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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100190/2019

10 **Held in Glasgow on 20 and 21 May 2019**

Employment Judge A Jones

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Mr A Sim	**Claimant** **Represented by** **Mr A Sim –** **(Brother)**
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Arnold Clark Automobiles Limited	**Respondent** **Represented by** **Mr S Jones –** 25 **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that the claimant was unfairly dismissed, that the compensation (in terms of basic award and compensatory award) to which he would have been entitled should be reduced by 100% on the basis that had a fair procedure been followed, he would have been dismissed and 35 that in any event, the claimant contributed to his dismissal to 100%, and that the claimant was wrongfully dismissed and that the respondent is required to pay the

claimant damages for breach of contract of **Five Thousand, One Hundred and Five Pounds, Eighty eight pence (£5105.88).**

REASONS

Introduction

5 1. The claimant was employed by the respondent from September 1998 until his dismissal on 12 November 2018 for gross misconduct. The claimant raised claims of unfair dismissal and breach of contract which were denied by the respondent. The claimant was represented by his brother and the respondent was represented by Mr Jones, solicitor. The respondent called three
10 witnesses; the claimant's manager, Mr Lewis Currie, who had suspended him and carried out the initial investigations, Ms Carr who chaired the disciplinary hearing and Ms Ramsay who conducted the appeal hearing.

Issues to be determined

2. The Tribunal was required to address the following issues:

15 1. Had the claimant been dismissed for a potentially fair reason; being conduct; and

    a. If so, had the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissal, and if so,

    b. Had the respondent acted fairly in all the circumstances

20 2. Did the respondent act in breach of contract by dismissing the claimant without notice or pay in lieu of notice.

Findings in Fact

3. Having listened carefully to the evidence and submissions and considered the documents to which it was referred, the Tribunal made the following
25 findings in fact:

4. The claimant was employed by the respondent as a Valet Manager until he took over as Forecourt Manager in around July 2017.

5. He signed a written contract of employment on 12 May 1997 which stated that "Before you work any overtime, you must obtain the approval of your departmental manager".

6. The respondent employs over 12,000 staff at a number of branches throughout the UK and the claimant was employed at its branch on Hamilton Road in Glasgow.

7. The respondent operates a Time Management System ('TMS') which is used to administrate holidays, overtime, sick leave and hours worked. Hours worked are recorded by a swipe card which employees are required to use when they arrive and leave their workplace.

8. Only managers will generally have access to the TMS.

9. The claimant had access to this system during his role as Valet Manager and was responsible for authorising and inputting overtime hours for those who reported to him. He also inputted and approved his own overtime hours.

10. Although when he moved to role of Forecourt Manager the claimant no longer had staff reporting to him, his access to TMS was not removed. There was no discussion with the claimant about the system and he was not issued with a new contract of employment.

11. The claimant regularly worked Saturday as overtime hours and this was always approved.

12. The TMS system requires managers to approve overtime hours which have been recorded on the system. The default position on the system is that such hours are not approved.

13. A manager will have a notification of 'anomalies' in relation to the staff for whom they are responsible and is required to work through such anomalies, such as extra hours worked, lateness or sickness, and address these as required on the system.

14. Overtime hours attracted an enhanced hourly rate of time and a half. The claimant was normally paid £10.91 per hour.

15. After he took on the role of Forecourt Manager, the claimant also took on additional duties of Health and Safety in relation to the forecourt. He did not receive any additional remuneration for these duties.

16. Mr Currie took over as general manager of the branch at which the claimant was employed in June 2018. The claimant reported to Mr Currie from this time although he also informally reported to other managers at the branch.

17. The claimant continued to deal with his own hours on TMS.

18. Mr Lindsay, who took over as Valet Manager, although nominally responsible for dealing with the claimant's hours on TMS did not see the claimant as his responsibility.

19. On 12 October 2018, Mr Currie was examining the TMS to get a better understanding of hours being worked by staff. He noticed that the claimant appeared to have been working a significant amount of overtime.

20. Mr Currie then called the People team of the respondent for advice on what to do. Mr Currie spoke to Ms Carr who advised Mr Currie to investigate further in order to understand what had happened and to meet with the claimant and have a conversation with him and then provide the People team with a note of that conversation. No record was taken of this advice.

21. Mr Currie then called the claimant into a meeting. Mr Currie had invited another manager Carl Skelton to be present at the meeting. The claimant was not advised in advance of the nature of the meeting, nor invited to be accompanied at the meeting.

22. No notes were taken of the meeting which also took place on 12 October. Mr Currie put to the claimant what he had discovered and asked the claimant for a response.

23. The claimant was shocked at the allegations which were put to him but admitted at the meeting that he had been approving his own overtime hours. Mr Currie suspended the claimant and the claimant went home.

24. A letter was then sent to the claimant dated 12 October confirming that the claimant was suspended and that the respondent would be in touch 'once ongoing reviews have been concluded'.

25. Sometime later, Mr Currie sent a note to the People department which was undated giving his version of the meeting which had taken place. It stated 'As per telephone call, after looking through Archie's TMS in detail, I noticed he had been getting paid overtime when he shouldn't have, at first I genuinely thought it was a mistake and went to see Darren Lindsay (Valet Manager) as to why he had clicked to pay. Darren straight away said no I defiantly do not click Pay its NOT PAY, so I went back and looked through 'audit trail' section and was horrified to see Archie had been going back in over ruling his clock in to then pay himself' and 'I made clear it was obvious as he had done it a couple of times a week and got away with it months back and then I could see it then got more and more as he was getting away with it. Again he admitted this'. The note concluded stating 'I suspended Archie on Friday morning pending a full investigation'.

26. Mr Currie had not in fact spoken to Mr Lindsay on that day or specifically regarding his concerns about the use by the claimant of the TMS.

27. The claimant was then invited to disciplinary hearing on 19th October by letter dated 16th October. The letter enclosed the note provided by Mr Currie, which was referred to as a 'statement', together with various documents setting out an audit trail of entries from TMS.

28. No further investigation had been carried out by the respondent prior the scheduled hearing.

29. The claimant emailed the respondent on 18 October indicating that he had only that morning received the letter and requesting a postponement of the hearing and that statements be taken from two other employees. The email

also challenged the accuracy of the content of the 'statement' provided by Mr Currie.

30. The postponement requested by the claimant was granted and a further date was arranged of 26 October. No investigations were carried out by the respondent in advance of that hearing and the respondent made no contact with witnesses who had been identified by the claimant, nor advise the claimant that these witnesses would not be contacted.

31. The disciplinary hearing was chaired by Ms Carr and she was assisted by Mr Kinnaird who was the General/Sales Manager and who worked with the claimant. The meeting was recorded with the consent of all parties.

32. The claimant prepared a statement in advance of the disciplinary hearing which he provided to the respondent.

33. During the meeting the claimant indicated that he accepted that he didn't start claiming for overtime for his current role until after he had completed the health and safety course around April 2018.

34. At the conclusion of the meeting, Ms Carr indicated that she wished to carry out additional investigations before reaching a decision in relation to the allegations against the claimant.

35. A letter was sent to the claimant dated 29 October indicating that he continued to be suspended on full pay pending further investigations.

36. Thereafter Ms Carr interviewed Mr Currie, Mr Swindell, Mr Skelton, Mr Mullholland and Mr Lindsay. All of these interviews were recorded and copies of the written record of the interviews were provided to the claimant in advance of the reconvened disciplinary hearing.

37. During an interview with Mr Lindsay, he was recorded as saying 'No, never queried anything because again I felt as if I wasn't in charge of Archie, because Archie's role had then changed from valet manager previously down to think it was site maintenance. So I always just presumed there was

someone in the branch dealing with Archie and I wasn't to take anything to do with him.'

38. The disciplinary hearing was reconvened on 12 November and the same people were in attendance and the meeting was again recorded.

5 39. In advance of the meeting, the claimant again provided a statement addressing issues which had arisen in the statements he had been provided with in advance of the hearing.

40. Ms Carr adjourned the hearing for a time an indeterminate time and when the meeting was continued, she advised the claimant that the she had decided 10 to dismiss him for gross misconduct. Ms Carr also advised the claimant that he would have the right to appeal and that details would be sent out in a letter to him confirming the decision.

41. A letter dated 12 November was then sent out to the claimant confirming the decision and stating that he had been 'summarily dismissed without notice or 15 payment in lieu of notice in accordance with the company's disciplinary procedure....The reasons for your dismissals (sic) are: falsely editing your own TMS records to authorise overtime payments without authorisation between 1 April 2018 and present for your own financial gain.' The letter went on to indicate that the claimant's length of service and previous disciplinary 20 record had been taken into account. The letter also outlined the claimant's right to appeal.

42. The claimant sent a letter dated 19 November outlining his appeal against dismissal. His appeal was based on four grounds; procedural aspects; factual aspects; legal aspects and mitigation.

25 43. Ms Ramsay, Senior People Advisor was appointed to deal with the appeal. She wrote to the claimant by letter dated 22 November indicating that a hearing would take place on 29 November.

44. At the conclusion of that meeting, Ms Ramsay indicated that she might require to carry out further investigations.

45. Ms Ramsay then wrote to the claimant by letter dated 21 December indicating that her investigations were ongoing and that that she would aim to have her response communicated to the claimant by the week commencing 7 January.

46. In fact, no investigations were carried out prior to the letter of 21 December being sent.

47. However, Ms Ramsay did interview Mr Currie again by phone on 4 January. She also had an email exchange with Ms Carr where Ms Carr answered various questions.

48. Ms Ramsay then wrote to the claimant by letter dated 8 January indicating that his appeal had been dismissed and that the internal procedure had been exhausted.

Observations on the evidence

49. Ms Carr and Ms Ramsay for the respondent were credible and reliable witnesses. Mr Currie's evidence was generally credible except in one important respect. He gave evidence that he spoke to Mr Lindsay about the claimant's overtime and what he saw as inconsistencies. He indicated in evidence in chief when asked what Mr Lindsay's reaction was to this that "he was horrified and a bit taken aback." His evidence before the Tribunal was that he spoke to Mr Lindsay on the same day that he interviewed the claimant once he was aware of what he saw as inconsistencies. While that evidence was consistent with the note he produced of the events of 12 October, it was entirely inconsistent with the statements which were taken from Mr Lindsay where no reference was made to such a meeting and the interview Mr Currie had with Ms Ramsay. During that interview, Mr Currie is recorded as stating "I didn't even bring Darren into it to be honest with you. I went up to the valet bay one day and I asked him who does...This came about originally because I wanted to know who done certain people's TMS with in the branch as there are three different departments....". The Tribunal therefore concluded that Mr Currie did not speak to Mr Lindsay at all about the claimant's overtime, and did not accept his evidence in that regard. Rather, the Tribunal concluded

that Mr Currie sought to embroider the version of events to substantiate the conclusion he had already reached in relation to the claimant's guilt. .

50. The evidence of the claimant was reliable and credible.

Submissions

50. Mr Jones, on behalf of the respondent invited the Tribunal to dismiss both complaints before it. Mr Jones invited the Tribunal to make a number of findings in fact and ultimately find that the claimant either did know or ought to have known that he was not entitled to approve his own overtime payments.

51. It was submitted that it was not in dispute that the claimant had been dismissed for a potentially fair reason, being conduct. Mr Jones invited the Tribunal to accept that the decision to dismiss the claimant had been within the band of reasonable responses. The respondent was said to have a genuine and reasonable belief that the claimant had committed the misconduct alleged.

52. It was also submitted that the respondent had carried out a thorough and even-handed investigation and that the claimant had every opportunity to state his case and that the criticisms made of the process by the claimant did not have merit. Reference was made in particular in this regard to the case of **Sainsbury plc v Hitt** [2002] EWCA Civ 1588 where the Court of Appeal found that the band of reasonable responses applied to the investigation carried out by an employer in the same was as it applied to the decision to dismiss.

53. It was accepted that best practice had not been followed by the respondent in failing to take minutes of the meeting with claimant at which he was presented with the allegations against him and suspended, but that this should be viewed in the context of the wider procedure. Mr Jones submitted that when viewed as a whole, the investigation was within the band of reasonable responses.

54. Reference was made to a number of other case including **Shrestha v Genesis Housing Association Limited** [2015] EWCA Civ 94 when

considering the adequacy of the investigation and in particular the failure of the respondent to interview the witnesses highlighted by the claimant.

55. Mr Jones submitted that while the claimant's length of service was a factor which was considered by the respondent, the case of **London Borough of Harrow v Cunningham** 1995 WL 1082932, was authority for the proposition that in cases of serious misconduct length of service will not save the employee from dismissal.

56. Mr Jones also invited the Tribunal to dismiss the claim of breach of contract on the basis that the respondent had a reasonable belief in the claimant's misconduct but also that he was in fact guilty of misconduct. In the alternative, the Tribunal was invited to find that the claimant was in repudiatory breach of contract by breaching an express term of the contract in relation to overtime.

57. Turning to remedy, it was submitted that even if the Tribunal found that there were any procedural irregularities which rendered the dismissal unfair, any compensation should be reduced by 100% on the basis of the case of **Polkey v AE Dayton Services Limited** [1987] UKHL 8, which considered the circumstances in which a dismissal would have taken place had a fair procedure been followed.

58. The respondent also submitted alternatively that any compensation which might be awarded ought to be reduced by 100% on the basis that the claimant had contributed to his dismissal.

59. On behalf of his brother, Mr Sim made relatively brief submissions. He submitted that dismissal was prejudged and that therefore it was unfair in terms of section 98(4) of the Employment Rights Act and also taking account of the ACAS Code of Practice.

60. Mr Sim also criticised the investigation which took place and highlighted inconsistencies in statements which were taken during the investigation. He said that there were procedural irregularities throughout the process and that the decision to dismiss had been perverse.

Relevant Law

61. Section 98 of the Employment Rights Act 1996 sets out the potentially fair reasons for dismissal. This includes the conduct of an employee which is a potentially fair reason for dismissing an employee.

62. Section 98(4) deals with the issue of whether or not, having established a potentially fair reason for dismissal, the employer had acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.

63. A Tribunal is also required to have regard to the ACAS Code of Practice on Discipline and Grievance procedures in considering whether a fair procedure was followed.

64. It is well established that in determining the fairness or otherwise of a conduct dismissal the case of **British Home Stores v Burchell** [1980] ICR 303 remains relevant. A Tribunal is required to consider:

    a. Did the employer genuinely believe the claimant to be guilty of the misconduct alleged;

    b. If so, were there reasonable grounds on which to sustain that belief and

    c. At that point, had the employer carried out as much investigation as was reasonable in the circumstances.

65. The Tribunal is also mindful that it must be careful not to substitute its own view as to the fairness or otherwise of a dismissal. In particular, it is not the role of the Tribunal to consider whether it would have concluded on the evidence before it that dismissal was the appropriate sanction. Rather, the Tribunal should consider matters from the viewpoint of the respondent and the information before it at the relevant time.

66. Even if a Tribunal finds that a dismissal was unfair then that is not the end of the matter. There are a number of bases on which a Tribunal can reduce the

compensation which it would otherwise have awarded a claimant in these circumstances.

67. In this first instance, a Tribunal may reduce compensation on the basis of **Polkey** that had a fair procedure been followed, the claimant would have been dismissed in any event.

68. Further, a Tribunal may conclude that a claim contributed to his dismissal, but virtue of his conduct being in some way blameworthy or culpable.

69. The test for the question of wrongful dismissal, which is a breach of contract claim, is rather different. This is a common law rather than statutory test and must be considered separately from the question of unfair dismissal.

70. In this regard, a Tribunal is required to consider as a matter of fact and on the balance of probabilities and taking into account the context, whether the employee's actions constituted a repudiatory breach of contract, entitling the employer to dismiss summarily. This is an objective test based on the evidence before the Tribunal.

Discussion and Decision

Unfair dismissal

71. In addressing the question of unfair dismissal, the Tribunal concluded that the respondent had a genuine belief in the misconduct of the claimant. It was necessary therefore to consider whether the respondent had reasonable grounds on which to sustain that belief and carried out as much investigation as possible in the circumstances. This also required the Tribunal to consider the reasonableness of the procedure adopted by the respondent.

72. The Tribunal had a number of significant concerns in relation to the procedure adopted by the respondent in relation to the dismissal of the claimant. The Tribunal was mindful that the respondent is a very large employer with significant resources and a dedicated People team to provide advice and support.

73. In the first instance, the Tribunal was extremely surprised that no record was taken of advice provided to managers by members of the People when this concerned issues of potential gross misconduct and that therefore there was no record of the call Mr Currie made to the People or the advice he received. This was particularly surprising given that Mr Currie had only recently taken on the role of General Manager and his evidence was that it was the first occasion on which he had suspended a member of staff.

74. Secondly, the initial meeting with the claimant was entirely unsatisfactory in a number of respects. It was clear to the Tribunal that this was in fact not only an investigatory meeting, but that the claimant's manager reached a conclusion in relation to the claimant's guilt prior to the meeting taking place.

75. Thirdly, there was no note taken of that meeting and the claimant was not advised in advance of the nature of the meeting. While there is of course no statutory requirement that an employee be entitled to be accompanied at a meeting of this nature or be advised in writing in advance of the nature of the meeting, the Tribunal was of the view that this meeting was crucial in determining the fairness of the future procedure.

76. Moreover, while Mr Currie did produce a 'note' of the meeting, it was not clear when this 'note' was produced, given that it was not dated. There was no effort to determine whether the claimant agreed with the content of the note.

77. The Tribunal also concluded that this note was entirely contradictory with Mr Currie's subsequent version of events given to the respondent during the appeal process, where he said that he had not spoken to Mr Lindsay about the claimant's overtime claims.

78. Fourthly, the evidence before the Tribunal was that the People team had understood that Mr Currie had carried out the investigation into the allegation against the claimant, whereas Mr Currie's clear evidence was that the People team carried out the investigation.

79. It was said by the respondent that little weight should be placed on these matters as Mr Currie was not responsible for making the decision to dismiss

the claimant. It was also suggested that it was not material if there was confusion over who was responsible for the investigation as further investigations were carried during the disciplinary process.

80. The Tribunal could not accept these submissions. In particular, the Tribunal was mindful that Mr Currie expressed a clear view as to the guilt of the claimant before the claimant had been given a reasonable opportunity to properly consider the allegations. This view was committed to writing and sent on to the member of the People team who had originally given him advice to speak to the claimant and find out what the position was. The Tribunal concluded that in these circumstances, this meeting was fundamentally unfair. In addition, Mr Currie recorded statements allegedly made by the claimant in response to those allegations which were subsequently disputed by the claimant.

81. It is acknowledged that further investigations were carried out by the respondent before reaching a decision but these were carried out after the first stage of the disciplinary hearing.

82. Sixthly, at no stage were the witnesses highlighted by the claimant contacted. The respondent indicated that they were not willing to interview witnesses who would only be character witnesses. However, by failing to find out more about what relevance these witnesses might have, given their relevance was dismissed out of hand, the respondent acted unreasonably.

83. The Tribunal formed the view that the manner in which the initial meeting was conducted with the claimant was so fundamentally unfair that it coloured the subsequent proceedings.

84. Seventhly, the Tribunal was extremely surprised that given the resources of the respondent, there was no clarity between Mr Currie and the People department as to who had carried out the relevant investigations. Of more concern in this regard, Ms Carr had given Mr Currie advice on what to do in relation to his concerns, and was then advised that Mr Currie was satisfied that the claimant was guilty of allegations, and indeed that the claimant had

(according to Mr Currie) admitted that guilt. Ms Carr was then the person responsible for determining the outcome of the disciplinary hearing. While it was accepted that Mr Currie did not directly seek to influence that decision, given her previous involvement and the unambiguous view of Mr Currie which was communicated to her, the Tribunal was of the view that Ms Carr, although she clearly believed she was being impartial, could not in fact be impartial when dealing with the disciplinary hearing. There was no evidence before the Tribunal to indicate why Ms Carr had been responsible for giving the initial advice and then chaired the disciplinary hearing itself. Given the size and resources of the respondent, the Tribunal concluded that another member of the People team ought to have dealt with taking the matter forward.

85. The Tribunal concluded that in these particular circumstances, the procedure followed was unfair and was not within the band of reasonable responses.

86. The Tribunal went on to consider whether the appeal hearing cured the procedure unfairness which had occurred. It concluded that it had not. In particular the Tribunal bore in mind that there was no effort on the part of the respondent to clarify the clear inconsistencies between the information provided during the appeal process by Mr Currie and his original note of how the allegation against the claimant had first arisen and been dealt with. In any event, the note of this conversation was not provided to the claimant for comment prior to a determination being made.

87. In all of these circumstances, the Tribunal found the that claimant's dismissal was unfair.

88. The Tribunal then went on to consider whether the claimant would have been dismissed in any event had a fair procedure been followed. The Tribunal concluded that there was a 100% likelihood that claimant would have been dismissed. The Tribunal therefore concluded that in terms of **Polkey** no compensation would be awarded to the claimant.

89. In any event, the Tribunal concluded that the claimant had contributed to his dismissal to the extent of 100%. The claimant had been responsible for

authorising his own hours in the past, however the Tribunal concluded that the claimant ought to have been aware that in authorising over time hours over time over a period of months, particularly when a new General Manager was responsible for the running of the branch, without raising this with any manager at all, that this was likely to be seen as misconduct on his part.

Breach of contract

90. The Tribunal then turned to the consideration of wrongful dismissal. In the first instance, the Tribunal considered the issue of whether or not the claimant's breach of contract in relation to failing to obtain agreement prior to working overtime hours amounted to a fundamental breach of contract. It concluded that this was not a fundamental breach of contract. The Tribunal was in particular mindful of the claimant's unchallenged evidence that in his previous role he was responsible for approving his own overtime hours. Therefore, while on the face of it, the claimant's actions may have amounted to a breach of contract, in fact there was a custom and practice whereby the claimant had approved his own overtime hours. In any event, the Tribunal was of the view that this did not amount to fundamental breach of contract.

91. The Tribunal also considered on the basis of the evidence before it, and on the balance of probabilities, whether the claimant's actions amounted to a repudiatory breach of contract. The claimant accepted in retrospect that he should have sought approval for the overtime hours he approved. However, the claimant had in the past approved his own overtime hours without objection.

92. In these circumstances, the Tribunal concluded that the claimant had been wrongfully dismissed and ordered the respondent to pay the claimant in lieu of the notice pay to which he would have been entitled which amounted to 12 weeks' pay, at £10.91 per hour and on the basis of a 39 hour working week, amounting to the sum of £5,105.88.

Employment Judge: A Jones

Date of Judgement: 24 June 2019

Entered in Register,

5 Copied to Parties: 27 June 2019

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