



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100537/2020

Held in Glasgow by CVP on 18 September 2020

Employment Judge: Rory McPherson

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Mrs A Bovill

**Claimant
In Person**

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15:17 Ltd

**Respondent
Represented by
W Laing
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that;

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1. The claimants claim for wrongful dismissal does not succeed; and
2. The claimants claim of notice pay does not succeed; and
3. The claimants claim in respect of holiday pay does not succeed; and
- 35 4. The claimants claim in respect of unauthorised deductions and car allowance do not succeed.

REASONS

E.T. Z4 (WR)

Introduction**Preliminary Procedure**

1. This Final Hearing was appointed to take place by Cloud Video Platform (CVP) by Case Management Preliminary Hearing on 22 May 2020 with written witness statements. The Note following that Case Management Hearings set out at para 20: *“The Tribunal may give little or no weight to the statement of a witness who does not attend the hearing in person to verify that statement on oath or affirmation and to be cross examined”*.
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- 10 2. Further and Better Particulars were issued for the claimant on 26 June 2020 and for the respondents on 24 July 2020.
- 15 3. Unsigned witness statements which were spoken to for the claimant were that of the claimant and Mr David V Baker. Unsigned witness statements produced but not spoken to, for the claimant, were from David Gillespie (dated 30 July 2020), Wayne Bradley (dated 11 August 2020) and Lee McCann (dated 12 August 2020) and Mandy Murdoch (13 August 2020).
- 20 4. Unsigned and undated witness statements spoken to for the respondent were those of Linsey McIlwraith and Mercier Mainwaring. Unsigned and undated witness statements produced but not spoken to, for the respondent, were from Tracey Middleton and Ted Ward.
- 25 5. Following the Hearing oral judgment was issued, subject to a request that written reasons be provided. That request having been provided timeously by the claimant written reasons are set out.

30 Findings in fact

6. Mr Mainwaring is the sole shareholder of 15.17 Ltd which he set up in February 2019 and which, at the material time operated as a department

store in Ayr. He has known Ms Bovill for around 30 years. Until November 2020 Ms Bovill had a good relationship with Mr Mainwaring.

- 5 7. Mrs Bovill was employed as Head of Stores at the respondents Ayr store premises from Sunday 2 June 2019 to Tuesday 9 November 2019.
- 10 8. The claimant's effective manager was Mr Ward. It was a matter of agreement that Mr Ward is not presently permitted to act as a director. The claimant once she had joined the respondent company in 2020, was aware of those restrictions in relation to Mr Ward.
9. Ms McIlwraith was at the material time the store manager for the respondents' Ayr Store.
- 15 10. The claimant signed a written contract with the respondents on Monday 27 May 2019 (the May 2019 contract).
11. The May 2019 contract provided for 3 months' notice (para 11).
- 20 12. While the May 2019 contract provided for the provision of a car, the claimant had not at the material time been provided with a car.
- 25 13. The contract (clause 10.3) provided for 34 holiday days per year. There was no contractual term, whether express or implied by any custom and practice that where an employee worked on a public holiday that employee was entitled to a day of in lieu. Clause 5.1 stated "*Our standard working hours are flexible Retails hours on weekday and weekends except holidays and public holidays but you will also work such further time as the busines of the Company may require*". Clause 19.2 provided that any variation of the contract required to be made in writing and signed by both parties. There was no such variation signed by both parties.
- 30 14. As at the date of termination, the claimant's accrued holiday entitlement was 14.5 days. As at the date of termination, the claimant had taken six days from

Wednesday 12 June to Wednesday 19 June 2019 and ten days from Friday 27 September to Thursday 10 October 2019.

- 5 15. Mr Ward advised that the claimant, in WhatsApp messages, that (consistent with the May contract) the claimant would have a car and that the company would provide a company car on Sunday 1 September 2020. The claimant in WhatsApp message identified that she identified the car she wished to have was a Mercedes G class. The company did not provide any company car.
- 10 16. Mr Ward further advised Ms Bovill in WhatsApp message that he had asked the Director Mr Mainwaring that the respondent increase the claimant' salary to £50,000 from Sunday 1 September 2020 and that the Director Mr Mainwaring should confirm the increase to her. The Director Mr Mainwaring did not confirm the increase to the claimant. The company did not increase 15 the salary from 1 September 2020 or at all.
- 20 17. The claimant's partner Paul died suddenly and unexpectedly on **Monday 28 October 2019**, having collapsed while at the claimant's home. Those events took place shortly after the claimant and her husband had returned from a holiday. Following upon **Monday 28 October 2019** the claimant took leave of absence.
- 25 18. The claimant was due to receive her full monthly pay on **Thursday 31 October 2019**. Owing to cash flow issues which had occurred in the company, there was a delay in the employees being paid their salary on time including the claimant who was due to be paid £3,750 (after tax). The claimant made contact with the company by e-mail late on Thursday 31 30 October 2019 expressing concern and Mr Ward responded intimating that the company was encountering financial difficulties committing that the claimant would be paid in stages.

19. The claimant in her written statement set out “*two weeks before my husband died, we were on holiday. The holiday was ruined because I was worrying about the £2,500 owed to me*” criticised the company.

5 20. On **Friday 8 November 2019** the claimant attended the respondents store for the purpose of taking money from the store towards her outstanding October 2019 pay. She took £900 from monies held within the shop toward the outstanding October monthly pay, leaving a balance due of slightly in excess of £1,000.

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21. On **Saturday 9 November 2020** the claimant again attended the respondent’s store in the late afternoon, the purpose of doing so was to obtain the balance of salary from cash held within the shop (held within the till and the safe).

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22. At or about the time of her arrival at the shop she met with Ms McIlwraith who was store manager but was in junior role to that of the claimant. Ms McIlwraith advised the claimant that she should not take monies from the till. The claimant disregarded this statement and removed approximately the cash from the till in the region of £520.

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23. The claimant thereafter demanded that Ms McIlwraith provide access to the shop safe held within the shop’s then locked cash room. Mr Ward (who was located elsewhere) advised that the claimant could not take those monies from the till. On not being given access the claimant telephoned Mr Ward herself.

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24. In a heated exchange Mr Ward intimated that she could not have these further monies (from the safe). This was followed by a series of WhatsApp messages, Mr Ward intimated that the monies held in the safe was to cover cheques and intimated that she should liaise after the following Monday and from the Wednesday to Friday she would receive the balance of the monies. The claimant responded indicating that she required the money that day. In a further exchange the claimant insisted she should be given the money or

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she would go to the police. The claimant had lost her temper and her response was inflammatory and was intended to intimidate Mr Ward against the background of Mr Ward's status as someone who was not permitted to operate as a director and further against the express statement that the monies held in the safe were allocated to outstanding liabilities (cheques).
5 Mr Ward responded take the money but that she was fired.

25. At the conclusion of the call to Mr Ward the claimant advised Ms McIlwraith that Mr Ward had advised that if she took the money from the store, she would be fired, and insisted that she be provided with access to the money held which the claimant thereafter took to the value of the outstanding monies owed. Ms Bovill had recorded aspects of the call with Mr Ward. No recording or transcript was provided to the Tribunal.
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15 26. It is the Tribunal finding that during this period on **Saturday 9 November 2019** the claimant acted in an intimidating and threatening manner to Ms McIlwraith.

27. It is the Tribunal's finding that the claimant in her communications with Mr Ward on **Saturday 9 November 2019** lost her temper and acted in an intimidating manner to Mr Ward. The claimant took that part of Mr Ward final statement that she was permitted, additional to money she had that day taken from the till, to take the balance of outstanding monies from the cash room, which she did. That statement was not made in isolation.
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25 28. The respondents summarily dismissed the claimant for gross misconduct which was communicated in the telephone call from Mr Ward.

29. Mr Mainwaring confirmed the dismissal by letter dated 6 December 2019 and which set out the opportunity to appeal. That letter described unauthorised removal of monies from the respondent's cash tills on 9 November and abusive and intimidating behaviour toward store staff and management on 9 November.
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30. The claimant appealed and attended an appeal hearing conducted by a third party following upon which the claimants appeal against dismissal was not upheld.

5 31. The claimant was not entitled to additional holidays for having worked additional days. On the available information I am satisfied that by the date of termination, the claimant had taken the full 16 days holidays which would have been otherwise due.

10 **Submissions**

32. Written submissions were provided by the claimant supplemented by oral submissions. Those submissions set out that

- a. the claimant was entitled to 3 months' notice pay as set out in the contract.
- 15 b. The claimant was authorised by Mr Ward to remove her outstanding monies which were (by then) 10 days late,
- c. the claimant in her submissions accepts that she lost her temper with Mr Ward which she says was in response to aggression from Mr Ward. The claimant denies that she was aggressive to the shop staff including Ms McIlwraith.
- 20 d. in relation to **Gross Misconduct** makes reference to **Sandwell & West Birmingham NHS Trust v Westwood** UKEAT/0032/92 (**Sandwell**) at para 113 in which the EAT summarised that what amounts to gross misconduct involves deliberate wrongdoing or gross misconduct and found that it involves deliberate wrongdoing or gross negligence. In case of deliberate wrongdoing, it must amount to wilful repudiation of the express or implied terms of the contract (referencing **Wilson v Racher** [1974] ICR 428 (**Racher**)).
- 25 e. In relation to **Wrongful Dismissal** the claimant set out that it was for the Tribunal to assess whether the claimant committed an act of
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gross misconduct. It was submitted that an on the spot dismissal was only appropriate in very limited circumstances. It was submitted that the circumstances did not amount to gross misconduct. It was submitted that the terms of the contract permitted a discretion to make a payment in lieu of notice and reference was made to **Cerberus Software Ltd v Rowley** [2001] ICR 376 (**Rowley**). Further it was argued that the claimant was entitled to 3 months' notice and that the claimant was entitled to a pay rise to £60,000 based on e-mail from Mr Ward set out in paragraph 16 above.

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f. The claimants written submissions from paragraph 4.1 to 4.8 are in effect in relation to Mr Ward's status having regard to the Companies Directors' Disqualification Act 1986, (the 1986 Act).

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g. In relation to Holiday Pay the claimant asserts that a custom and practice existed in retail trade generally and applied in the respondents whereby if someone worked beyond 5 days that person would take back the time that was owed (this being understood to be a description that they would gain a day's holiday for each day worked beyond 5 days).

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h. In relation to **Car Allowance**, the claimant points to the contract which provides that the claimant would be provided with a car, she points to ...

i. In in relation to **Breach of Contract** the claimant asserts that she is **entitled** to notice pay, car allowance and holiday pay.

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33. In the claimant's oral submissions, the claimant further accepted that she had lost her temper with Mr Ward.

34. For 15:17 written submissions were provided, supplemented by oral comments;

5 a. In relation **Wrongful Dismissal/ Notice Pay** it was accepted that the contractual notice period was 3 months. It was argued of the two purported types of misconduct set out to the claimant both of themselves were in themselves justification for dismissal without notice and the balance of the evidence supported the respondent's position that the claimant had committed an act of gross misconduct and that no notice was due:

10 1) having regard to the manner in which the claimant had addressed management (Mr Ward) supported by Ms McIlwraith taken with contemporaneous direct witness statements and the claimant's own account of her own telephone call with Mr Ward, it being argued that on any interpretation it was abusive; further that Ms McIlwraith statement confirming the respondents' account was not
15 challenged in cross.

2) in removing money without authorisation on date.

20 b. In relation to Holiday Pay the respondent relied on the contractual terms including clause 10.3, 5.1 and 19.2 which required any variation to be set out in writing. Reference was made to **Solectron Scotland Ltd v Roper** [2004] IRLR 4 (**Roper**) where the EAT held at para 22 that to constitute a binding implied term, a custom or practice must be followed "*because there is a sense of legal obligation to do so*" and that was not the case here. The respondent set out their position on holidays and concluded that the claimant
25 had (in effect) taken in excess of her accrued holidays by the date of termination.

30 c. In relation of car allowance, it was argued that that relevant clause of the contract did not contain specific details of any amount and was thus unenforceable. Reference was made to **Wills Management (Isle of Man) v Cable and Wireless plc and Anr** [2005] EWCA Civ 806 (**Wills**), the Court of Appeal at para 26 set

out that an “*agreement to agree*” an essential contractual term is not contractually enforceable and that a court (or Tribunal) “*cannot make for the parties the agreement which they have not made for themselves*”.

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Evidence by Statement alone

Relevant law

35. Rule 41 of the 2013 Rules provides

10 “41. *The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound*
15 *by any rule of law relating to the admissibility of evidence in proceedings before the courts.*”.

36. The Civil Evidence (Scotland) Act 1998 (CESA 1988) section 2 (1) (a) provides that

20 “*In any civil proceedings—*

(a) *evidence shall not be excluded solely on the ground that it is hearsay;*

(b) *a statement made by a person otherwise than in the course of the proof shall be admissible as evidence of any matter contained*
25 *in the statement of which direct oral evidence by that person would be admissible; and*

(c) *the court, or as the case may be the jury, if satisfied that any fact has been established by evidence in those proceedings, shall be entitled to find that fact proved by the evidence notwithstanding*
30 *that the evidence is hearsay.’*

37. Although not addressed I had reminded myself that in **McVinnie v McVinnie** 1995 SLT (Shr Crt) 81 (**McVinnie**) Sheriff Macphail, sitting in Edinburgh, considered the application of the CESA 1988 and quoted with approval the comments of Lord Cameron of Lochbroom in the Outer House in **Smith v Alexander Baird Ltd** on the use of affidavits “*The material in dispute may go to the heart of the case. Assessment of the witnesses' credibility may be crucial. But the court must in the end judge each case on its own circumstances against the general policy of the legislation to extend the modes in which evidence may be tendered at a proof*” and further the comments of Lord Caplan, again in the Outer House in **Ebrahim v Ebrahim** “... *The court will be bound, if contrary evidence is led which was subject to cross-examination, to take account of the fact that the evidence led for the pursuer in the matter was not subject to cross-examination*”. Sheriff Macphail concludes that he would have “*no doubt that the sheriff will be well aware of the need for caution in determining whether to accept any part of the evidence in the affidavit and how much weight, if any, to give to it.*”.

Witness evidence

Discussion and decision

20 38. Mr DV Baker spoke to his witness statement. His statement related to a joint company venture. He was not an employee of the respondents at the material time. He was not a witness to any matters relevantly before the Tribunal.

25 39. Where the claimant's evidence was contradicted by Ms McIlwraith as to the events on 9 November 2020, I did not accept those aspects of the claimant's evidence. Where the claimant's evidence was contradicted by Mr Mainwaring, I did not accept those aspects of the claimant's evidence. I would not wish these reasons to be misunderstood as implying a finding that she lied. The position is simply that, having heard the evidence of those witness who spoke to their statements, I was unable to accept the accuracy

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of the claimant's honest, but I consider inaccurate, recall when compared to those who gave contradictory accounts.

5 40. It was suggested that witnesses who gave evidence for the respondent were lying to the Tribunal. That is not accepted. The Tribunal found the evidence of the Mr Mainwaring and Ms McIlwraith to be straightforward and compelling.

10 41. The Tribunal preferred the evidence of Mr Mainwaring and Ms McIlwraith to the unsigned witness statement of those witness who did not attend the hearing in person to verify that statement on oath or affirmation and to be cross examined. A number of individuals including Mr Ward did not give or speak to their witness statements. That was their choice. Mr Ward in his statement accepted his status as someone who is unable to act as company
15 director. The Tribunal however did not consider that it required to give any material weight to the statements themselves, including having regard to the direction set out above, absent those statements being confirmed by those who it is indicated provided same and further and crucially those individuals being present and being subject to cross examination.

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Wrongful dismissal/Gross Misconduct.

Relevant Law

25 42. The issue for the Tribunal is not, as in unfair dismissal claims, about whether a reasonable (but mistaken) employer would consider an act or acts to be gross misconduct and decide to dismiss. In relation to wrongful dismissal, the issue was simply whether or not I found the claimant's actions amounted to gross misconduct. This question is to be decided objectively, and is not to be answered by reference to a range of reasonable responses (applied where the issue is one of unfair dismissal).

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43. If an employee is dismissed with no notice or inadequate notice in circumstances which do not entitle the employer to dismiss summarily, this will amount to a wrongful dismissal and the employee will be entitled to claim

damages in respect of the contractual notice. An employer is entitled to terminate a contract without notice in circumstances where the employee has committed an act of gross misconduct. It is for the employer to prove on the balance of probabilities whether the employee has committed gross misconduct. Whether an employee has committed gross misconduct entitling the employer to terminate summarily is a question of fact in each case.

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44. **Sandwell** above sets out that what amounts to gross misconduct involves deliberate wrongdoing or gross misconduct and found that it involves deliberate wrongdoing or gross negligence. I further noted that in the case of deliberate wrongdoing, it must amount to wilful repudiation of the express or implied terms of the contract (referencing **Wilson v Racher** [1974] ICR 428 (**Racher**)).

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45. I have further reminded myself that the courts have considered when '*misconduct*' might properly be described as '*gross*': **Neary v Dean of Westminster** [1999] IRLR 288 **Neary** (para 22). In **Neary**, Lord Jauncey rejected a submission that gross misconduct was limited to cases of dishonesty or intentional wrongdoing. Neary was considered more recently by the Court of Appeal in **Adesokan v Sainsbury's Supermarkets Ltd** [2017] I.C.R. 590, at paragraph 23, Elias LJ said that the focus was on the damage to the relationship between the parties; that some deliberate actions which poison the relationship obviously fall into the category of gross misconduct.

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46. Gross misconduct means misconduct so serious that it breaches the contract of employment in such a way as to relieve the other party to the contract of being bound by it. Most such terms are implied. A classic formulation of the implied term of confidence and trust between employer and employee was set out in **Woods v PWM Car Services (Peterborough) Ltd** 1981 IRLR 347, as approved in **Malik v BCCI** (1997) IRLR 468, cases dealing with employer's conduct, as that a party to the contract must not "*without reasonable and proper cause, conduct itself in a manner calculated and*

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likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”.

Wrongful Dismissal/Gross Misconduct

5 **Discussion and Decision**

47. As observed in the oral judgment the Tribunal stated the background to this case was tragic due to the sudden loss of Ms Bovill’ s partner Paul. Further there was a clear failure on the part of the respondent to pay the agreed monthly pay on time and before Saturday 9 November the claimant had not yet received her full £3,750 (after tax) monies from the October salary which was due on 31 October 2019. She had received part of the monies due. The company was experiencing financial difficulties.

48. While it was accepted by all parties who gave evidence that Ms Bovill was grieving the sudden and unexpected loss of her partner it is the conclusion of the Tribunal that the claimant acted without reasonable and proper cause, and conducted herself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee in her actions on Saturday 9 November, including; in failing to acknowledge that insisting upon being given access to monies in the safe had been advised to her to have impact on the companies abilities to meet other liabilities. Those actions had the effect of poisoning the relationship. Further in her acting in intimidatory manner to Ms McIlwraith and in effect to Mr Ward her actions amounted to gross misconduct. I do not however conclude that the claimant in taking monies after Mr Ward’s text message amounted to unauthorised removal of monies.

30 **Notice Pay and pay rise**

Relevant law

49. In relation to the claimant's position on pay rise as set out in **Wills** above, an "agreement to agree" an essential contractual term is not contractually enforceable and that a court (or Tribunal) "*cannot make for the parties the agreement which they have not made for themselves*". It was submitted for the claimant by reference to **Rowley** that a discretion existed to make payment of notice pay. In **Rowley** the issue before the Court of Appeal was in effect whether he had been under a duty to mitigate his loss arising from whether it was open to Mr Rowley to assert wrongful dismissal (breach of contract) rather than unfair dismissal. The issue arose from a term in the contract which gave his former employer's the right to choose whether or not to pay him his salary in lieu of notice. It was concluded that Mr Rowley's claim was a claim for wrongful dismissal and damages for his former employer's breach of contract would be assessed in the usual way. **Rowley** does not compel an employer to make a discretionary payment.

Notice Pay and pay rise

Discussion and decision.

50. The effect of immediate termination was to end the claimant's entitlement to notice pay. While the claimant argued, in addition to their primary position that the actions did not amount to notice pay, that the respondent had discretion to make payment, the Tribunal is satisfied that there are not outstanding monies due.

Holiday pay

Discussion and Decision

51. The contract of employment set out that it was agreed that the claimant was entitled to be paid for 34 days the claimant had taken her outstanding holiday, as such there was no outstanding accrued holidays.

Car Allowance

Relevant Law.

52. As set out in **Wills** above, an “*agreement to agree*” an essential contractual term is not contractually enforceable and that a court (or Tribunal) “*cannot make for the parties the agreement which they have not made for themselves*”.

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Holidays

Relevant Law.

53. As set out in **Roper** above to constitute a binding implied term, a custom or practice must be followed “*because there is a sense of legal obligation to do so*”.

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Discussion and Decision

Car Allowance

54. The terms of the contract provided an intention to provide a car, there had been no concluded agreement reached between the parties.

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Other Matters

55. While the claimant in her submissions made reference to the Mr Ward’s status, I was not directed to any authority that this Tribunal has jurisdiction to make any relevant findings in relation to the 1986 Act. While Mr Ward’s status was a matter of agreement no other finding or conclusion is made.

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Conclusion

56. The role of the Tribunal is to weigh the evidence before it. This involves an evaluation of the primary facts and an exercise of judgment. The Tribunal has done so applying the relevant law.

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57. If there are further submissions which either party considers it is necessary, in the interests of justice, to address supplemental to their respective existing submissions, they should set out their position in a request for reconsideration in accordance with Rule 71 of the 2013 Rules.

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58. The Tribunal in this written judgment wishes to repeat its condolences to the claimant.

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Employment Judge: Rory McPherson
Date of Judgment: 04 November 2020
Entered in register: 11 November 2020
and copied to parties

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