IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

Judgment of the Employment Tribunal in Case No: 4120981/2018 Heard at Edinburgh on 20 June 2019

Employment Judge J G d'Inverno, QVRM, TD, VR, WS

Mr A Morana	**Claimant** **In Person**
DBM Building Contractors Limited	**Respondent** **Represented by** **Mr T Brown, Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:

(First) That the claimant's claim in contract for reimbursement of the fuel costs associated with his journey from Aviemore to his then home address in Wishaw on 10 August 2018 following his summary dismissal in Aviemore on that day succeeds; and the respondent shall make payment to the claimant in that regard in an agreed amount of £50.

(Second) The claimant's claim in respect of non payment of wages for days worked on 22 and 23 July having been withdrawn contingent upon the respondent paying to the claimant the sum of £312.18 in full and final settlement of the claim and that payment having been made by the respondent on 26 June 2019 the claim is hereby dismissed.

(Third) That the remainder of the claimant's complaints of breach of contract are dismissed.

REASONS

1. This case called for final hearing on the claimant's residual breach of contract claims following dismissal, at Open Preliminary Hearing on 8 April 2019, for want of jurisdiction (lack of qualifying service), of the complaint of unfair dismissal.

2. The claimant appeared on his own behalf, the respondent company was represented by its Director Mr T Brown.

3. The claimant was delayed in traffic en route to the Tribunal with the effect that the hearing commenced at 11 am. The claimant failed to make copies of the documents to which he wished to refer in the course of hearing. Given the lateness of the hour the Employment Judge, exceptionally, authorised the making of the required copies by the Tribunal staff.

4. In the course of Case Management Discussion conducted at the outset of the hearing the claimant clarified, the respondent confirmed and the Tribunal noted the following as the Issues requiring investigation and determination at the hearing.

The Issues

5. The parties agreed and the Tribunal records the following as the issues requiring investigation and determination at the final hearing.

(First) Pay in lieu of notice. Whether the claimant has entitlement to one month's net pay in lieu of contractual notice in terms of clause 2.8 of his written contract (which failing to one week's net pay in lieu of statutory entitlement to notice in terms of ERA 96 section 86(1)(a).)

(Parties were further agreed that the determination of the first issue turned upon whether on the evidence presented and on the balance of probabilities the Tribunal concluded that the claimant was or was not summarily dismissed for gross misconduct (for reason of being under the influence of alcohol) on 10 August 2018.)

(Second) Whether the claimant is entitled in contract to be reimbursed by the respondents, in an agreed sum of £50 in respect of the cost of fuel incurred by him in returning from the respondent's site at Aviemore to his then home address in Wishaw, following his dismissal on 10 August 2018.

(Third) Whether the respondent is due and resting owing to the claimant in respect of two days net pay for Saturday 22nd and Sunday 23rd July 2018 being days upon which it is accepted by the respondent the claimant worked in addition to his normal hours and if so whether the claimant has entitlement to such payment at his normal basic rate of pay or at a premium overtime rate of 1.5 x basic rate of pay, (on either alternative let it be assumed there is an entitlement, in an arithmetic amount to be agreed between the parties).

(Fourth) Whether the respondent was in breach of its contractual obligations, expressed or implied in the terms of the Contract of Employment, by failing to proactively arrange and provide the claimant with accommodation, on the night of Monday 31 July 2018; and if so, in what amount, if any, is the claimant entitled to damages therefor.

(Fifth) Whether the respondent breached its contractual obligations, owed to the claimant, by the respondent's Director Mr Brown asking the claimant

together with the Site Supervisor and other members of the respondent's team, to assist him, Mr Brown, in tidying up the site and if so to what damages, if any, is the claimant entitled in respect thereof.

(Sixth) Whether the respondent had breached its contractual obligations owed to the claimant by failing to include in his final remittance holiday pay in respect of a July bank holiday worked by the claimant; and if so, to what damages is the claimant entitled in consequence thereof.

(Seventh) Whether the respondents were in breach of their contractual obligations owed to the claimant by not paying him for the time spent by him in travelling from his home to his place of duty in Inverness and if so to what damages, if any, is the claimant entitled in respect thereof.

6. In relation to Issue **(Seventh)** above the claimant sought to rely upon the words ", *not pay for my business travels* –" which appear in the penultimate sentence at section 9.2 of his initiating application ET1. The claimant clarified, for the first time in the course of this final hearing that he was seeking to advance such a claim. He accepted that the words which he relied upon did not readily disclose any such a general claim particularly in circumstances where he did specify at box 8.2 of the claim form, at paragraph 4 a particular single instance of such non-payment which the respondent and the Tribunal had taken the words at box 9.2 to be a reference to.

7. Each party lodged a bundle of documents; for the respondent extending to some 79 pages and for the claimant to some 16 pages.

Agreed Facts

8. In the course of Case Management Discussion conducted at the outset of the hearing parties confirmed and the Tribunal records parties' confirmation that the following matters, which were intended by both parties to be binding upon the Tribunal for the purposes of the hearing had been agreed;

(a) Notice Pay

Parties were in agreement that, in terms of clause 2.8 of the Contract of Employment the claimant had a contractual entitlement to four weeks' notice which failing four weeks' pay in lieu of notice, except in circumstances where he was summarily dismissed.

(b) The net value of four weeks' pay in lieu of notice was a matter which would be agreed, on a contingent basis, between the parties.

(c) That the value of the claimant's net daily wage was £156.09.

(d) That the cost of fuel incurred by the claimant in respect of his journey from Aviemore to his home in Wishaw on 10 August 2018 and in respect of which he falls to be reimbursed in the event that the Tribunal were to determine he had an entitlement, is £50.

(e) That in the month of July 2018 the net value of the payment which fell to be made to the claimant in respect of his normally worked hours (that is under exclusion of the two additional days of 22 and 23 July 2018) was £3,121.94.

(f) That the amount of remittance in fact paid to the claimant in respect of the month of July 2018 was £3,425,63 that is to say the payment was made in an amount which was £299 in excess of that which the claimant would be due for the normal hours worked by him in the month of July 2018.

(g) That in respect of the month of July 2018 the claimant submitted to the respondent invoices and was entitled to reimbursement by the respondent in respect of accommodation arranged and paid for by him,

at the respondent's request, for the evenings of 21, 22 and 23 July 2018 in the sum of £299.

(h) That the remittance received by the claimant from the respondent for the months of July 2018 included remittance in addition to remuneration for the basic hours worked by him, and being in respect either of 2 (£156.09 x 2) for the additional days worked by him on 22/23 July 2018 or in respect of reimbursement of accommodation costs incurred by him on the nights of 21, 22 and 23 July 2018.

(i) That, whether by reason of underpayment in respect of the additional days worked 22 and 23 July 18 or by non-reimbursement of the accommodation costs incurred by him in respect of the nights of 21, 22 and 23 July parties are agreed that the total sums paid to the claimant in connection with his Contract of Employment and in furtherance of the respondent's contractual obligation for the month of July 2018 that is to say the sum of £3,425.63, represented an underpayment of £312.18.

(j) That the respondent undertakes to pay and the claimant undertakes to accept of full and final settlement of the underpayment the sum of £312.18 to be paid within seven days of 20 June 2019 and that the respondent's representative and the claimant shall respectively write by email to the Tribunal confirming, respectively the transfer and receipt of that payment with a request that the confirmation be copied to the Employment Judge.

(k) That the act of communication to the Tribunal of receipt by the claimant of the sum of £312.18 shall constitute withdrawal of the claimant's complaint in respect of non-payment of wages for 22 and 23 July 2018 and that upon such confirmation and receipt that claim will be and is hereby dismissed.

Concession

9. In addition to the Agreed Facts, it was a matter of concession on the part of the respondent that although clause 2.6 of the claimant's Contract did not expressly provide for the same, salaried employees such as and including the claimant were entitled to be paid at their basic rate of pay for any additional days or weekends worked by them in accordance with the company's needs being hours or weekends in excess of the normal hours of work set out in clause 2.6. There was no concession on the part of the respondent that salaried employees such as and including the claimant, were entitled to be paid at a higher rate for any such hours or weekends worked.

10. The claimant gave evidence on his own behalf. For the respondent evidence was led from Mr Brown its Director and Mr D Kerr the Site Supervisor at Aviemore on the day of the claimant's dismissal. All three witnesses gave evidence on oath, answered questions in cross examination and re-examination and questions put by the Tribunal.

Findings in Fact

11. On the oral and documentary evidence presented the Tribunal made the following essential Findings in Fact restricted to those necessary to the determination of the issues.

12. The claimant whose date of birth is 3 September 1984 commenced employment with the respondent, on a three month trial period, on 16 May 2018 in the appointment of Senior Site Manager at the site occupied by the respondent company in Aviemore. The letter of engagement issued by the respondent to the claimant on 8 April 2018 is copied and produced at R1. The claimant's main terms

and conditions of employment, which form part of his Contract of Employment, are copied and produced at R7.

13. The claimant's written main terms and conditions of employment provide, amongst other matters, as follows:-

> "***2.3 Salary***
> *Your salary is £48,000 per annum paid monthly in arrears on or before the last day of each month, statutory and voluntary deductions and subsequent adjustments in pay will be noted in your monthly payslip. Any subsequent changes to your basic pay will be notified to you in writing. You will also be paid a car allowance of £250 per month and be given fuel card for business travel between projects in accordance with the company terms and conditions.*
>
> ***2.5 Place of work***
> *You are employed in the office and at various sites where the company operates. The company's head office is at the address stated below.*
>
> ***2.6 Hours of work***
> *Your normal working hours are 8am to 4.30pm Monday to Thursday and 8am to 1530pm Friday with half an hour lunch each day. Occasionally, you may be required to [*sic work*] additional hours or weekends in accordance with company needs. Your particular hours may be adjusted to suit company requirements and may vary from winter to summer. Where this is the case you will be advised by Mr T Brown.*
>
> ***2.7 Holidays***
> *The company's holiday year runs from 1st of January to 31st December each year. New starters working full time are entitled to the following variable days after 13 weeks service during the year which they join:-*

January 22nd, February 20, March 18, April 16, May 14, June 12, July 10, August 8, September 5, October 3rd, November 2nd, December 1st plus all normal public holidays for Scotland.

You must commit to take a minimum of 18 days holiday per year. A maximum of 0 days holiday may be carried forward into the following year. Also a maximum of 5 additional day's holiday may be bought from the company at a rate equivalent to a day's salary per day taken.

Payments will in no circumstances be made in lieu of holidays not taken. (Except in case of leavers).

2.8 Period of notice

Except in cases of summary dismissal, the period of notice to terminate your employment is as follows: one month from company and two month from you.

3.4 Company vehicle

Non applicable, as car allowance of £250 per month is included along with a company fuel card which will be supplied for business travel only.

3.9 Accommodation

We have agreed a monthly allowance of £600 per month to cover staying away from home on our Aviemore project. You will be site based for 10 weeks on".

14. The claimant's 12 week trial period concluded on 8 August 2012. The claimant's employment continued beyond the end of his trial period. The initial 10 week period, during which the monthly accommodation allowance of £600 per month was to be paid to the claimant, fell to be measured from the first date of the claimant's arrival on the Aviemore site, 21 May 2018, and expired on 27 July 2018.

During the 10 week period the claimant sourced and put in place his own accommodation requesting only that the respondent agree to receive the invoices directly from the accommodation provider and make payment under them directly to, the accommodation provider.

15. During the initial 10 week period, at the claimant's request the accommodation provider had submitted invoices directly to the respondent and the respondent made payment under those invoices directly to the accommodation provider. Following the expiry of the 10 week period, which period had been the parties' mutual assessment of the duration of the period of time during which the claimant would require to be in Aviemore, the respondent continued to accept liability to reimburse the claimant for accommodation costs incurred.

16. The Contract of Employment imposed no obligation upon the respondent, requiring them to proactively source and supply accommodation to the claimant.

17. The claimant was aware, in his capacity as Site Manager, that the project duration would overrun beyond the 10 week period. He was aware of the same at least two weeks prior to the expiry of the 10 week period. The claimant was aware that the respondents would continue to meet the cost of his accommodation during the overrun period.

18. The claimant was aware that the accommodation which he had arranged for the initial 10 week period would no longer be available to him following the night of 27 July when the claimant travelled home for the weekend on 28 July. He made no attempt to arrange alternative accommodation until returning to Aviemore on Monday 31 July. His attempts made by him on 31 July to identify accommodation for the night of 31 July were unsuccessful. At some unspecified time later in the course of the day the claimant informed the Secretary to Mr Brown of that position.

19. The claimant slept in the site office on the night of 31 July. The office was located within a container. The claimant incurred no costs in respect of that night.

20. When he advised the respondent's Director Mr Brown, on the following day, that he had not made arrangements for further accommodation and requested that the respondents tried to do so, Mr Brown immediately put in place accommodation at a location approximate to the site which accommodation was then available to the claimant for the remainder of his time on site.

21. The final remittance paid by the respondent to the claimant included payment in respect of five days of accrued but untaken proportionate paid annual leave entitlement. No additional sum was due and outstanding to the claimant in respect of the bank holiday worked by him in the month of July.

22. In his capacity as Site Manager the claimant had responsibility for ensuring that the sub-contractors on the site in turn discharged their contractual obligations in respect of leaving the work areas occupied by them clean, tidy and safe. The claimant was not directly responsible for the carrying out of cleaning duties himself rather, his responsibility, was to ensure, amongst other things, the safe, tidy and clean condition of the site by monitoring and supervising the sub-contractors' occupation of the site as required.

23. The site was not maintained in a clean and tidy state. The respondent received a complaint from the customer. In response to the complaint the respondent's Director Mr Brown accompanied by a number of staff from the company's Head Office attended at the site and together with the Site Supervisor Mr Kerr set about tidying up the site prior to a visit by the customer. All of the respondent's staff, led by its Director Mr Brown were involved in that task. Mr Brown asked the claimant to assist him in the task along with the respondent's other employees. The claimant did so.

24. At no point did the claimant object to, refuse or otherwise take issue with the request. He made no complaint prior to, during or after having acceded to the request, before raising the present proceedings.

25. The making by the respondent's Director of a request to the claimant to assist himself and other staff of the respondent in the tidying up task did not constitute a breach of contract on the part of the respondent.

26. The respondent did not compel the claimant to carry out those duties rather, the respondent requested that the claimant assist and the claimant did so without protest or complaint.

27. In acceding to the request and in assisting in the clean-up exercise the claimant was not required to work any additional hours and was paid at his full contractual rate for the normal hours which he worked. The claimant had no entitlement under the Contract to receive additional contractual remuneration for the work carried out by him when he acceded to the respondent's request.

28. The claimant was entitled in contract for the additional days worked by him on Saturday 22nd and Sunday 23rd July. The rate at which he was entitled to be paid was his basic rate of pay.

29. The claimant's Contract of Employment contained no express obligation on the part of the respondent to pay the claimant for hours spent by him travelling from his home to his place of duty. Neither was any such condition implied in the Contract.

30. The claimant was always aware that the first place of work in which he would be engaged was the respondent's site at Aviemore. He was aware of that when negotiating and agreeing his salary. Neither party proposed that there be payment for the hours spent travelling from residence to place of duty. The claimant did not ask for such payment. The respondent did not agree to make such payment.

31. In terms of clause 2.3 of his Contract of Employment the claimant was entitled to have the respondent meet the fuel cost of his return journey from the site at Aviemore to his home in Wishaw on 10 August 2018 notwithstanding his summary dismissal in Aviemore on the morning of 10 August 18.

32. The respondent having recovered from the claimant, as they were entitled to do, the fuel card which was the respondent's property following the claimant's dismissal and the claimant thus being required to himself initially incur the fuel cost, he is entitled to be reimbursed in that regard in the amount which has been agreed between the parties in the sum of £50.

33. On the night of 9 August 2018 the claimant was sharing accommodation with two joiners who were working at the site and whose names were Marcin Ledwoch and Tomasz Ledwoch. The claimant left the site at approximately 6 pm returning to the accommodation where he ate an evening meal in the company of those individuals. Both the claimant and Tomasz and Marcin Ledwoch drank alcohol with their evening meal. They then went out and spent the remainder of the evening and into the small hours of the following morning. All three individuals drank during this period, firstly in the accommodation and thereafter in local bars and disco. In the opinion of Marcin Ledwoch, set out in his letter to the respondents dated 9 January 2019 and copied and produced at R22 of the bundle, the amount of alcohol consumed by all three individuals, including the claimant, from 6.30 pm onwards on the 9th and in the early hours of the 10th of August was such that all three were "*pretty drunk when we attended work on the 10th of August*" and that was the reason that he and his colleague left the site without protest when requested to do so.

34. On the morning of 10 August 2018 some time between his normal report time of 8 am and 9.30 am the claimant attended at the Aviemore site where he was seen by Mr Brown to enter the site carrying a breakfast roll and a cup of coffee. Mr Brown called out to him telling him not to take food and drink onto the site as they were attempting to clean it. The claimant came back out of the site passing, en route, the Site Supervisor Mr Kerr. Mr Kerr formed the view that the claimant was under the influence of alcohol. He did so by reason of a combination of the following factors. Mr Morana was "not fresh", his eyes were bleary, his speech was slurred and Mr Kerr could smell alcohol on his breath.

35. Mr Kerr asked the claimant if he had been drinking on the previous night and told him that he believed him to be under the influence of alcohol.

36. Mr Brown then spoke to the claimant. He likewise formed the view that the claimant was under the influence of alcohol. He did so for the following reasons. The claimant appeared to be very tired, his eyes were bleary and his speech was slurred. Mr Brown could smell alcohol on the claimant's breath. Mr Brown owns a bar and is very familiar with the smell of alcohol. He was in no doubt that he smelt alcohol on the claimant's breath.

37. Mr Brown told the claimant that he thought he was drunk. The claimant did not deny that accusation nor did he state that he had not been drinking. Mr Brown then said to the claimant "*I suspect you of being under the influence of alcohol. I think you have been drinking. You need to get off the site right now, go away. I need your fuel card back right now.*" The only response that the claimant made to that accusation was that he did not want to give the respondent the fuel card. Mr Brown advised the claimant that if necessary he would call the police at which point the claimant returned the fuel card to him and left the site.

38. Later in the morning, Mr Brown became aware that the two joiners (co-workers sharing accommodation with the claimant) were also drunk when reporting for work that morning and likewise, they were sent off the site.

39. The claimant had consumed alcohol on the preceding night, 9 August, to the extent that when he attended for work on the defendant's site in Aviemore, in his capacity as Site Manager with responsibility for the management of the site he was smelling of alcohol and was still under the influence of alcohol.

40. In consequence, and in the absence of any denial on his part of the accusation that he was under the influence of alcohol, he had been drinking and was still under the influence of alcohol, the respondent's Director Mr Brown summarily dismissed the claimant for gross misconduct.

41. In so directing the claimant to leave the site forthwith, Mr Brown summarily dismissed the claimant for his conduct of coming onto site under the influence of alcohol in his capacity as Site Manager which conduct was defined as gross misconduct in the company's Handbook.

42. The respondent's position in that regard was confirmed to the claimant by letter dated 13 August 2018, copied and produced at R-16 of the bundle, a further copy of the company Handbook having already been provided to the claimant on 26 July 2018 prior to a meeting on 27 July at which he had received a verbal warning.

43. The claimant was summarily dismissed by the respondent on 10 August 2018 for gross misconduct being his attendance on site under the influence of alcohol.

44. The claimant having been summarily dismissed he no longer had contractual entitlement to receive one month's notice in terms of clause 2.8 of his Contract of Employment.

Summary of Submissions

Submissions for the Claimant

45. In submission Mr Morana reiterated the position adopted by him in evidence being:-

    (a) That it had not been open to the respondent on 10 August and was not open to the Tribunal at today's hearing to conclude that the claimant was under the influence of drink and therefore might be summarily dismissed, in the absence of contemporaneous blood or other scientific tests which proved that fact conclusively. Accordingly he invited the Tribunal to find that he had not been guilty of conduct justifying his summary dismissal and that in those circumstances he was entitled to one month's pay in lieu of notice in terms of clause 2.8 of the Contract.

(b) That regardless of whether or not he had been dismissed the respondents remained contractually liable for the provision of fuel (reimbursement of the cost of fuel) for his return journey from Aviemore on the 10th August 18 bearing in mind that the sole purpose of his travelling to Aviemore had been to carry out his contractual duties which he had been doing on the Monday, Tuesday, Wednesday and Thursday of that week. He confirmed, in the event that it were to succeed, that he had agreed the value of that claim with the respondent in the sum of £50.

(c) In relation to alleged non-payment for days worked on 22 and 23 July Mr Morana confirmed that he had now agreed with the respondent to accept the sum of £312.18 in settlement of that claim which he withdrew, contingent upon his receiving payment from the respondent in that sum.

(d) In relation to compensation, in relation of alleged non-payment of holiday entitlement in respect of an unspecified bank holiday worked by him in the month of July Mr Morana, beyond acknowledging that he had been paid for the day worked *per se.* He made no further submission in relation to the position adopted by him in evidence which was that the respondents did not recognise public holidays. He made no response to the terms of clause 2.7 of the Contract which expressly recognised an entitlement to paid annual leave in respect of all normal public holidays for Scotland nor to the respondent's assertion that his final payment had included remittance in respect of his proportionate entitlement to accrued but untaken paid annual leave as per clause 2.7 as at the date of his dismissal.

(e) In relation to damages for non-arrangement by the respondent of accommodation for him on the night of 31 July 2018, Mr Morana submitted that the respondents should be regarded as being contractually obliged to proactively arrange accommodation for him

regardless of whether he made any request in that respect and that their failure to do so, in relation to the night of 31 July 2018, constituted a breach of contract.

(f) In relation to payment for hours spent travelling from his home to his place of duty, Mr Morana firstly recognised that the wording of his Particulars of Claim did not immediately disclose notice of such a claim as opposed to the express claim in respect of the cost of fuel for the journey of 10 August. Nevertheless and while recognising that the Contract made no such express provision for the same, he submitted that an obligation to pay for such travel should be implied into the Contract because the requirement for him to travel to the respondent's site in Aviemore arose entirely out of his employment with them.

(g) In relation to his assisting the respondent's Director and other employees in tidying up the site prior to a visit by the customer, Mr Morana submitted that despite his acceding to the request without objection at the time, the fact of his being asked to assist in itself should be regarded as a breach of contract because the task of physically tidying the site, as opposed to supervising the sub contractor in their doing so did not form part of his normal duties.

(h) In relation to the quantification of remedy (damages) Mr Morana quantified his claims as follows:-

(i) In respect of one month's net pay in lieu of notice £3,121.94

(ii) In respect of the cost of fuel for the journey from Aviemore to Wishaw on 10 August 18 £50 (an agreed value)

(iii) In agreed settlement of the claim of alleged non-payment of wages for days worked on 22 and 23 July 2018, £312.18 (an agreed amount)

(iv) In respect of alleged non-payment of one day's accrued but untaken annual leave entitlement, £156.09

(v) In relation to alleged failure to provide accommodation in breach of contract for the night of 31 July 2018, £200

(vi) In respect of being allegedly forced to assist the respondent's Director and the respondent's other staff in the clearing up of the site, £800 he provided not basis for that quantification

(vii) In relation to non-payment of wages in respect of time spent travelling from home to place of duty in alleged breach of contract, the claimant provided no quantification nor did he attribute any specific figure in damages sought to that claim in the event that it was held established

Summary of Submissions for the Respondent

46. Mr Brown for the respondent submitted as follows:-

(a) In relation to the issue of summary dismissal for gross misconduct, Mr Brown relied upon his own evidence, the evidence of Mr Kerr and the written statement from Mr Marcin Ledwoch dated 9 January 2019. He invited the Tribunal to prefer that evidence over that of the claimant given at the hearing and to find, based upon it, that the

claimant had been under the influence of alcohol on the morning of 10 August 2018, which conduct constituted gross misconduct in terms of the company's Handbook with which the claimant was particularly familiar and a further copy of it having been provided to him on 27 July and that that had been the principal reason for the claimant's summary dismissal.

(b) Mr Brown invited the Tribunal to hold that upon the evidence available to the respondent on 10 August, at the material time the respondent was reasonably entitled to conclude that the claimant had been drinking on the preceding night from around 6.30 pm and to some time into the small hours of the morning of 10 August to an extent that when he reported for duty and came onto the site on the morning of 10 August he was still under the influence of alcohol and had been summarily dismissed on 10th August 18 for that gross misconduct.

(c) The claimant having been thus summarily dismissed, in circumstances where the respondent was entitled to summarily dismiss him, had no contractual entitlement to pay in lieu of notice that being expressly excluded in circumstances of summary dismissal in terms of clause 2.8 of the written Contract.

(d) In inviting the Tribunal to prefer his own evidence and that of Mr Kerr and of Mr Ledwoch over the claimant's, Mr Brown relied upon the fact that the claimant had at no time on the morning of 10 August in the face of being accused of being under the influence of alcohol both by Mr Kerr and by Mr Brown denied that allegation and that the tenor of his subsequent correspondence was restricted to challenging the respondent's ability to prove that he had been under the influence of alcohol in the absence of chemical tests. He also relied upon inconsistencies in the claimant's oral evidence in that he initially denied having had any drink on the preceding evening but

subsequently, when shown the letter from Mr Ledwoch, changed his position and agreed that he had had something to drink with his evening meal.

(e) In relation to the cost of fuel in respect of the claimant's post dismissal return journey from Aviemore, Mr Brown accepted that there was a distinction to be made between the question of who should meet the fuel cost of that return journey on the one hand and the return of the company fuel card, which was company property at the point of dismissal on the other. He accepted that had the claimant in fact refuelled his vehicle prior to the time of his dismissal the company would have accepted the cost of fuel in relation to his return journey and would not have sought to recover that from him. He confirmed that the value of that claim in the event that it was to succeed had been agreed with the claimant in the sum of £50.

(f) In respect of alleged non-payment for days worked 22 and 23 July 18, Mr Brown confirmed that it was accepted by the respondent that the claimant had worked on those days and that he was entitled to be paid for those days at his basic rate of pay. He submitted that there was no provision entitling the claimant to be paid at a higher or overtime rate. His belief had been that the claimant had been paid but he now accepted, however, that the remittance made to the claimant for the month of July should have included two additional sums; firstly payment in respect of the extra days worked on 22 and 23 July but also and secondly reimbursement for the cost of accommodation arranged by the claimant on 21/22/23 July. He accepted that the remittance paid to the claimant had included an additional payment in respect of only one of those elements and he confirmed that he had reached extrajudicial agreement with the claimant whereby on the one hand the respondent undertook to make payment to the claimant of the sum of £312.18 within seven days of 20 July 2018 in return for which the claimant had agreed to accept

that payment in full and final settlement of that claim which, contingent upon that payment being made was withdrawn by the claimant and thus did not require to be determined by the Tribunal.

(g) In respect of the claimant's allegation that the respondent had disregarded, as a matter of policy, public holidays and the claimant's unspecified allegation that while on the one hand he had worked and been paid for a public holiday in July on the other hand he should have received an annual leave payment in respect of it and had not, Mr Brown repudiated that claim. He referred the Tribunal to and relied upon the terms at clause 2.7 of the Contract which expressly stated that the respondent acknowledged an entitlement on the part of employees including the claimant to all normal public holidays in Scotland. He further relied upon the documentation covering and relating to the claimant's final remittance which made clear in his submissions that that remittance included payment in respect of five days of paid annual leave, that being the claimant's whole accrued but untaken proportionate entitlement as at the Effective Date of Termination of his employment 10 August 2018. He invited the Tribunal to dismiss that claim.

(h) In relation to the claim for damages in respect of an alleged breach of contract and failure to proactively provide accommodation for the claimant on 31 July 2018, Mr Brown again repudiated that claim and invited the Tribunal to dismiss it. While accepting the general proposition that the respondents would meet the cost of the claimant's accommodation, subject to the terms of clause 3.5 of the Contract, Mr Brown submitted that the Contract and that clause in particular imposed no legal obligation upon the respondent to proactively arrange and provide accommodation for the claimant in circumstances where the claimant did not request that they do so. Under clause 3.5 a £600 per month allowance was payable to the claimant for the first 10 week period during which it was envisaged,

by both parties, at the time of entering into the Contract, the claimant would be working on the Aviemore site. The claimant arranged his accommodation for that ten week period directly himself. At the claimant's request the respondent agreed to receive invoices in respect of the accommodation directly from the accommodation provider and to settle the same directly with the accommodation provider. On the expiry of the contract arranged directly by the claimant with the accommodation provider on 28 July 18, the claimant took no steps to arrange other accommodation attempting to do so only on his return to Aviemore on 31 July. He specifically had not asked the respondents prior to 31 July to arrange accommodation for him. In the event he did not arrange accommodation on 31 July and only at that point, some time later in the day on 31 July did he, on his evidence, inform the secretary of the respondent's Director that he had not. On his own initiative and decision and in his capacity of Site Manager he decided to spend the night of 31 July in the site office. He did so. In doing so he incurred no cost or outlay. He thereafter on the following day asked Mr Brown to arrange accommodation for him which Mr Brown was content to do and immediately did.

(i) In relation to the allegation that the claimant had been forced to carry out duties other than those properly falling within the scope of his responsibilities as Site Manager Mr Brown invited the Tribunal to dismiss that claim on the evidence which had been adduced. He firstly submitted that the claimant's duties as Site Manager included responsibility for ensuring that the sub-contractors who occupied the site left their respective areas clean, tidy and safe. He submitted that the claimant had failed in his performance of that duty in consequence of which the site had become untidy and he, in his capacity of Director had therefore himself assembled and led a work party of employees of the respondent including the Site Supervisor to tidy up the site. All of the respondent's other employees were engaged in assisting Mr Brown in that task. He had asked the

claimant to likewise assist. In the face of that request the claimant had not refused or raised any objection or concern with it. Neither had he expressed the view that assisting in such an exercise was something that fell outwith the scope of his duties under the Contract. Rather, he had along with the remainder of the respondent's employees assisted in the task. He had raised no issue in relation to such a matter and neither had he asserted that it was in any way a breach of contract prior to the raising of his Employment Tribunal claims. Mr Brown denied that the claimant had been forced to carry out the duties but separately and in any event submitted that assisting in restoring the site to the correct tidy state would not involve a breach of contract.

(j) In relation to the claim, explained by the claimant only in the course of the hearing, that a failure to pay him for time spent travelling from his home to the site's place of duty amounted to a breach of contract, Mr Brown submitted as follows:

(i) Firstly the Contract contained no entitlement to payment for such travel time. The Contract defined sites such as the Aviemore sites as the claimant's place of work (clause 2.5). It was at all times, in the course of parties agreeing terms, apparent to both parties that the claimant would be working on such sites including specifically that he would be working on the Aviemore site until the completion of that particular project. At no time did either party raise the issue of nor, in Mr Brown's submission have in contemplation, any question of the claimant being paid for time spent on travelling. That was not an oversight as the Contract, in two places addressed the fact that the claimant would spend time engaged in such travel. Firstly clause 2.3 under salary a car

allowance of £250 was paid and in addition a fuel card was provided whereby the company would directly meet the fuel costs associated in such travel. Specifically however there was no undertaking to pay the claimant for the time spent in so travelling. The claimant's hours of work were defined at clause 2.6 of the Contract and specifically made no mention of entitlement to be paid for time spent on travelling. Mr Brown submitted that that claim was without foundation. He invited the Tribunal to dismiss that claim.

Applicable Law

47. The presented claims invoke the Employment Tribunal's concurrent contractual jurisdiction conferred, in terms further to section 3 of the Employment Tribunals Act 1996 and which arises upon termination of a Contract of Employment. They are accordingly claims which fall to be determined in accordance with the principles of the substantive law of contract in the same way as such claims would be determined in the sheriff court or Court of Session.

48. The claimant seeks damages in respect of the various alleged breaches of contract. The measure of damages in contract is a sum of money the payment of which would put the alleged innocent party namely the claimant, in the position that they would have been in but for the breach.

Discussion and Disposal:- the first claim – for damages for non-payment of one month's contractual pay in lieu of notice

49. Where parties have reduced their Contract of Employment to writing, the Contract of Employment falls to be regulated by those written obligations, insofar as the same are susceptible of clear interpretation on their face and are not inconsistent with any overriding statutory provision. In addition to the express terms there will

be implied into any Contract of Employment, in the absence of express provision, certain additional conditions, by operation of law.

50. Absent a contractual provision the claimant, by reason of his length of service, would be entitled to receive only one week's notice of termination of employment (payment in lieu of notice, in terms of section 86(1)(a) of the Employment Rights Act 1996). Clause 2.8 of the Contract, however, entitles the claimant to one month's contractual notice (and by implication pay in lieu of notice) "*except in cases of summary dismissal*". That exception, which is expressly contained within the clause, mirrors the exception which clearly applies to the statutory entitlement namely that where an employee is summarily dismissed in circumstances in which such action on the part of the respondent can be justified entitlement to notice, whether statutory or contractual is lost. In this case the respondent asserts that the claimant was summarily dismissed for gross misconduct the same being his coming onto the site for duty as Site Manager while under the influence of alcohol.

51. There was no dispute between the parties that such conduct, if it was established, would justify summary dismissal. The issue of fact between the parties in the circumstances therefore was whether or not, in the face of the circumstances presented on 10 August 2018 the respondent was reasonably entitled to conclude that the claimant was under the influence of alcohol and to summarily dismiss him. If that question of fact is answered in the affirmative i.e. in favour of the respondent then no entitlement to notice exists and the claim under this head falls to be dismissed. If that question of fact is determined in the negative, that is in favour of the claimant, then it is accepted by the respondent that the claimant would have contractual entitlement to receive one month's notice and to dismiss him without that notice would constitute a breach of contract the measure of damages in respect of which, being the sum of money payment of which would put the claimant in the same position that he would have been in but for the breach, and which sum is properly quantified in the sum of £3,121.94 being the agreed value of one month's net pay.

52. The claimant's position is that for the respondents to conclude that the claimant was under the influence of alcohol on the morning of 10 August 2018, in the absence of conclusive scientific evidence of specific levels of alcohol in his bloodstream, amounted to a breach of contract and thus to conclude that he was guilty of gross misconduct to dismiss him without notice (summarily) amounted to a breach of contract entitling the claimant to damages in a sum equivalent to one month's net pay in lieu of notice.

53. Unlike in a complaint of unfair dismissal where the issue for the Tribunal would be whether the respondent's conclusion that the claimant was under the influence of alcohol and therefore guilty of gross misconduct was one which fell within the band of reasonable responses available to a reasonable employer, the issue of fact for determination in respect of this "breach of contract" claim, is whether, on the balance of probabilities, the claimant was or was not under the influence of alcohol when he reported for duty on the morning of 10 August 2019.

54. In criminal proceedings, where the standard of proof is "beyond reasonable doubt", there would be considerable merit in the claimant's assertion that a finding in fact made by the Tribunal, and therefore also a conclusion reached by the respondent that the claimant was under the influence of alcohol would require some blood test or other scientific evidence. In civil proceedings such as these however the standard of proof is that of, "on the balance of probabilities". It is accordingly possible for the Tribunal to reach a conclusion on a consideration of the evidence before it that the claimant was or was not under the influence of alcohol and therefore was or was not guilty of conduct which, in the particular circumstances of his employment constituted gross misconduct justifying his summary dismissal.

55. In the above regard the claimant's evidence before the Tribunal, although not at the point of his dismissal, was to deny that he had been drinking on the preceding evening and to state that the respondents were unable to prove, in the absence of scientific evidence, that he was under the influence of alcohol when he reported for duty on the 10th. On being shown, in the course of cross examination the written statement of his co-worker Mr Ledwoch (Marcin) which was to the effect that he,

his work partner Tomasz Ledwoch and the claimant had all been drinking, from 6.30 pm on the preceding night until about 3.30 am on the morning of 10 August, variously in the accommodation provided and local bars and disco and further that the amount of alcohol consumed in the course of those hours was such that all three individuals were pretty drunk when attending for work on the morning of 10 August, the claimant changed his evidence to admit that he had had something to drink with the evening meal at 6.30 pm.

56. When asked to confirm whether he then accepted that he had also continued to drink while out after 6.30 pm he responded by stating that he was only out till 12.30 and reverted to the previously made proposition that no-one could conclude that he was under the influence of alcohol in the absence of scientific evidence.

57. The evidence of Mr Brown and Mr Kerr, likewise given on oath, concurred in that they both saw and spoke to the claimant on the morning of the 10th, they both concluded that he was under the influence of alcohol by reason of a combination of factors; in the case of Mr Kerr that the claimant did not appear fresh, appeared as if he hadn't been to bed, was bleary eyed, was slurred in his speech and his breath smelt of alcohol and, in the case of Mr Brown, that the claimant was bleary eyed, slurred in his speech and that there was a clear smell of alcohol on his breath.

58. In response to the claimant's proposition that what Mr Brown may have smelt on his breath was cappuccino, Mr Brown's evidence was that he was in no doubt that the claimant was smelling of alcohol, he owning a public bar and being very familiar with the smell.

59. Separately, there was before the Tribunal a written statement in letter form of Mr Marcin Ledwoch. Although, in the absence of Mr Ledwoch to be cross examined the weight which the Tribunal attributes to such a statement is limited, it nevertheless attaches some weight to the evidence which is consistent and supportive of the oral evidence of Mr Brown and Mr Kerr.

60. Both Mr Kerr and Mr Brown made reference to the fact that when they each, in their turn, told the claimant, on 10 August, that they believed that he was under the influence of alcohol he, the claimant, did not deny that accusation nor did he repudiate the suggestion that he had been drinking on the preceding day.

61. The burden of proof on this issue sits with the respondent. It is for the respondent to prove on the preponderance of the evidence and on the balance of probabilities, to the satisfaction of the Tribunal, facts upon which a conclusion can be properly reached as to whether it was more probable than less probable, in the circumstances, that the claimant had been drinking on the preceding night to the extent that he remained under the influence of alcohol when he attended on site for duty on the morning of 10 August 2018 some time after 8 am and before 9.30 am.

62. I reject the claimant's proposition that the burden of proof on this issue of fact can only be discharged by conclusive scientific evidence from contemporaneously carried out blood tests. I found the evidence of Mr Kerr and of Mr Brown to be both credible and reliable in this regard in relation to the issue and I accepted it.

63. I find, on the balance of probabilities, that the claimant had been drinking on the preceding night and not only with his evening meal at or about 6.30 pm but thereafter for several hours and to the extent that when he reported for work on the following morning 10 August he was still under the influence of alcohol.

64. On that basis, I find that the respondents were entitled to summarily dismiss him and did not do so in breach of contract. Accordingly the claimant has no entitlement to contractual notice or pay in lieu of notice (and separately no entitlement to statutory notice). The claim for damages for non-payment of notice pay is dismissed.

65. The second issue that of fuel costs for the return journey Aviemore to Wishaw on 10 August, I determine in favour of the claimant. The cost of fuel in respect of both legs of the journey that is from Wishaw to Aviemore and from Aviemore to Wishaw respectively at the beginning and the end of the working week in question had

already been incurred prior to the claimant's dismissal. The sole purpose of the claimant's journey to Aviemore was to undertake the discharge of his contractual duties. Having travelled to Aviemore for that purpose and having engaged in the discharge of those duties on the Monday, Tuesday, Wednesday and Thursday of the week of his dismissal, the costs of fuel associated with the return journey had been and would have been necessarily incurred regardless of whether the claimant had or had not been dismissed on the 10th. In asking for the immediate return of the company's fuel card, that is to say of company property, following the claimant's dismissal the respondent acted within the terms of the Contract and not in breach of any provision of it. A distinction falls to be made, however, as in fairness to Mr Brown he recognised in the course of cross examination, between the return of company property on the one hand and the meeting by the company of the fuel cost of the return journey on the other, that journey being one which was wholly and necessarily undertaken in consequence of the claimant's discharge of his contractual duties in Aviemore and which would have been incurred regardless of the fact of his dismissal. In consequence of the return of the fuel card, the means by which that cost was intended to be borne directly by the respondent in terms of clause 2.3 was effectively removed from the claimant. The claimant required to incur that cost at first instance and is contractually entitled, in the circumstances, to be reimbursed by the respondent in that regard. Parties have agreed the value of that cost in the sum of £50.

66. I find that the claimant's claim for reimbursement of the fuel cost of the return journey Aviemore to Wishaw on 10 August 2018 succeeds and the respondent shall pay to the claimant the sum of £50 in satisfaction of that claim.

67. In relation to the third issue, alleged non-payment for days worked on Saturday 22 and 23 July 2018, as was confirmed by both parties in the course of their respective submissions parties have reached extrajudicial agreement that the respondent shall pay to the claimant, within seven days of 20 July 2019 and that the claimant shall accept, the sum of £312.18 in full and final satisfaction of that claim which upon such payment will be and is herein contingently withdrawn in

consideration of the same. Accordingly, and subject only to that contingency, that claim is held withdrawn and is hereby dismissed.

68. The fourth issue alleged non-payment of compensation in respect of paid annual leave entitlement. I hold, on the evidence presented that the claimant has failed to establish any such claim. I further hold on the evidence presented that the assumption of fact upon which the claim was advanced by the claimant, namely that the "*respondent does not recognise public holidays*" was unfounded in fact and is contradicted by the express terms of clause 2.7.

69. I hold that the final remittance, paid to the claimant by the respondent, included payment in respect of five days paid annual leave entitlement being, as at the date of his dismissal, his whole accrued but as yet untaken proportionate contractual entitlement. That claim is accordingly dismissed.

70. The fifth claim is a claim for damages in respect of breach of contract constituted by the respondent not proactively arranging accommodation for the claimant on the night of 31 July. This claim is misconceived. The Contract imposes no such proactive obligation on the part of the respondent to, of its own initiative and absent any request, arrange accommodation for the claimant. *Per contra,* the terms of clause 3.5 "Accommodation" are such as leave the responsibility of arranging accommodation with the claimant. That is what the claimant did at first instance himself so finding and putting in place a contractual arrangement with an accommodation provider for his accommodation in the ten week period which, at the time of entering into the Contract of Employment, both parties envisaged would be the period of time during which the claimant would require to discharge his duties in Aviemore. In relation to that first ten week period only the respondent, at the claimant's specific request, agreed to receive invoices directly from the accommodation provider and to settle these invoices directly with the accommodation provider rather than paying the monthly allowance to the claimant out of which he for his part would then settle the invoices. The fact of that variation to the mechanism, of the discharge of the obligation in clause 3.5 in respect of accommodation arranged by the claimant, did not operate to impose upon the

respondent any future obligation to proactively arrange for accommodation on the part of the respondent.

71. The fact that the period of time required for the conclusion of the Aviemore project extended beyond the ten week period, in circumstances where the respondent's Mr Brown accepted in the course of evidence that the contractual obligation in relation to accommodation likewise extended, would result in the provisions of clause 3.5 continuing to apply for the extended period. In those circumstances, it was, in first instance, for the claimant to arrange and put in place further accommodation after the expiry of the initial Contract which he entered into with the accommodation provider.

72. In relation to any such future accommodation arrangements it would have been open to the claimant to request the respondent's agreement to a variation to the mechanism of discharge of the respondent's obligation such as or similar to that which he requested in relation to the first accommodation or, yet again to request, as he eventually did, that the respondents arrange accommodation for him, within the terms of the monthly allowance as on the previous occasion. It would have been open to the respondents to agree such a variation on the mechanism as in fact they subsequently did. They were, however, under no obligation to do so.

73. The absence of commercially arranged accommodation to the claimant on the night of 31 October did not result from any breach of contractual obligation on the part of the respondent but rather, from the fact that the claimant delayed attempting to find accommodation until his return to Aviemore on 31 July. On his own initiative, and acting on his own authority as Site Manager, he decided to spend the night of 31 July 18 in the site office. On the following day he spoke directly to the respondent's Mr Brown and requested a variation in the mechanism asking that Mr Brown try to identify and arrange accommodation for him directly. The respondent's Director was prepared to do so and did so, immediately putting in place accommodation for the claimant covering the remainder of his period in Aviemore. The claimant incurred no financial loss on the night of 31 July 2019. To the extent, if any, which he suffered any other head of loss recoverable in

contractual damages, that loss did not result from breach of contract on the part of the respondent but rather from his own failure to take timeous steps to put in place further accommodation.

74. I hold that the claimant has failed to establish any breach of contract on the part of the respondent in respect of the above claim and the claim is dismissed.

75. The sixth claim is for damages in consequence of being "forced" to carry out other duties. At the heart of this claim is an offer by the claimant to prove that he was "forced" to carry out duties to assist the respondent's Director and his fellow employees in tidying up/cleaning (sweeping sawdust), the Aviemore site prior to a customer visit, on the basis that such duties fell outwith the scope of his contractual duties and therefore being forced to carry them out constituted a breach of contract.

76. There was no evidence before the Tribunal that went to support the contention that went to establish the contention that the claimant was forced to carry out such duties. The claimant's own evidence extended only to the fact that Mr Brown had asked the claimant to assist and the claimant did assist in the carrying out of those tasks. The evidence of both Mr Brown and Mr Kerr, the Site Supervisor was to the effect that while the carrying out of such a task fell outwith the normal duties of their own posts as Director and Site Supervisor and of the other employees who were asked to assist, they all agreed to assist on the basis that the company's responsibilities to ensure that the site was kept clean, tidy and safe having not been adequately discharged by reason of the claimant's failure as Site Manager to adequately monitor and require the sub-contractors to fulfil their contractual obligations in that regard they considered it appropriate when asked by Mr Brown to assist him in rectifying the position.

77. The claimant was likewise asked by Mr Brown to assist and the claimant did assist. At no point did he decline to assist nor did he ever raise any issue in relation to the request or otherwise complain about it. In effect by his actings he agreed to the request.

78. Leaving aside the question of whether the claimant's responsibilities to ensure in his capacity as Site Manager that the site was kept clean, tidy and safe could extend in urgent circumstances, to assisting other staff including his Managing Director in the task in question, on any view of the evidence the claimant has failed to establish that he was "forced" to carry out those duties. The mere asking the claimant to assist would not of itself constitute a breach of contract and in the event the claimant acceded to that request without complaint. He was not compelled to carry out the duties or directed to do so in the face of a complaint or refusal on his part. The claimant incurred no financial loss in carrying out the duties. He was not required to work any additional hours in order to so assist. He was paid at his normal rate of pay for the time which he spent in assisting his MD and other staff with the task. The claimant has failed to establish a breach of contract in respect of this complaint and this claim is dismissed.

79. The seventh claim is for damages for non-payment of time spent in travelling from residence to place of duty. A real question arose as to whether this claim was properly given notice of by the claimant in his initiating application ET1 and therefore as to whether it was properly before the Tribunal. The respondent's representative did not however argue that he was unable to respond to the claim which was specified for the first time in the course of the hearing. On that basis having heard evidence in submissions from both parties in respect of the matter the Tribunal has determined the claim.

80. While it would be open to parties to expressly contract for such payments the Contract, which parties have reduced to writing, does not do so. Neither is this a circumstance in which because the Contract is entirely silent on or fails to recognise the existence of a requirement to travel from home to places of duty it is necessary to imply some obligation into the Contract in order to give it business efficacy. The circumstance is indeed envisaged and is addressed by parties at clause 2.3 under the heading "Salary" which provides amongst other matters "You will also be paid a car allowance of £250 per month and be given fuel card for business travel between projects in accordance with the company terms and

conditions." The terms of the written Contract are clear and unequivocal on the point and are to the effect that no such obligation to pay for hours spent in travelling from residence to place of duty forms part of the agreement. Even had the wording of the written Contract been ambiguous there was no evidence before the Tribunal that went to support the proposition that parties had intended that such an obligation form part of the agreement. The respondent's position was that their intention had never been to include such a provision nor did they believe that the claimant intended the same or was under any misapprehension in respect of the same. The claimant had never raised the matter in circumstances where it was apparent from the point of first engagement between the parties that the first place of duty in which the claimant would be required to work was on the respondent's site in Aviemore. Likewise in clause 2.5 of the Contract "Place of Work" it is made clear that the claimant's place of work would be not only in the respondent's office at Bathgate but at various sites where the company operates. The claimant for his part did not assert that he had ever focused the issue in discussions with the respondent when agreeing his salary and other terms of employment. He relied rather upon a proposition that such a provision was automatically implied into a Contract of Employment either by the law or by common practice. He offered no authority or further evidence in support of those contentions.

81. On the evidence presented the claimant has failed to establish that any such obligation was included in the Contract and accordingly has failed to establish any breach of contract in respect of non-payment to him for hours spent engaged in travel to and between places of work. This claim is accordingly dismissed.

Date of Judgement: 17th July 2019
Employment Judge: Joseph d'Inverno
Date Entered in the Register: 18th July 2019
And Copied to Parties