



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Jason Bartram

**Respondent:** Crest Nicholson Operations Ltd

**Heard at:** London South Employment Tribunal (by CVP)  
**On:** 5 March 2021

**Before:** Employment Judge Keogh

## Representation

**Claimant:** Mr Soulsby, Solicitor  
**Respondent:** Mr Way, Counsel

# RESERVED JUDGMENT

1. The correct Respondent in this matter is Crest Nicholson Operations Ltd, who is substituted for the previous Respondent Crest Nicholson Plc.
2. The Claimant's claim for wrongful dismissal is successful.

# REASONS

1. This is a claim brought by Mr Jason Bartram against Crest Nicholson Operations Ltd for wrongful dismissal.
2. In advance of the hearing I received a bundle of documents and witness statements from the Claimant and Mr David Smith on behalf of the Respondent, which I reviewed. I heard oral evidence from both witnesses. The Claimant was represented by Mr Soulsby, Solicitor, and the Respondent was represented by Mr Way of Counsel.
3. At the outset of the hearing I considered an application to substitute the existing Respondent, Crest Nicholson plc, for the correct employer, Crest Nicholson Operations Ltd. I allowed that application on the basis that there was no prejudice to Crest Nicholson Operations Ltd in substituting them, applying the principles in *Gillick v BP Chemicals Ltd* [1993] IRLR 437.

4. Due to time constraints I decided at the outset of the hearing that I would hear evidence on liability only, with any question of remedy to be determined at a future hearing.

## **Facts**

5. The Claimant was employed by the Respondent as a Senior Build Manager from 11 March 2019 to 7 February 2020 when he was dismissed without notice. He managed four sites for the Respondent.
6. Under his contract of employment dated 25 February 2019 the Claimant was entitled to three months' notice of termination of employment. One exception to this was that the Respondent could terminate the Claimant's employment without notice or pay in lieu of notice if guilty of gross misconduct.
7. On 30 January 2020 the Claimant was advised by the site manager of the Longcross Phase II Construction Site, Mr Mullholland, that he would need to attend a funeral on 31 January 2020. The Claimant agreed to this on the basis that Mr Mullholland would be on site until 11am so that the Claimant could attend some off site meetings and then attend the site to cover for Mr Mullholland.
8. Unknown to the Claimant, the funeral Mr Mullholland was due to attend was in the morning and meant that he had no intention of attending the site. He later confirmed this in a witness statement.
9. On the morning of 31 January 2020 the Claimant was contacted by a Senior Health and Safety Advisor of the Respondent, Mr Henderson, who enquired about site arrangements.
10. Mr Henderson made a decision to visit the site at 10.30am that morning. He found that the site was not attended by a manager. He contacted the Claimant by telephone. The Claimant immediately travelled to the site, arriving there around 11am.
11. The Claimant was invited to an investigation interview on 5 February 2020.
12. In a statement prepared for the investigation Mr Henderson stated that he was aware that Mr Mullholland was attending a funeral on the morning of 31 January 2020. It is not clear how he knew this, however it is apparent that he did not communicate this information to the Claimant.
13. A disciplinary hearing was convened on 7 February 2020, chaired by Mr Smith. At the hearing the Claimant was summarily dismissed for gross misconduct.
14. The Respondent seeks to rely on Regulation 13.1 of the Construction (Design and Management) Regulations 2015 which require the Respondent to 'plan, manage and monitor the construction phase and coordinate matters relating to health and safety during the construction phase to ensure

that, so far as is reasonably practicable, construction work is carried out without risks to health or safety.’ It is suggested that in order to comply with Regulation 13.1 the site needed to be attended by a site manager inducted by the Respondent at all times while construction was ongoing. It is noted that these Regulations were not referred to during the disciplinary hearing, however the Claimant accepts he was aware of them and the responsibilities which they imposed upon the Respondent, including the requirement to have a manager on site.

15. In his oral evidence Mr Smith clarified his reasons for dismissing the Claimant. He considered that trusting Mr Mullholland to attend site in circumstances in which it was his last day at work and he had a funeral to attend was an error of judgment.
16. The Claimant contends, and it was not challenged, that Mr Mullholland was an experienced employee and an experienced manager and had shown himself to be conscientious and reliable. Mr Mullholland would have had to attend site at some point to drop off his car and phone, and to complete his handover to the new trainee manager.
17. The Claimant appealed the decision to dismiss. An appeal meeting took place on 19 February 2020. The Claimant’s dismissal was upheld.

## **Issues**

18. The issue for the Tribunal to determine in a claim for wrongful dismissal is whether the Respondent breached the Claimant’s contract of employment by dismissing the Claimant without notice. In the present case this requires the Tribunal to determine whether, objectively, the Claimant was guilty of gross misconduct which would have entitled the Respondent to summarily dismiss him. The Tribunal is not bound to consider only the reasons relied upon by the employer at the time but must decide for itself whether there was gross misconduct or not. It is not a question of the employer’s reasonableness.

## **Conclusions**

19. The first question to consider is what was the actual conduct alleged to have amounted to gross misconduct? The Respondent points to two matters, firstly an error of judgment on the part of the Claimant, and secondly what is said to be a strict duty in relation to a breach of the CDM Regulations.
20. It is not in dispute in this matter that the Claimant relied upon the word of Mr Mullholland that he would be present on site until 11am on 31 January 2020, and that Mr Mullholland deliberately lied to him about this. It is not challenged that Mr Mullholland was an experienced employee who had in the past shown himself to be conscientious and reliable. He needed to attend site in order to drop off his car and phone and to complete a handover. On the other hand it was his last day of work and he had a funeral to attend. The site was some distance from his home (although it is not clear where the funeral was being held).

21. Balancing these factors, I conclude that there was no error of judgment by the Claimant in relying on the word of Mr Mullholland. It was part of the Claimant's job role that he had to manage four sites, and this required him to delegate responsibility to managers. He was entitled to rely on Mr Mullholland's previous reliability and there was no reason to suspect that Mr Mullholland might lie to him. The fact that it was his last day at work and he had a funeral to attend does not in itself mean that he was likely for the first time to be unconscientious in his approach to his managerial responsibilities. In the circumstances there was no misconduct arising from an error of judgment by the Claimant, and certainly none which could constitute gross misconduct.
22. I have considered carefully whether there was nevertheless a strict duty upon the Claimant in relation to ensuring there was someone on site, even if he did not and could not reasonably have known that the site was unattended. Mr Smith did not go so far as this in his evidence. He suggested that the situation might be different, although he was not sure, if there were only two or three people on site decorating. When asked what would happen if a manager was late in attending site due to being stuck in traffic and whether that manager's manager might be disciplined in that situation he could not answer.
23. I find that imposing a strict duty on a senior manager to ensure that there is always on site, and dismissing for gross misconduct if there is not, imposes far too high a burden on the employee. It would mean that the senior manager would be liable to dismissal if one of their managers was late to site for whatever reason and however culpable the breach. In the present case it is plain there was a breach of the Regulations, however the Claimant was in no way culpable for that breach. He did not conduct himself at all in a manner which caused the breach.
24. In the circumstances I find that the Claimant did not commit gross misconduct and the Respondent was not, therefore, entitled to dismiss him without the three months' notice he was due under his contract of employment. The claim for wrongful dismissal is therefore successful.

---

Employment Judge Keogh  
Date: 5 March 2021