EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FRANCES SPENCER**

BETWEEN: **Mr J Cherry** **CLAIMANT**

AND

ACS Facilities Ltd **RESPONDENT**

ON: **15th February 2019**

Appearances

For the Claimant: Ms Z McCallum, counsel
For the Respondent: Mr M Humphries, director

JUDGMENT

The Judgment of the Tribunal is that:

1. the Claimant was dismissed in breach of contract in respect of notice and the Respondent is ordered to pay the Claimant £1626.96, being 3 weeks net pay;
2. The Respondent was in breach of contract in failing to pay the Claimant expenses incurred of £771.40
3. The Claimant's claim for pay in lieu of holiday accrued but not taken is dismissed.
4. The total payable by the Respondent to the Claimant is £2,398.36,

REASONS

Written reasons are provided as, at the hearing, the Respondent expressed his dissatisfaction with the outcome and stated that he wished to appeal.

1. The Claimant worked for the Respondent for 5 ½ months as engineer. He was dismissed on 27th June 2018. He now brings complaints for breach of

contract (unpaid expenses), unlawful deductions from wages, notice pay and holiday pay. The case was listed for a three hour hearing.

2. Both the Claimant and the Respondent had prepared a witness statement for the hearing. The Claimant had also prepared a bundle of documents. The Claimant was very ably assisted by Ms McCallum and who had also prepared a list of issues.

The Notice pay issue.

3. When the Claimant was dismissed he was paid one week's salary in lieu of notice. It is the Claimant's case that in accordance with his contract he was entitled to one month's notice. The Respondent's case is that at the time of his dismissal he was still in his probationary period and therefore was only entitled to one week's notice.

4. The Claimant was employed by the Respondent from 15 January 2018. His contract of employment (24) provides that after one month, and until successful completion of his probationary period he was entitled to one week's notice. On successful completion of his probationary period he was entitled to one month's notice. The ACS employee handbook provides that "*you join us on an initial probationary period of 3 months. During this period your work performance and suitability will be assessed, and, if it is satisfactory, your employment will continue*."

5. It was common ground between the parties that there were no meetings about the Claimant's performance or probationary period before 15th April.

6. There was a meeting between Mr Humphries and the Claimant on 17th June 2018. There is a dispute between the parties as to what was said at the meeting. Mr Humphries said that he told the Claimant that his probationary period would be extended by a further 3 months because of the Claimant's aggressive manner when dropping off expense sheets in the office. I was referred to a document in the bundle (54) dated 18th May documenting a meeting held on 17th May but which was not given or sent to the Claimant at the time and is unsigned. I was also referred to a subsequent (unsigned) document (56) referred to as an "early 6-month review of performance". The Claimant also denies having seen this document until it was disclosed in October 2018.

7. The Claimant says, on the other hand, that he and Mr Humphries were working together on site on 17 May when they had an informal chat about financial problems of the company. However, the informal chat did not refer at any stage to the Claimant's probationary period. The Claimant had never seen the document at page 54 of the bundle and it was produced during the preparation for this litigation. He accepts that there was a meeting on 11ith June which he understood was a 6-month review but he does not agree the documented content of the meeting.

8. Conclusions as to notice pay. The Claimant's contract is clear that on successful completion of his probationary period he is entitled to one

month's notice. The Probationary period is defined as 3 months. It follows that unless probationary period was extended within that period the Claimant had successfully completed his probationary period on 15 April 2018. As from that date he was entitled to one month's notice.

9. To that extent it matters not whether I prefer the evidence of the Claimant or that of Mr Humphries as to what occurred on 17 June. By that date the Claimant had already successfully completed his probationary period and it was not open to Mr Humphries to extend it. However, for the avoidance of doubt I have unhesitatingly prefer the evidence of the Claimant. I do not accept that the documents which were disclosed to the Claimant in October were taken contemporaneously and reflect the true position. The Claimant is therefore entitled to an additional 3 weeks' pay in lieu of notice

Unpaid expenses /breach of contract

10. It is the Claimant's case that he has not been reimbursed for expenses incurred in the course of his duties in breach of contract. His case is that has been very difficult to establish what is due as he was not given any pay slips or proof of parking charges, so that he could see what he had been paid. Pay slips were subsequently sent and appear in the bundle. He does accept liability for one parking fine of £130which he has deducted from his schedule of loss.

11. As a mobile, field-based engineer the Claimant was given the use of a company van. In the Company Vehicle Agreement (50) signed by Claimant it was made clear that the employee was responsible for paying any parking fines incurred whilst carrying out his or her work. "*In the event that the company for whatever reason has to pay a parking ticket on your behalf, the amount will be deducted from wages. You will be advised in advance with regard to this deduction." In r*elation to the congestion charge the Company Vehicle Agreement made it clear that the employee was responsible for paying any penalty. "*In the event that the congestion charge penalty is paid by ACS Facilities Limited the money will be deducted from your wages*."

12. The Company Handbook (unsigned but accepted by the Claimant) provided that parking and congestion charges would be reimbursed when incurred during normal business hours, but that any penalties received would not be reimbursed. "*Any such charges received by the company will be identified to the driver and recharged – these costs are not a legitimate business expense and any attempt to recover are unacceptable and may result in disciplinary action*."

13. Employees were entitled to be reimbursed for fuel charges, whether these were incurred on company business or privately, the latter being a recognized perk. The Company Handbook refers to company fuel cards, though it is common ground that the Claimant did not have one of these.

14. The Claimant was initially told that he should provide receipts for petrol and parking. Then he suggested to the Accounts Manager, Lesley, that it would

be easier if he simply provided his credit card statements which itemised both parking and fuel and she agreed.

15. The Respondent disputes this was agreed, and insists that it was company policy that the Claimant had to provide his receipts. He says he cannot reclaim VAT without receipts. He says vehicles cannot be identified without receipts. (Most petrol receipts do not identify the vehicle so I did not understand the latter point.) However, Lesley was not called to give evidence and the Claimant has produced an email exchange between Lesley (70) in which she confirms that she "took the amounts you highlighted of the statements for your expenses". As such I accept the Claimant's evidence that this is what was agreed with Lesley. Given this agreement (and the Respondent does not deny that the Claimant had paid for fuel) I find that the Respondent is liable to reimburse the Claimant for such amounts.

16. On 21 August 2018 the Claimant was informed that the Respondent would deduct, amongst other matters, £490 from the expenses which they accepted were due, for penalty charges relating to the DART toll. There were 10 penalty charges in total.

17. As to the first four the Claimant says he paid these at the time, having been notified of the charge by Mr Humphries, and these appear on his credit card statements. There should not have been any further charge and if there were that that was an error.

18. As to the remaining 6, the Claimant accepts that he did not pay the toll when he should have done. However, the van that the Claimant drove was registered to Mr Humphries at his personal address. The penalty notices were sent to Mr Humphries. The Claimant was not informed that penalty notices had been issued. Mr Humphries did not send these to the Claimant. Nor did he pay them at once. Consequently, the penalties for non-payment increased. The Claimant accepts that he is liable for the early penalty charge of £35 per crossing (i.e. 35 x 6 = £210). However, he says that, once the 24-hour deadline for initial payment had passed, and in the absence of a penalty notice and the relevant penalty number, he was unable to pay the charge and should not now be penalised for Mr Humphries' failure to pay promptly or to notify him.

19. Mr Humphries on the other hand says that the Claimant must have known that he had gone over the bridge and it was up to him to follow it up and to pay it.

20. The Claimant accepts that his is liable for penalties if he fails to pay the DART charge. However, the Company handbook states that penalties received by the company "will be identified to the driver and recharged. It must be implied into such a term that the charges will be identified to the employee at the earliest possible stage so that he can pay while the charge remains low. I accept that without being informed of the penalty number the

Claimant was unable to pay and that he is therefore only liable to pay that which he would have paid had he been expeditiously informed.

Holiday Pay

21. It is the Claimant's case that he was entitled to an additional 3 months' pay in lieu of holiday accrued but not taken. The 3 days in dispute appeared to relate to 3 bank holidays when the Claimant was "on call" but was not at work. He was not, in fact, called out but was paid for those days.

22. While on call the Claimant was not required to remain at home but was required to be within 4 hours of a call out. Most of the Claimant's destinations while on call were likely to be within 1 ½ to 2 hours of his home, so allowing time for the Claimant to return home to collect his van he would have been reasonably free to pursue leisure interests provided they were not too far from home. He obviously could not go away for the weekend or drink alcohol.

23. The ECJ has confirmed that stand-by time spent at home may constitute 'working time' where the geographical and temporal constraints imposed by the employer objectively limit the worker's opportunities to pursue personal and social interests. However, this was not realistically so in this case. I therefore find that as such, the time that he Claimant was on call is not counted as working time and that he is not entitled to additional days holiday in respect of these days. (*Landeshauptstadt Kiel v Jaeger*– and *Sindicato de Médicos de Asistencia Pública (SIMAP) v Consellería de Sanidad and anor 2001 ICR 1116, ECJ* and *Ville de Nivelles v Matzak 2018 ICR 869, ECJ*.

24. I therefore order the Respondent to pay the Claimant the amounts set out above, as calculated by the Claimant. Given the time constraints I was not able to verify the calculation but the arithmetic (as opposed to the principles) has not been challenged by the Respondent.

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Employment Judge Frances Spencer
22nd February 2019