EMPLOYMENT TRIBUNALS

Claimant: Mr A Porter

Respondent: Healthmatic Ltd

Heard at: Birmingham (by CVP) **On:** 18 September 2020 and 12 October 2020 in chambers

Before: Employment Judge Miller

Representation

Claimant: In person
Respondent: Mr J Ellison (consultant)

RESERVED JUDGMENT

1. The claimants claim of breach of contract for failure to pay notice pay is unsuccessful and is dismissed.

2. The claimant's claim for breach of contract for failing to pay expenses is successful. The respondent shall pay the claimant the sum of £36.

REASONS

Introduction and issues

1. The claimant was employed by the respondent, a company that designs, builds, and manages public toilets on behalf of public authorities, as a business development manager. His employment started on 1 May 2019 and continued until his dismissal with immediate effect on 10 December 2019. The claimant started the early conciliation process with ACAS on 5 March 2020 and the early conciliation certificate was issued on 3 April 2020. On 9 April 2020, the claimant brought a claim of breach of contract in respect of the failure to pay his notice pay and an outstanding expense claim £36 against the respondent.

2. The claimant does not dispute that the respondent was entitled to dismiss him, but he says that he was entitled to his notice pay and the payment of expenses on the termination of his employment.

3. The respondent says that the claimant is not entitled to notice pay because he was dismissed for gross misconduct, and it says that the expenses payment was not due because it was for a parking penalty, rather than a business expense.

4. I clarified the issues with the parties at the outset of the hearing. They are

    a. did the claimant's actions amount to gross misconduct and particularly did they amount to a fundamental breach of his contract of employment such that the respondent was entitled to treat the contract as repudiated?
    b. On what contract term(s) does the respondent rely?
    c. Did the claimant act in breach of that or those contract term(s)?
    d. was that breach fundamental?
    e. What was the claimant's claim expenses of £36 for and did the claimant have a contractual entitlement to have his expense of £36 reimbursed?

5. If the claimant's claims are successful, how much compensation should be awarded by way of damages?

The hearing

6. The hearing was conducted remotely by video link. The claimant represented himself and gave evidence. The respondent was represented by Mr Ellison and I heard evidence from Mr Piers Dibben, the respondent's owner and sales director; Mr Martin Fearon, the respondent's general manager; and Mr Malcolm Holt, a senior business development manager. Each of the witnesses had provided a witness statement which I read in advance and I was provided with an agreed bundle of 121 pages. Two further documents were admitted into evidence, namely an additional page from the respondent's disciplinary policy relating to conduct and a document called "Alistair opportunities since 1 May 2019" which was a table of cases and information at the respondent said the claimant had failed to upload onto its shared drive.

Findings

7. The claimant commenced work with the respondent on 1 May 2019. His job involved, as I understand it, generating sales leads and following up on those sales.

8. On the same date Mr Dibben sent the claimant an email attaching a copy of his employment contract and the employee handbook. The claimant agreed that he received that email and attachments. The contract of employment provides at paragraph 18 that between one month and five years continuous service the claimant will be entitled to one month's notice of termination of employment. This provision was uncontroversial.

9. The handbook (including the late added page) included the following rules which are set out in full.

> "Outside activities and other employment.
> You are not permitted to engage in any activity outside employment with the company that could reasonably be interpreted as competing with the company. You are required to seek permission from management before taking on any other employment while employed by the company unless you are on a zero hours contract.
>
> Property and equipment.
> You are not permitted to make use of company or third parties' telephone, fax, postal or other services for personal purposes."

10. I find that the claimant received this document including those paragraphs on 1 May 2019 and he had the opportunity to read it.

11. Shortly after his commencement, the claimant had a two-day induction period. The claimant agreed that this included some site visits, being shown how to use the systems and a brief overview of the respondents work practices. The claimant formal training or practice on the use of the respondent systems. I find that the claimant did have an induction and he was shown how to use the systems.

12. Around August 2019, Mr Dibben says that the respondent became aware that the claimant was not following the correct processes when planning or recording his sales appointments. These processes required him to put his appointments in a shared Outlook calendar and to record details of his files and meetings on a shared drive accessible by the respondent.

13. Mr Dibben referred to some specific examples of issues that had arisen as a result of the claimant's failure to follow the respondent's process. Particularly there was an email chain extending from 2 August 2019 to 13 August 2019 in which the claimant had been copied into a conversation with a potential client on 2 August 2019 which concludes "I'm away next week, but Alistair and Andy are both CC'd on this email can help with all things commercial and practical". This is followed up by an email on 13 August 2019 from Mr Dibben to the claimant saying "hi Alistair could you pick up Ventnor now please. I CC'd you on last reply, we just need to plan next move. Thanks". Mr Dibben says that this is an example of concerns raised by clients as a result of claimant's actions.

14. It was put to the claimant this was evidence of him not following up on clients and having to be chased to do so.

15. The only other example I was shown related to Stoke Mandeville parish council. I was shown another email trail in which on 21 October 2019 the clerk to the council wrote to Mr Dibben to explain that the claimant had been to see him the previous week, they had a constructive discussion and that the claimant had hoped to get figures to him by the end of that week. The clerk clearly had not received anything, and it appears that he did not have the claimant's email address. Again, the respondent relies on this as an example of the claimant failing to progress his sales.

16. Mr Dibben said that the respondent had started to receive a number of issues being raised by clients about the claimant having constructive meetings then failing to follow up on it. When challenged about the fact that none of these issues were raised formally, Mr Dibben said that that was not the culture of the organisation. They discussed matters informally on a regular basis with the claimant. The claimant denied this.

17. I prefer Mr Dibben's evidence on this point. I accept that there would have been a number of informal ongoing conversations between the claimant and Mr Dibben and other employees of the respondent. I also accept that there may have been other clients contacting the respondent to chase up progress on claimant sales.

18. It is apparent that the respondent chose to deal with these issues informally at this stage and I conclude that they felt they were issues that could be resolved by discussion with the claimant. Had they considered them to be serious conduct matters, they would have approached the claimant formally before this point and the word at the very least be a record of these complaints. None of the respondent's witnesses were able to provide any more detail about specific complaints that they had received during this period.

19. On 21 October 2019, the claimant had a meeting with Mr Fearon. This meeting was at a service station on the M6. Mr Fearon says that the purpose of the meeting was to discuss concerns that have been raised with him by Mr Holt and Mr Dibben informally already. There are no notes of this meeting. It was agreed that this was an informal meeting, although Mr Fearon was clear that it was for work purposes. He said the purpose of the meeting was to discuss concerns that had been raised with the claimant by Mr Holt Mr Dibben informally previously. He said that he reiterated with the claimant the importance of the procedures making sure that they are followed.

20. Mr fear on the statement says that the claimant implied in that meeting that Mr Dibben and Mr Holt did not have the right to question his behaviour. The claimant disputed that and said that actually he took issue with some particular criticism from Mr Dibben about him being late on one occasion. Mr Fearon agreed that he may have paraphrased, but he was inferring that from the claimant's actions. Mr Ferron's evidence was that the main reason for the meeting was to find out if there is any underlying reason to explain the claimant's lack of diligence around procedure.

21. On 24 October 2019 Mr Holt wrote to the claimant. This email was sent following a failed catch up. Mr Holt said that in this meeting they discussed the claimant's diary entries as well as his use of the respondent's Matmax system. The email records that, as far as is relevant,

> "we spoke about how Matmax needs be kept up-to-date at all times all visits need to be put on their relevant conversations or any correspondence needs be added to the notes. We spoke about making sure all opportunities are put onto Matmax and are kept up-to-date and relevant. We spoke about how quotations should have the Matmax

opportunity ID as a reference that all quotes need to be saved onto the relevant Council in dropbox."

22. I find that both Mr Holt and Mr Fearon raised on these occasions with the claimant the importance of recording his work properly on their system. The claimant reported that these were not formal meetings and he received no warnings or any indication that a failure to comply with these processes could result in any serious sanction, let alone dismissal. I find that, at this point, there was no intention to sanction the claimant in respect of this. The respondent was clearly trying to get the claimant to adhere to its processes.

23. During this period, Mr Dibben had been monitoring the claimant's use of the dropbox and Matmax facilities and he was still unhappy with the claimant's compliance with procedures. He therefore sent an email to the claimant on 6 November 2019. I set it out in full:

Hi Alastair - good job today and the area has huge potential. Enclosed is a quote that went to Minehead earlier this year which can be doctored. Also a multiple quote for south Ayrshire.

With regards to the first conversation, I am asking that by 25th Nov, you will have all your notes and opportunities in Matmax, and all quotes in Dropbox. If you have any queries as to how any of this works then you must say so please and we will get you more training on it. Your diary should planned not reactive please — and meetings or telephone calls should be followed up promptly. I really don't want one more "Could you ask Alastalr to come back to me" email or conversation. You are part of a team, not a lone wolf and we all can contribute or be helped with any site, council or technical issue.

I hope that the op for your wife goes to plan next week and please book all the time off that you need to. The above is not about the immediate, and nothing is more important than home.

24. This email is clear, and I find, that Mr Dibben was becoming frustrated with the issues the claimant was causing with clients by this point. It is equally clear that Mr Dibben is requiring the claimant to input all of his notes and relevant information onto the respondent's systems by 25 November 2019. I agree with the claimant's view, however, that this was a clear deadline – 25 November. There was nothing in there about the claimant having to do anything sooner than then.

25. Mr Holt had made it clear in his email of 24 October 2019 that the claimant must use Matmax and a shared diary from then, but this email of 6 November in my view, is giving the claimant a clear deadline by which to finally bring all of his work up to date. I accept the respondent's position that this three-week grace period was given in recognition at least in part of the fact that the claimant's wife was in hospital around this time. It was reasonable to give this period and this deadline. The claimant was entitled to take this at face value and use the three week period to get his files up to date.

26. Mr Dibben and Mr Holt then decided to check the drop box on a weekly basis to ensure that the claimant was uploading documents. While monitoring the Dropbox it came to Mr Dibben and Mr Holt's attention that the claimant had uploaded documents that they thought suggested that the claimant had been undertaking work for someone else other than the respondent. These were specifically said to be "a letter of authority for the Claimant to act as a consultant on behalf of mainland energy, numerous photos of energy meters taken on his company mobile phone and copies of messages between the Claimant and other energy consultants discussing contracts". I was taken to copies of these documents.

27. The claimant was required to attend an investigatory meeting with Mr Holt and Mr Fearon on 29 November 2019. This was held at a café in Birmingham New Street Station. At this meeting, two issues were addressed. The first was the respondent's view that the claimant was still not complying with their procedures. The second was the respondent's concerns that the claimant was working for a third party.

28. The claimant was not shown the documents at this meeting, but Mr Fearon said that they were described to the claimant. The claimant's explanation was that he had helped set up Decorum Energy for a friend in 2017 and he was helping his wife with her company, Mainland Energy, as she was then too ill to deal with all the work. Mainland Energy he said, was his wife's company. Each of the arrangements to which the documents referred were, the claimant said, informal arrangements with friends or family.

29. In respect of the uploading of the documents, the claimant said that the schedule of files on which the respondent was relying was as at 22 November and in fact he had uploaded the documents on 23 and 24 November. The claimant was suspended at this meeting pending an investigation. This was confirmed in writing in a letter dated 2 December 2019. The allegations were:

    - Failing to follow the correct procedures for recording, managing and quoting sales opportunities. in contravention of company policy and direct instruction. Having a detrimental effect on the business.

    - In Working as an Energy Consultant for another business without the permission or knowledge of Healthmatic.

    - Using company equipment to carry out business activities for another without the knowledge or permission of Healthmatic.

30. The final allegation related to the use of the company phone, presumably to take the photographs and make and receive calls relating to the energy contracts matters.

31. During the suspension, the claimant's work telephone number was transferred to Mr Holt. He said in his witness statement that he received a number of calls form people asking about the claimant's work with Mainland Energy. However, when giving evidence he confirmed that in fact he had had one call form the claimant's landlord during that period. The claimant

said he did not know what that call was about, although he did say that since his employment had ended he had assisted his landlord with an energy matter for a hotel his landlord had acquired.

32. Mr Holt said that he received three further calls on the claimant's work phone number after the claimant had left enquiring about Mainland Energy matters. The claimant said that probably someone else had given those people his work telephone number.

33. On 9 December 2019, the claimant attended a disciplinary hearing. There are brief notes of that hearing in the bundle. The meeting was conducted by Mr Fearon and Mr Holt. The claimant said that the documents the respondent said had been uploaded to Dropbox were not shown to him until he received the Tribunal bundle with the exception of one Letter of Authority and the document called "Alastair Opportunities Since 1st May 2019" which had been sent to him with the invitation to the disciplinary hearing which was sent on 2 December 2019.

34. Mr Fearon said that in fact all the documents now relied on as showing that the claimant was working for someone else had been presented as a hard copy at the disciplinary meeting he said he remembers the claimant saying he couldn't say where they had come form or how they had been uploaded. He specifically refers to the photographs of electricity meters. The claimant says there is no record of this in the minutes.

35. In fact, at paragraph 9, there is a reference to the photographs and the claimant says they must have been sent to him and he was unsure where the meters were located. I prefer the evidence of Mr Fearon. It is consistent with the contemporaneous record. I find that the claimant was shown pictures of the electricity meters at the disciplinary hearing.

36. The other documents relied on by the respondent as showing that the claimant was conducting business other than the respondent's are:

    a. A letter of authority dated 1/11/2019 which is headed "letter of authority for Alistair Porter t/a Mainland" authorising the claimant to obtain energy quotes for Banks Devlin. The claimant said he did do work for Banks Devlin but received no payment. It was in payment, in effect, for legal services they had provided him with previously

    b. A letter of authority dated 22 Octoebr again authorizing the claimant trading as Mainland Energy to obtain energy quotes for "Sizzlers Kebab and Pizza House"

    c. Some text messages relating to FabGem, which the claimant said was his wife's company, including one which refers to commission and the claimant getting paid. Mr Dibber said these went back as far as September and it did not appear to be disputed by the claimant.

37. The claimant said, at the disciplinary hearing and to the tribunal, in respect of the allegations about Banks Devlin that he had helped his wife arrange a quote for the firm and, as she had not been able to do it and the firm had

done legal work for him in the past (2013) he helped his wife with the admin work. He said he needed to use a trading name to get the business quotes.

38. In respect of the other documents, the claimant said, effectively that the messages were innocuous, and he did not know anything about the photographs. The claimant did not provide any credible explanation for the letter of authority or Sizzlers Kebabs and Pizzas.

39. The claimant said that he offered evidence in the form of a thumb drive to the disciplinary panel but they did not access it. Mr Fearon said that he did not need to access it – he accepted the claimant's explanation that he was working for Banks Devlin without payment of cash but in return for legal services.

40. I find that the claimant was undertaking work on his own account as Mainland Energy while he was employed by the respondent. The documentary evidence is compelling, and the claimant did not offer a convincing explanation. Further, I find that the respondent did not know or sanction this. Mr Dibben agreed that the claimant had told him previously that he had an expertise in energy procurement, but I accept Mr Dibben's evidence that this is not the same as working as an energy consultant at that time.

41. In respect for the failure to comply with processes, this was also considered at the disciplinary hearing. The evidence from all the respondent's witnesses was that the claimant had taken some steps towards complying with the process, but they were not adequate. I accept this evidence. As Mr Dibben said, it would be difficult to make notes of a meeting 4 months after the event, and this is the reason the detail of the claimant's work was not uploaded as requested on to Dropbox.

42. However, I do not accept Mr Fearon's evidence that the claimant was required to have done a substantial amount of the work before 25 November. As the correspondence referred to above makes clear, the 25 November was the final deadline to get everything up to date. It might have made sense to start doing it before then, but it was not required and the claimant could not be criticized for not doing it in advance of the deadline.

43. In respect of the use of work devices, it follows form my findings above that the claimant was using his work mobile phone to conduct Mainland Energy business. The claimant agrees that he used it for personal use, but I find that it went further than this and he used it to conduct his mainline business.

44. The claimant appealed against the decision to dismiss him. He made the same points again and the appeal was not upheld. He did not attend the appeal but nothing relevant turns on that issue.

45. The respondent produced evidence that the claimant incorporated a company on 21 January 2020 in the name of Mainland Energy which the claimant did not deny. He said that this was after his employment so is not relevant. I do not agree. It adds weight to the respondent's case, and my findings, that the claimant was operating a business in the name of Mainland Energy during his employment with the respondent.

46. There was no evidence as to the amount of time that the claimant was spending during working hours working on Mainland Energy. Mr Dibben said that what it meant in reality was that the claimant was focusing on his business and not the respondent's which must have accounted for his failure to comply with processes and follow up clients. He also said that the claimant's LinkedIn profile recorded the claimant as working part time for the respondent when in fact he had a full time contract.

47. I find that this was in fact the case. The evidence demonstrates that the claimant was working on his energy business, he was failing to fulfill company processes and he was not following up customers.

48. Finally, in respect of the parking cost, the claimant gave evidence that he had paid £36 for parking during work time. The claim was consistent with his expenses request and his bank statement. There was no evidence to suggest this was a parking fine. I therefore find that the claimant incurred £36 in expenses in November 2019 while working for the respondent which has not been paid.

Law

49. Outside of unfair dismissal law, an employer is entitled to dismiss an employee on notice. The amount of notice they must ive is the greater of that set out in the contract of employment or that provided for in section 86 of the employment rights act 196. The statutory minimum notice for an employee who has worked for between one and 2 years is one week. If the contract of employment provides for more than this, then the contractual terms will apply.

50. An employer is entitled to dismiss an employee without the minimum notice (whether contractual or statutory) of the employee is guilty of gross misconduct or if there has been repudiatory breach by the employee of the implied term of mutual trust and confidence. The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is a 'question of fact for the tribunal of fact'. It a highly context-specific question. The legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract. (Tullett Prebon PLC and others v BGC Brokers LP and others [2011] IRLR 420).

Conclusions

51. In my judgement, having regard to all the facts I have found, the claimant was, by conducting his own business in such a way that he was using the respondent's resources to do so and failing to properly apply his time and effort to the respondent's business acting in a repudiatory breach of the implied term of trust and confidence.

52. Applying the test in *Tullett Prebon*, the claimant had shown an intention to abandon and fail to properly perform his contract of employment. He was

not acting in competition with the respondent, but his focus lay on his own business.

53. In respect of the expenses claim, it was not disputed that the claimant was contractually entitled to be paid expenses incurred. I have found that the claimant did legitimately incur parking expenses of £36 and the respondent has not shown any good reason for not paying them. I find therefore that the respondent acted in breach of contract in failing to pay these expenses and the claimant is awarded £36.

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Employment Judge **Miller**

12 October 2020

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS