EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr M Tolan	v	**Secure Power Limited**

Heard at: **Sheffield** **On:** **23 January 2019**

Before: **Employment Judge Little**

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr J D Morley, Managing Director**

JUDGMENT having been sent to the parties on 31 January 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These reasons are given at the request of the respondent by Mr Morley's email of 31 January 2019.

2. **The complaints**

   Mr Tolan presented his claim to the Tribunal on 2 September 2018. He brought the following complaints: -

   - Holiday pay
   - Breach of contract – mileage expenses
   - Breach of contract – other expenses
   - Wrongful dismissal (breach of contract) – notice pay

   In addition the claimant sought the additional remedy provided by Employment Act 2002 section 38 in circumstances where an employer had not provided to the employee the statutory statement of main terms and conditions for employment.

3. **The issues**

The claim had not been afforded a preliminary hearing for case management and so at the beginning of the hearing I agreed with the parties the issues which it appeared I would have to determine. I confirmed to the parties that I would not be considering the fairness of the claimant's dismissal, because he did not have the right not to be unfairly dismissed, as he had not worked for the respondent for a minimum of two years.

The agreed issues were as follows: -

Wrongful dismissal/notice pay

3.1. Was the employment ended by the claimant's resignation on 25 July 2018?

3.2. If it was, what was the claimant's entitlement to notice by way of payment in lieu?

3.3. Alternatively, was the claimant's employment ended by dismissal on 31 July 2018?

3.4. If so, was the respondent entitled to summarily dismiss the claimant because he had allegedly committed gross misconduct? The alleged misconduct was overclaiming or falsifying expense claims and failing to meet clients but pretending that he had.

Breach of contract - expenses

3.5. Was the claimant contractually entitled to a re-imbursement of expenses for mileage incurred in July 2018 and other expenses as of the effective date of termination?

3.6. If so in what amount?

3.7. Was the respondent entitled to deduct any earlier overpayment of expenses from the July expenses and/or from the claimant's holiday pay?

Holiday Pay

3.8. What payment in lieu of accrued but untaken holiday was the claimant entitled to as of the effective date of termination?

3.9. Was the claimant issued with a statement of employment particulars in compliance with the Employment Rights Act 1996, section 1?

3.10. If not, is he entitled under Employment Act 2002 section 38 to a higher or lower award by way of additional remedy?

4. **The evidence**

The Tribunal had issued standard case management orders on 6 September 2018 and one of those orders required written statements to be prepared for all witnesses who were to give evidence at the hearing and that no later than 15 November 2018 the parties would send to each other copies of those statements. Unfortunately, it transpired at the beginning of the hearing that although the claimant had prepared a witness statement he had not sent a copy

to the respondent. Further, Mr Morley had not really prepared a witness statement at all but instead produced an unpaginated document, with un-numbered paragraphs, which ran to 7 pages which was described as 'Timeline of events leading up to the dismissal'. In the circumstances Mr Morley agreed that this was intended to be his witness statement and it was so treated. Accordingly, time had to be allowed not only for me to read the documentation but for the parties to read each other's statements. Time was also given for the parties to prepare their questions. This was not ideal, but by apparently deliberately ignoring the Tribunal's Order, the parties had unfortunately put themselves in this position.

Accordingly, the evidence which I heard was limited to the evidence from the claimant himself and from Mr Jonathan Morley, Managing Director of the respondent.

5. Documents

The case management order referred to above also explained what the parties had to do in terms of exchanging documents and then preparing an agreed bundle. Whilst they seem to have exchanged documents, the bundle which was placed before me was fairly inscrutable. The parties had decided to do one section each. The substantial number of papers in the claimant's section were unnumbered and instead were divided into sections such as 'Matt Tolan evidence 1'. There were even more papers in the respondent's section, again unnumbered and with the same type of idiosyncratic sections.

6. The facts

6.1. Mr Tolan commenced employment with the respondent on 18 April 2017. His job title was Head of Client Services, although the claimant describes himself as a Business Development Manager. In any event essentially it was a sales position.

6.2. The claimant contends that he was never given a written contract of employment. Within the respondent's part of the bundle I have been taken to a contract of employment which is in the claimant's name but which neither party have signed. There is also an email of 10 April 2017 from a Sally Clark of Clark Recruitment, through whom the claimant had been recruited. That email is to the claimant and reads – "Please find attached the revised contract. I think all looks good. Just check through."

6.3. As the relevant facts in this case are in relation the latter period of the claimant's employment I do not need to make any findings of fact about anything arising in 2017.

6.4. The claimant purported to resign in an email dated 25 July 2018 and that email was sent to the claimant's manager Mr Palmer, and also copied to Mr Morley. In it the claimant explained some health problems of one of his children and some other personal problems in relation to another. In paragraph 17 of the claimant's witness statement he acknowledges that the reason he resigned was because of what he describes as 'huge personal stress rather than pressure in the job role'. The claimant asked Mr Palmer to accept the email as one calendar months' notice to leave

Secure Power and the claimant said that he was happy to work that, if required.

6.5. Also on 25 July 2018 the claimant took it upon himself to send an email to one of the respondent's main clients, YESSS Electrical. He described the email as being a personal one not connected to Secure Power. He went on to say that he was in the process of leaving the business as were a few colleagues. He said that Secure Power had lost it's main client who contributed to 30% of revenue and profit and that was why he and others had been 'let go'. The claimant enquired whether he could come and see YESSS to discuss what the claimant described as 'the huge potential" with regard to something called UPS. He was hoping that there might therefore a position with YESSS for him to explore that idea.

6.6. Further, on 25 July 2018 Mr Morley wrote to the claimant. He mentioned that a number of things had come his attention recently and he wanted to discuss these with the claimant. That included cancelling meetings and still claiming the mileage for the meetings; falsifying the respondent's recording system CRM with what were described as fake emails and also an issue about a rental car being claimed at one figure but having cost significantly less. I should add that for some reason neither party has pursued the rental car issue before me.

6.7. Thereafter the respondent invited the claimant to various meetings to discuss these matters. It proved difficult to arrange a meeting and the claimant said that he was unwell. On 27 July 2018 the claimant sent an email to the respondent saying that he was now fit to work and in those circumstances Mr Palmer invited him again to a meeting. The claimant said that instead the meeting should be on the date originally arranged, which was the following Tuesday. When pressed the claimant wrote a further email to Mr Palmer in which he said "Sorry Andy. I am off sick then" – that is to say the claimant had now decided he was not well enough to return to work on the Friday 27 July to have the meeting.

6.8. On 30 July 2018 Mr Morley wrote a letter to the claimant which was headed "Notice of disciplinary meeting". The date of that meeting was to be the Tuesday 31 July 2018. The disciplinary allegations were those mentioned above.

6.9. In the event the claimant failed to attend the meeting on 31 July 2018 and in his absence he was dismissed. A letter of that date was written to him which explained that his employment had been terminated on grounds of gross misconduct with immediate effect and that there would be no notice given or payment in lieu made.

6.10. The claimant made an appeal against that dismissal but subsequently failed to attend any of the appeal meetings which the respondent arranged. When writing by email to Mr Morley on 20 August 2018 to inform him that he would not be attending an appeal hearing, the claimant informed Mr Morley that he had continued to use his contacts on Linkedin and that he had all the company contracts and end client information from the CRM which he said 'had already been used' – in other words to the claimant's advantage with other potential employers.

6.11. The final payslip issued to the claimant at the end of August 2018 was subject to deductions. There was no payment or reimbursement of mileage expenses for July because Mr Morley considered that those should be retained as he believed there had previously been a substantial overpayment to the claimant because of false claims. Mr Morley had in the meantime compared various records of mileage for the car in question, including mileage information given when the vehicle was serviced. That information suggested to Mr Morley that the claimant could not have undertaken the amount of mileage he had actually claimed for. The final payment payslip also contained a further deduction which had been set against the sum which the claimant would otherwise have received as accrued holiday pay.

7. My conclusions

7.1. How and when did the claimant's employment end?

I find that the claimant had resigned with notice on 25 July 2018. His emailed resignation refers to him giving one months' notice which the claimant intended would expire on 24 August 2018.

It follows that the claimant remained in the respondent's employment as of the date, during that notice period, when he was summarily dismissed by the respondent. That date was 31 July 2018.

7.2. In principle, what was the claimant's entitlement to notice of dismissal?

If the claimant was only entitled to statutory notice, he would, having been employed for approximately 15 months, only have been entitled to one weeks' notice. However, in the contract of employment which the respondent says was issued, albeit not signed, the notice entitlement is given as one month. It is that period, or at least the payment in lieu for it, that the claimant now seeks damages. It is to be noted that whilst the claimant denies being sent a contract of employment, that document seems to be the most likely source of his information that he was required to give, or receive one months notice.

7.3. Was the respondent entitled to dismiss the claimant without any notice or payment in lieu of notice?

That depends on whether the claimant had committed gross misconduct. As I have noted, the claimant had been informed by the respondent of various disciplinary allegations against him, namely, that he had cancelled meetings with clients but had falsely recorded that such meetings had taken place and that he had claimed mileage for travelling to meetings which had not in fact taken place.

In addition, by the date of dismissal the respondent had been made aware of the email of 25 July 2018 which the claimant had written to YESSS, one of the respondent's customers. I have recorded above the salient parts of that email which included the claimant misrepresenting that he had been "let go" when in fact that very day he had resigned. I should also note that the respondent regarded YESSS not only as a customer but also a potential competitor. Whilst it had knowledge of the YESSS email, the respondent accepts that it did not add that to the

disciplinary charges notified to the claimant with the result that he had no opportunity to put forward any explanation for that behaviour. Whilst that failure may have made the dismissal unfair if I had been considering this claim as an unfair dismissal case, for the reasons mentioned above I do not have jurisdiction to entertain an unfair dismissal complaint.

It is also to be noted that in the albeit post dismissal email that the claimant sent on 20 August 2018 (during the appeal process) the claimant had informed the respondent that he had retained all the company contacts and end client information which as he put it he had "used already". It is unclear whether that use had been whilst he was still employed by the respondent.

Mileage

In relation to the allegedly missed meetings for which the claimant had nevertheless claimed mileage, the respondent has provided to me, in section 4 of its documentary evidence, ten examples of where they believe that happened. Mr Morley's witness statement has focussed on five of those examples.

During the course of cross examination the claimant accepted that in two of those cases he had made an incorrect entry onto the CRM system. However, he contended that having done so it was not possible to make corrections, in other words, as he put it, "it was irreversible". The claimant now contends that in those circumstances he told his line manager Mr Palmer so that the respondent's records could be corrected/amended. I have not heard from Mr Palmer. However, the claimant does accept that he then went on to record those entries again as claims in the mileage reports which he put in and against which he was paid expenses for mileage. The claimant had taken no steps therefore to point out that Mr Palmer had apparently failed to act upon what the claimant allegedly told him. Instead the claimant made the claim and received the payment without raising any further issues.

In respect of a third example, which involves an alleged meeting with the customer Axiom Building Services, I find that the claimant has provided a plausible explanation for that company's Alison Smith denying that she had had a meeting with the claimant. The claimant says that it was another Alison, Alison James, who he had met.

In respect of the fourth example, I find that the claimant did mislead both the respondent's customer YESSS (Carlisle) and the respondent itself by pretending that he was unable to attend a meeting on 4 July 2018 with YESSS because his company car had suffered two tyre blow outs on the way there. The claimant in fact went to the length of providing to the customer what purported to be a photograph of his car that day standing by the side of the road with punctured tyres. In fact, from a digital dating record on another copy of this photograph which was in the respondent's possession, it appears on the balance of probabilities that the photograph was taken in August 2017, almost a year prior to the date when it was used as an excuse for non-attendance. The claimant had then proceeded to claim mileage for attending this apparently non-existent meeting.

I also find that there was a similar deception in relation to a claim for mileage attending a meeting with a Dean Ward of YESSS (Sheffield) (See respondent's document 4.9). It can be seen from the claimant's email of 5 June 2018 to the client that there is a strong suggestion in it that the claimant was cancelling the meeting, whereas the CRM which he subsequently submitted refers to meeting the customer, albeit somebody other than Dean Ward, because it was Mr Ward who "was late" per the claimant in the CRM.

My conclusions on gross misconduct

Taking into account the claimant's breach of the duties which at that time he still owed to the respondent – duties of trust and confidence – especially bearing in mind that he was a senior employee and having regard to the false mileage claims and recordings of meetings I find that the claimant had committed gross misconduct. Accordingly, in those circumstances the respondent was not in breach of contract when it dismissed the claimant summarily and without payment in lieu of notice.

7.4 Was the claimant entitled to a payment of mileage expenses allegedly incurred in July 2018?

In my judgment the respondent was entitled to offset what it believed to be a considerable over claim and therefore overpayment of mileage both in that month and in earlier months.

7.5 Was the respondent entitled to recover further overpaid mileage expenses by making deductions from the payment in lieu of accrued but untaken holiday and to which the claimant would otherwise be entitled?

In fact, the respondent did purport to recover a further part of the overpaid mileage from the holiday pay documented in the claimant's last payslip. Whilst I find that it is likely that the claimant owed the respondent further monies in respect of overclaimed mileage, the legal position here is significantly different.

The Employment Rights Act 1996, section 27, defines what are wages and what are not wages. Payments which reimburse expenses incurred are not wages. Accordingly, I have found that the respondent was entitled to set off against those expenses the overpayment or part of it.

However, holiday pay comes within the definition of wages. That means that deduction from holiday pay (wages) is only permitted in the circumstances set out in section 13 of the same Act. In the context of this case that means that the claimant would have had to have previously signified in writing his agreement to the making of such deduction or authority to make such a deduction would have to have been contained within the claimant's contract of employment. Clearly, Mr Tolan had not signified in writing his agreement to any such deduction.

Was there sufficient authority in the contract of employment? Under the heading 'Holiday entitlement' on the second page of the contract of employment the following passage appears:

"If you are dismissed for gross misconduct or leave without giving and working your full notice, you will only be entitled to the statutory minimum holidays for the current holiday year."

I do not find that passage to have the effect of giving the employer authority to make deductions from holiday pay. Protection of wages and in particular the holiday pay aspect of wages (where health and safety considerations underline the importance of paid holidays in both European and domestic law) any authorisation to make deductions contained in the contract of employment must be spelt out in clear and unambiguous terms. The passage to which I have referred does not meet that criteria.

In those circumstances I find that the respondent should not have made the deduction of £798.00 from the holiday pay shown within the claimant's last payslip. The appropriate course for the respondent, if it was so advised and minded, would have been to take action in the civil courts if it wished to recover any further allegedly overpaid mileage.

7.6 Was the claimant entitled to be reimbursed for non-mileage expenses?

The type of expenses which the claimant seeks the relatively modest reimbursement of under this head of his claim is in respect of subsistence and possibly client entertaining. From the evidence I have heard it seems that the respondent had historically paid such expenses to the claimant. Apart from not actually paying them, the respondent has not made any challenge to the veracity of this claim. It is in those circumstances that I award the claimant the further sum of £62.89.

7.7 Is the claimant entitled to receive any additional remedy under the provisions of the Employment Act 2002 section 38?

This turns on the question of whether the respondent was in breach of it's duty to give the claimant a statement of employment particulars. As I have noted, the respondent has produced an unsigned contract of employment and also the email from Clark Recruitment of 10 April 2017. In these circumstances I find that the claimant was in receipt of a contract of employment, although it is common ground that neither side signed that contract. However, the relevant duty under the Employment Rights Act 1996 section 1 is simply to give that statement to the employee. I have also noted that it is likely that the claimant learnt that he was required to give or receive one months' notice of termination from reading that contract.

8 Final Conclusion

Accordingly, this claim is only made out in respect of part of the various complaints and Judgment is entered for the claimant in the amount of £860.89 only.

Employment Judge Little

20th February 2019