may have been prepared, in addition to the

2 page report which was issued. I was not sent such report and have still not seen any investigation report setting out the findings following the investigation (assuming there actually was an investigation, which I do not necessarily accept – certainly it was in no way a proper or meaningful investigation).

53. This report was discussed at the Board meeting on 21 December (which I did not attend). I understand that the directors discussed Mr Smith's investigation and recommendations and agreed to invite me to a disciplinary hearing [DOC 27].

54. I was invited by letter of 10 January 2019 [DOC 28] to attend a disciplinary meeting on 18 January with Mr Shand, as agreed by all members of the company's Board. No witness statements were sent to me and in fact none were ever prepared for any witness (and no witnesses were to attend the disciplinary hearing). This is an astonishing omission given that the question of who knew what, and who approved what, was at the core of these issues. I don't believe there was ever a proper investigation designed to uncover the facts, but instead it was designed simply to achieve a pre-determined result. The investigator had no interest in taking witness statements that might assist in understanding the true sequence of events. I do know from speaking to former colleagues that other employees were spoken to by the company in relation to one of the key issues (comments made by Mr Howard about the insurance being in place) but their responses were disregarded by the investigator as being inconvenient and have never been referred to by the company.

55. The allegations in the invite letter were:

a. Entering into the contracts with Bassadone knowing that there was no insurer counterparty
b. Entering into addendums to the above knowing MBG could not meet their obligations
c. Misrepresentations to Bassadone / Ssangyong (I have not addressed these in my statement as the allegation was ultimately not upheld)
d. Not acting with reasonable care, skill, diligence, integrity

56. I was unable to attend the disciplinary hearing due to illness but my health was improving with the support of my family and GP and I was hopeful that with more time I would be well enough to attend a hearing. BTO advised the Respondent by email on 15 January 2019 [DOC 29] that my health was improving and that I was working on a written response as well. We asked for matters to be delayed until I was well enough to attend the disciplinary hearing and explain my position.

57. My health was improving and I felt able to prepare a written response. I submitted extensive and detailed comments on 17 January 2019, the day before the planned disciplinary hearing, and also intimated a grievance in relation to the Company's actions – (DOC 30).

58. The meeting was postponed once, to 4 February (email of 17 January – DOC 31).

59. BTO stated by email on 25 January [DOC 32] that I would not be fit to attend the rescheduled hearing, but in their reply the company's lawyers refused any further postponement [DOC 33]

60. The Respondent refused to make any medical inquiries as to when I would be well enough to attend a hearing and insisted on going ahead on 4 February. I he was denied the opportunity to be present and explain my case. I felt that they were disregarding my health condition. I believe that if they had postponed the hearing to early April I would likely have been well enough to attend.

61. A letter was issued on 7 February [DOC 34] stating that the company was dismissing me with immediate effect due to gross misconduct, and advising of my right of appeal. The outcome letter does not address in detail the various points made by me in my submissions. It acknowledges that no witness statements were taken or provided to me as part of the process. The letter relies on the email to me from Mr Howard on 5 March relating to the Bassadone contracts, and states there is no evidence that Mr Howard ever told me anything different – that is not surprising given the absence of any proper

investigation or any witness statement of Mr Howard. The same applies to the findings in respect of the addendums, which I maintain Mr Howard was aware of. The outcome also rejects my argument that what I did was consistent with custom and practice, stating that there is no evidence of that, but again, there had been no investigation of that point.

62. The letter also rejects my grievance. It does not deny that staff were wrongly told I had resigned, merely stating there was no “official” announcement.

63. The letter states that my final salary will be paid in the normal manner, and subsequently I was paid in respect of the payroll and “dividend” element, indicating again that these were both viewed as being my contractual remuneration.

64. This decision set me back significantly in terms of my health, which had been improving. I obviously knew I would stop work eventually, but it would have been at my own pace, using structured strategies to minimise the impact. The very sudden stop in my work life, combined with an immediate severance of all work relationships was probably one of the worst things that could have happened to a person with my condition and very much exacerbated my health problems.

65. Had the company not dismissed me and instead if we had been able to work together to resolve the problems, I am confident that my health would have continued to improve and I would have been able to return to work probably by late April, possibly on a part time basis initially. The other issues in my personal life were also easing at that time which had been contributing to me feeling a bit better, until the dismissal decision arrived. The decision to dismiss was undoubtedly a real setback for me and affected my health significantly.

66. With the assistance of my solicitor I intimated a detailed appeal document on 14 February [DOC 35]. The first page outlines the main appeal points which include –

    a. That there was no genuine belief I was guilty of gross misconduct
    b. No consistent treatment

c. Predetermined process
d. Lack of impartiality
e. Unfair and opaque process – no witness statements and I do not even know who Mr Smith spoke to
f. Refusal to further postpone the hearings to enable me to attend

67. After some discussion (including concerns being expressed about the impartiality of the "independent" third party) an appeal hearing proceeded with an external party, Peninsula in Edinburgh on 9 April. See invite letter of 21 March [DOC 36].

68. A decision letter in relation to the appeal was issued on 3 May [DOC 38] with a report from Peninsula [DOC 37]. Much of the decision simply consists of minutes of the meeting (which I do not accept to be accurate) and the actual decision and reasoning is very brief. I note that as part of considering the appeal, the investigator spoke to both Mr Smith and to the company's solicitors, who appear to have been making the argument that there was no need to disclose the investigation report [page 188]

69. Peninsula accepted (at least in part) the complaints that there had not been a proper investigation and there was a failure to fully disclose the evidence. Peninsula found there had been a lack of transparency as proper witness statements were neither taken not disclosed.. It is noted [page 188] that there was a detailed investigation report but I was only sent a summary

70. In relation to consistency Peninsula note that "while others may have been involved" my actions were found to be gross misconduct. This leaves open the point that for any "others" who were involved, no disciplinary action at all was taken.

71. Despite upholding several key concerns, Peninsula concluded that my dismissal should stand as I had not brought any additional evidence. In fact I had produced a lot of documentation to support my arguments (not included in the Bundle due to volume) but I do not believe this was considered by Peninsula.

Unfairness

72. In my claim form I set out many criticisms of the Respondent's process. The most significant were:

a. It was not genuinely believed I had been guilty of misconduct, as the other directors had known of the position for some months, were working to resolve the problem, Mr Howard had agreed to me entering into the contract, and the directors did not express any concern over my actions during that time. I was simply a scapegoat to appease the client and/or the Regulator. I was not dismissed by reason of misconduct.

b. There was no consistency – Mr Howard was not disciplined for telling the customer that the insurance was in place, and indeed the Respondent refused to properly investigate that.

c. Mr Smith was not an impartial investigator as he had an interest in ensuring that neither the broker GSR nor any of the GSR directors (i.e. all the Aros directors save for me) would be blamed. I believe he has been behind everything that happened. As a result of my removal he has become acting CEO (taking on my salary) and has an opportunity to acquire my shares from me. He therefore also had a personal interest in the outcome of these matters.

d. The outcome was predetermined - The Respondent wrongly advised employees at an early stage that I had resigned – the outcome of the process was predetermined

e. The investigation was not intended to uncover the facts but was simply going through the motions to achieve a predetermined result. No witness statements were taken from anyone despite the fact that the issue of who knew what at what point was absolutely crucial. I was not told to any meaningful extent what the witnesses' position was in relation to the crucial evidential matters that arose

f. There appears to have been a full investigation report prepared but it was not sent to me. Accordingly, while I was told the allegations against me, I was not told the rationale for putting these issues forward, and why the

Respondent considered I may be guilty of these offences. I was not told what the witnesses had to say about the key issues.

g. The Respondent concluded its investigation without the benefit of my input, and declined to make any medical inquiries as to when I may be fit to participate.

h. The Respondent conducted its disciplinary hearing in my absence, knowing I was unfit to attend, had stated I was getting better, and had requested a further postponement to allow me to attend. The Respondent declined to make any medical inquiries as to when I may be fit to participate. While I was able to make written submissions, I was denied the right to attend and explain my position fully and address any questions Mr Shand had for me. While I accept that a hearing can proceed in absence I would expect that to be a last resort and only after proper inquiry into when I might recover sufficiently to be able to attend

i. The appeal did not cure any defect and in fact merely adds to the unfairness of the dismissal. Despite acknowledging the significant defects in the Respondent's process, the decision to dismiss was upheld. I was still not shown any witness statements or the full investigation report. The appeal hearer concluded, in effect, that as I had failed to bring additional evidence, my dismissal should still stand. That makes little sense. The appeal hearer cannot possibly have come to a proper conclusion as to whether my conduct merited dismissal in the absence of witness statements or a proper analysis of the evidence, which did not take place. I consider that the appeal hearer was not impartial and note that Peninsula provide HR and employment law services to the Respondent. I don't accept that the minutes of the appeal hearing are accurate, and they have refused to send me the digital transcript.

73. I consider I was subject to disability discrimination:

a. I have a long term underlying mental health condition. Following my suspension, my health deteriorated substantially, and I was unable to attend the investigation and disciplinary hearings

b. The Respondent was aware of these issues and was aware or should have been aware that this amounted to a disability

c. The Respondent was aware from correspondence that I was particularly unwell following suspension

d. I asked that the meetings be postponed and on each occasion they were postponed once

e. I asked for a further postponement and on each occasion this was declined.

f. At the time of the disciplinary hearing I had indicated that my health was improving

g. The Respondent declined to seek any medical input in relation to when I might be fit to attend

h. I was at a particular disadvantage due to my disability related illness - my inability to attend the hearings prevented me stating my defence. It would have been a reasonable adjustment to further postpone them

i. The Respondent failed to make these reasonable adjustments

74. The refusal to further postpone the meetings, in particular the disciplinary hearing, caused me considerable distress. I had wanted to at least be able to look Mr Shand in the eye and explain my position. I knew that my health was slowly improving, and I wanted to be able to attend the meeting. I felt that they should at least have got medical input to judge how long a delay may be required but they seemed to be intent on going ahead and did not want to take account of my disability. I did not realistically think that I would persuade Mr Shand not to dismiss me, as I believed the company had already decided to do so, but we might have been able to explore some sort of resolution.

75. I accept some criticism in relation to the issues with Bassadone. Not in relation to the contracts themselves – it was not unusual to enter into a contract requiring us to find an insurer even if one was not in place, I had assurances from Mr Howard representing our broker that there were no problems, and he agreed that the contracts should go ahead. However, once the contracts were entered into I could potentially as MD have taken a firmer line in terms of requiring GSR to find an insurer and explore alternatives urgently so that the

situation could be resolved. I did have discussions on an ongoing basis with Mr Howard and to a lesser extent Mr Smith, but ideally I could have taken control of this to a greater extent. However this was the period when I was suffering stress issues in my own life.

Since dismissal

76. Due to the impact of the company's actions, and the termination of employment, I wasn't in any fit state to look for new work until around May of this year.

77. Prior to that it was too much stress and I would not have coped in an interview situation. Driving had become a little easier by then, but there was certainly no way I could have handled a long journey. Trains were becoming easier, but prior to May / June I found crowds hard to deal with

78. I began making moves to find work from May onwards. I applied for a permanent lecturing post at Dundee, but they really wanted a research bias, which is not my preference. I applied to both Stirling and Perth (UHI), but whilst both were initially interested, it is only Perth (UHI) that has developed at this stage.

79. The role I now have (I started on 12 August 2019) is effectively a zero hours arrangement, but in reality, I'm going to be pretty busy. Once established, I'm expecting circa £15k per year (£20k if their plans go ahead). That said, as I'm just getting started with them, it will be only circa £6 to 7k in the 12 months after dismissal in February of this year. There are pretty much no additional benefits. I have not yet received my contract of employment and have not yet done enough hours to have a payslip – because it is a zero hours contract I need to specifically claim payment for hours worked.

80. In relation to pension I am joining the public sector scheme but again it is very early and I don't have details. I anticipate the notional employer contributions will be around 15%.

81. I will continue to try to build on the Perth (UHI) opportunity and there are undoubtedly permanent opportunities should I want them within the next couple of years. I am settling in well and have already built a strong level of credibility, so they are very keen I should stay around as long as possible. I enjoy teaching and was successful in this role in the past, so it is a good basis to build from.

82. I have also looked at the non-executive directorship option. However, as a great deal of this comes through networking and travel to networking events, I don't see this being a realistic option in the near future. Teaching a large class of students is easy for me because it's work, but social interaction on a big scale is very hard now as my confidence in such situations has been heavily eroded.

83. At my age and in light of the impact of my dismissal I do not think another full time executive role would be feasible in the near future.

Remedy

Unfair dismissal

84. I do not seek reinstatement but seek only compensation

85. My schedule of loss will be produced.

Disability discrimination

86. I believe it is unlikely that had I been allowed to attend the hearings that the company would not have dismissed me. I believe this was their predetermined outcome. Accordingly my only claim for loss of earnings related to disability discrimination is for 2 months – the wages I would have received had the company acted properly and postponed the disciplinary hearing; I believe that if the process had been delayed another 2 months I would have been able to attend the disciplinary hearing.

87. I also claim injury to feelings as per the schedule of loss.

88. I seek an uplift in compensation due to the failure to follow the ACAS Code in respect of the Respondent: not carrying out necessary investigations (not taking witness statements), invite letter did not contain sufficient detail and did not enclose witness statements. An appropriate uplift would be 25% as the need to take witness statements was so fundamental to the issues.

Holiday pay

89. As at the date of termination of employment, I was due accrued holiday pay– my calculation is set out in the schedule of loss. The dismissal letter said I would be paid any accrued holiday

but it was not in fact paid.

I confirm that the foregoing is to the best of my knowledge and belief, complete and accurate