



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102259/20 (P)

Held on 1 February 2021

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Employment Judge J M Hendry

15 **Mr G Maitland**

**Claimant
In Person**

20 **Integra Well Solutions Limited**

**Respondent
Represented by
Mr.C. Edward
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimant's application for payment of the balance of his notice having no
30 reasonable prospect of success is struck out.

REASONS

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1. The Claimant in his ET1 sought a finding that he was entitled to payment of the balance of his notice following termination of his Service Agreement (JB8).

E.T. Z4 (WR)

2. The Service Agreement, although unsigned, was accepted by parties as regulating parties' contractual relationship. The Respondent's position in their ET3 was that the Claimant was in material breach of his Agreement by not devoting his full time to the company's interests and by working for another company in Oman.

Issues

3. The question for the Tribunal was whether the Claimant was in material breach of his Agreement. If he was then he could not insist on payment of the balance of his notice. If the Respondent could not demonstrate he was in material breach then it was accepted that the balance of the notice required to be paid.

Evidence

4. Witness Statements were lodged in advance of the hearing from the Claimant, his partner, Dr L Sutherland-Pheiffer and Mr Salam Mahmood Al-Busaidi the CEO of Petrodollar (who was unable to give evidence). The Respondent intended to lead evidence from Mark Murray and Andrew Fisher Directors of Intergra.

Facts

5. The Claimant entered into a Service Agreement which provided as follows:

2. Appointment and Term

2.2 Subject to clauses 14.8 and 17, the employment of the Executive pursuant to this Agreement commenced on the Commencement Date and will continue unless and until terminated by either party giving to the other not less than 12 weeks written notice.

4. Duties of the Executive

4.1. During the term of this Agreement, the Executive shall:

4.1.1 devote the whole of his working time and attention to his duties under this Agreement;

4.1.2 undertake such duties as may from time to time be delegated to him by the Board or required by his office as a director of the Company or any Group Company;

5 4.1.3 use his best endeavours to promote, protect, develop and extend the business and interests of the Company and any Group Company;

4.2 During the term of this Agreement, the Executive shall not:

10 4.2.1 do anything which is reasonably likely to result in material damage being caused to the goodwill or trading prospects of the Group, bring the Group into material disrepute or do anything which is materially prejudicial to the interests of the business and/or the commercial interests of the Group;

15 4.2.2 without the consent of the Board, be engaged, concerned or interested whether directly or indirectly in any other business, firm, organisation or company (other than the holding for investment purposes of not more than 5% of the shares in any company quoted or dealt in on a Recognised Investment Exchange); or

20 4.2.3 hold any office, position or employment which may reasonably be expected to materially interfere with the performance of his duties under this Agreement (save with the prior written consent of the Board).

16. Confidential Information

25 16.1 Save as required in the proper performance of his duties under this Agreement, the Executive must not at any time (whether during or after the termination of his employment) use or disclose to any person, or attempt to use or disclose to any person, any Confidential Information of the Company or Group.

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17. Termination

35 17.1 Without prejudice to any other rights of the Company, the Company may terminate the employment of the Executive immediately in writing (without any notice and without Payment in Lieu) if the Executive shall at any time:

40 17.1.1 commit any act of dishonesty, serious misconduct, gross misconduct or material neglect in the discharge of his duties under this Agreement;”

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Background

6. The Claimant has worked for many years in the oil industry. He is resident in Oman. He has a long-term relationship with a company in Oman
45 “Petrodollar”. His work Visa there was sponsored by that company.

7. The Claimant knew Mr K Murray, an Engineer, who was involved in the oil industry in Aberdeen.
8. Mr. K Murray who became Director of the Respondent company had previously managed a company "Devenick Ltd" This company had gone into administration. Mr Murray and his brother-in-law Andrew Fisher decided to set up a new company to provide services to the oil industry. The initial idea was to develop products ("tools") for that industry. Mr Fisher was experienced in business. Mr Murray had an engineering and design background.
9. Mr Murray knew the Claimant and they entered into discussion about the Claimant joining the new venture. The Claimant had been interested for many years in developing a tool for use in the oil industry. It was a device to close off the flow of liquids such as oil in pipes. He told Mr Murray that there would be a ready market in Oman for such a device. It was hoped that the Respondent company could develop the device and get it manufactured.
10. The Claimant e-mailed Mr Fisher on 7 November 2018 (JB4):
- "I had a meeting with the Petrodollar group yesterday discussing the way forward for myself with Integra and how this would flow smoothly with Petrodollar.
I have informed them I would be working for Integra for three days a week, they in turn asked me to work for Petrodollar for the remaining two.
This seems a solution workable for both parties.
The still have a lot to offer us.
It still gives me a work/resident visa, office space, access to new connections in PDO."*
11. Mr Murray and Mr Fisher were aware that the Claimant had a relationship this Omani company.
12. There had been a number of discussions held about the new venture and the Claimant's role in it. Mr Murray had meetings with the Claimant in January 2019. He explained how they planned to operate. The Claimant would be the company's contact in Oman. The Claimant was confident that he could bring sales to the company that was he claimed to be well known in the oil

industry in Oman and had a number of contacts there. As a result, Mr Murray offered the Claimant a position as a Director with the new company. The Claimant was also offered shares in the company (6%) and a Directorship.

- 5 13. In early 2019 Petrodollar sent the company a draft "Agency Agreement". Mr Murray and Mr Fisher were not impressed with the document. They did not progress the idea of that company being their agents. The company was aware that the Claimant was sponsored by Petrodollar and this was how he had come to have a Visa in Oman. It was made clear to the Claimant that
10 the Visa situation had to be resolved to allow Integra to be responsible for his Visa. It was also made clear to the Claimant that he should have no other interests in Oman other than the Respondent. This was in response to the proposal from the Claimant that was that he would work a couple of days a week for Petrodollar. He was told that this was unacceptable.
- 15 14. By April and May 2019 the company was trading and trying to make sales. The Claimant came to the UK to meet the company solicitors to sign the Service Agreement. Mr Murray was to carry out design and engineering work.
- 20 15. Before the Claimant started to work for Integra in January 2019 the client had requested a "Tungsten Stem". The Claimant asked if they could provide them with this and Mr Murray confirmed they could. This turned out to be the only sales lead the Claimant brought to the company during his period of
25 employment.
16. The Directors had weekly meetings by telephone. The Claimant was often pressed about any progress he had made in securing work in Oman but was vague. The two Directors began wondering what the Claimant was actually
30 doing there.
17. In order to provide an income the Respondent company decided to rent tools and equipment. The Claimant was asked to report on which tools were best

for the Omani market. The Claimant failed to provide any detailed information.

- 5 18. In November Mr Murray and Mr Fisher were concerned about the lack of progress. Mr Fisher loaned the Respondent a substantial sum to invest in rental tools. The matter was raised at the weekly Director's meetings and the sums involved recorded in the Minutes from October onwards (JB16).
- 10 19. In December 2019 Mr Fisher and Mr Murray travelled to Oman. The Claimant was asked to set up meetings in advance with prospective clients. Mr Murray and Mr Fisher were due to stay in Oman for four days. They discovered that the Claimant had only set up one meeting with Oman Oil. They were disappointed that the Claimant had not arranged additional meetings and through their own efforts arranged to meet a number of other prospective
15 customers.
- 20 20. A presentation should have been prepared by the Claimant for use when they met a representative of Oman Oil. He had not prepared anything. The other Directors made an *ad hoc* presentation. During this the Claimant got up and left the meeting without notice. The two Directors were mystified at this action.
- 25 21. Mr Murray and Mr Fisher were becoming increasingly suspicious of the Claimant's actions. During the meeting at Oman Oil he sat on the opposite side of the table from them as if he was not part of their company. It was clear that the representatives from Oman Oil didn't know what the Respondent's product ranges were before the meeting.
- 30 22. A meeting was arranged with Petrodollar. It seemed from the meeting that Petrodollar were making a pitch for agency work from them.
- 35 23. The Respondent asked the Claimant to come to Aberdeen to discuss matters and arrangements were put in place for him to visit at the end of January. The Claimant, before he was due to travel, sent an e-mail advising he was not fit to travel. The e-mail had been passed to his partner. He arranged a conference call for 8 February. On 7 February he sent an e-mail to say that

he was unfit to take part. He was pressed for information and on 8 February he submitted his resignation.

24. The Claimant e-mailed Mr Fisher on 8 February 2020 in the following terms:-

5 “Andy

It is with personal regret that I tender my notice to Integra. The situation you have put me in is untenable.

10 1. *Our expectations for and of the company are too different for us to reconcile. I have tried to come to a best understanding about what the nature of the business is, one year on, but you have not answered by emails where I have questioned whether we are a design and manufacture business or a third-party retail business. As a result, there*
15 *is a gap in our expectations as I will go on to explain.....”*

25. Mr Fisher and Mr Murray were taken by surprise by the terms of the email. Mr Fisher responded:

20 “Gary

I am completely shocked at your e-mail and upset at its contents and inferences.

I believe not only have we been fair and accommodating to you but have also allowed you a level of self-management that would not be provided at any other similar organization; we have always been a team of three with each of
25 *us being considered to having equal inputs to the company.*

I would like to have a call or further discussion with you, as this is very much a bolt out of the blue, and contrary to our recent interactions and indeed our overall relationship since we started.....

30 *We will seek appropriate advice with regards to your decision to resign and the insinuations stated below and revert in due course.”*

26. Mr Maitland responded that he could not take the call.

35 27. The company took legal advice and e-mailed their response on 14 February (“JBp.66-70”). The e-mail indicated the Claimant had not mentioned when his employment would end. They wrote:

40 *“Your e-mail makes it clear that you would prefer to bring matters to an end quickly and with that in mind I propose that your employment should formally*

come to an end on 29 February. I appreciate that the draft service agreement refers to 12 weeks' notice on either side there is no need for us to be tied to that."

5 28. The Claimant was asked to go on garden leave meantime.

29. Mr Fisher began making investigations into the Claimant's actions. He discovered that the Claimant appeared on the Petrodollar website as an employee. He was named as their Chief Operating Officer (JBp158).

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30. This he thought explained why the Claimant had not sat with them at Oman Oil and were unaware of the Respondent's products. He emailed the Claimant on 4 March:-

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"For several months contrary to ? instructions you have ignored repeated requests to submit reports about your activity on behalf of the company. That is a breach of Clause 4.1.6 of your service agreement. Mark and myself regularly report but you have simply ignored our requests for information. For some months we have had no idea that you have been doing degenerate orders for the company. You have generated no orders for the company.

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It also appears that you are working for another company as you have been currently displayed as part of "Team@petrodollaroman.com. It appears that it has been going on for some time. It therefore appears that you have been drawing a salary/expenses from Integra while at the same time working for other parties. That is a direct breach of Clause 4.2.2 of your service agreement. You will recall that when we drew up the service agreement you were specifically asked to declare any outside interests. You made no declaration. Your conduct in working for another company while drawing a salary from Integra is a clear and very serious breach of your service agreement which justifies summary dismissal. If there is some explanation for your conduct please let me have it as soon as possible.

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The e-mail ended:

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If you want to discuss matters I am happy to do that. However, the first step is that you provide a full; report on your activities on behalf of the company over the last four months."

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31. Mr Maitland responded indicating *"there was no arrangement in place for salary payments to be dependent on performance and I intend to inform the company fully on the work in progress."*

32. He wrote:

5 *"I have no other employment in Oman or anywhere else in the world, and am not in any contravention of the 'service agreement'. I deem this to be a very serious allegation and this slander is libelous. My only business relationship with Petrodollar is that they provide me with the work visa of which you are fully aware. You are aware of my dealings with Petrodollar as a possible agent for Integra, and met with members yourself, when you visited Oman. I suggest you withdraw this allegation in writing failing which I will take this further and you will need to provide evidence of this allegation."*

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33. The Respondents continued to made investigations into the Claimant's role in Oman. This included investigations in to the e-mails sent by him.

15 Email traffic

34. The Claimant received an e-mail from Mark Murray on 7 January and which he forwarded to his partner (JBp.134). He wrote:-

20 *"The latest from Mark."*

She responded:

25 *"All gobildegook! The emphasis is on systems and not manufacturing. Maybe you understand it better than I do."*

*Cheers
Lee."*

30 35. The e-mail from Mr Mark Murray included an e-mail from Andy Fisher dated 2 January. This gave details of the company's activities and commercial aspirations. It recorded details of the company's financial position. In it Mr Fisher had written:-

35 *"Baker, Petroline, Weatherford and Caledyne were all based on making the sale and delivering in a 8-12 week time frame, with good planning and a helpful machine shop, we tried to get this down to 5-8 weeks, this covers over 90% of the data sheets provided this year. The ones that are longer development times are the safety valves, Packers (which we haven't done data sheets for yet so that's another 100 or so variations to add), bridge plugs,*

Side Pocket Mandrels (including their related kick over tools and Gas Lip Valves), the ball valves and of course our GRE plug that all required in hands test phase incertification.” There was reference to a 100k tooling budget.

5 36. On 6 January Mr Maitland forwarded an e-mail to Mr Fisher of 2 dated January (JB139-140).

37. His partner e-mailed him on 22 May (JB86):

10 “Hi Gary

This customer form is in pdf format so I can't type into it! WTF? does expect you to hand write them? or does he expect you to develop your own form.. which is a waste of time if we have the form already? What does he actually want? If you ask him now, he will know that you haven't started it until now?? Why oh why I ask does he put it in pdf? Let me know xxxx”

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38. The Claimant forwarded an e-mail from Mr Fisher of the 11 December (“JB128”). The e-mail contained sensitive company information including Mr Fisher’s funding of Integra and additional funding that was required. It also included a salary of the directors and the salary of an employee Amy Black.

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Witnesses

39. On some general matters such as the way in which business is carried out in Oman the Claimant appeared a relatively truthful witness. However, in relation to his period as a Director with the Respondent there were crucial aspects of his evidence which I did not accept and overall I found him to be neither credible nor reliable witness. In particular, he fenced for some time with the Respondent’s Counsel about his exact relationship with Petrodollar denying he continued to work for them after his appointment and later asserting that because he was not paid by them he could not be working for them. In his submissions he attacked the level of investigation asserting that the Respondents could not prove he continued to work for Petrodollar. When it was out to him that working for another company’s interests even if unpaid could be regarded as working for them (in any event not devoting full time

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attention and efforts to the company business) he seemed to concede that he was still involved with Petrodollar carrying out unspecified activities for them. The evidence overall lacked candour.

Submissions

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40. As a result of the Claimant's admissions Mr Edwards sought immediate strike out of claim. It could, he submitted, no longer succeed. It should be recorded that the Claimant felt under a disadvantage in relation to the issue of submissions and this turn of events. Mr Edwards explained that the Claimant could no longer succeed as he had admitted he was in material breach. I sought to explain the position to the Claimant both as regards the substantive law and the Tribunal Rules. He found it difficult to understand that the Respondents were no longer arguing solely that he was in breach of his Service Agreement because of working for Petrodollar but also relating on breaches of confidentiality. He accepted that his partner had been privy to some of the sensitive information contained in various emails which he had passed to her. These emails appear to have been lodged by him as part of the Joint Bundle and included are emails from him sending emails from the other Directors to her for comment.

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41. The Claimant also struggled with the idea that the Respondent could use this as evidence of a breach of contract despite not knowing about these matters at the time of his summary dismissal. I explained to him that the issue was whether he had in fact been in breach of contract even if unknown at the time. Given this turn of events I was sympathetic to Mr Maitland being given an opportunity of considering his position. He wanted an opportunity to telephone his lawyer for advice and because of the circumstances that had arisen I allowed him to do so. Unfortunately, the advice he received and then relayed seemed to relate to the law surrounding unfair dismissal and the requirement for the dismissal to be looked at using the state of knowledge of the employer at that time.

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42. Mr Maitland denied that he worked for Petrodollar. His position was that he was entitled to use his wife for administrative support. She photocopied things for him. He denied that she framed responses for him. He had worked
5 diligently for the company and had not been paid for anything he had done for Petrodollar. The lack of business was down to failures on the part of the company. There had been an inadequate investigation in the alleged breach of contract which made the position unfair. They could not prove he was in breach of contract.

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43. Mr Edwards position was straightforward. The Tribunal had to apply an objective test. The Claimant in evidence had acknowledged that he was bound by the terms of the Service Agreement and the clauses contained there regarding confidential information. He had also accepted that
15 information contained in the emails were confidential and sensitive and he had not obtained permission to disclose this information to his partner. He was patently in material breach of contract. He referred the Tribunal to the well- known case of **Boston Deep Sea Fishing v Ansell** (1888) 39CH D 339 as authority for the proposition that an employee guilty may be dismissed
20 summarily without notice for gross misconduct. The dismissal may be justified by reliance on facts not known at the time of the dismissal but only discovered subsequently.

Discussion and Decision

25 44. The Tribunal has the power to strike out a claim or response at any stage in the proceedings. The terms of the Rule are as follows:

“Striking out

30 ***37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—***

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

5 *(c) for non-compliance with any of these Rules or with an order of the Tribunal;*

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

10 *(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*

15 *(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."*

45. In the present case the Claimant's admissions in the course of his evidence were crucial. Given those admissions namely that sensitive information such as salaries and the company's financial position had been disclosed to his partner without authority he was by his own admission in material breach of his obligations and he appeared to accept he was although in his view he had done this innocently.

20 46. The law on this matter appeared clear. The test that must be used to establish a material breach of contract is an objective one. The Service Agreement provided at Clause 16 that information should not be disclosed to third parties. It was apparent that the Claimant preferred to let his wife comment on correspondence from the company. She would photocopy these documents for him. There appeared to be no good reason for her to have access to the emails concerned and permission for any such access had not been sought. As was pointed out by Mr Edwards the emails were sent to his partner's email address over which the company would have no control.

30 47. In the light of the clear evidence that was before the Tribunal it was apparent that the Claimant's case could not now succeed. He had openly accepted the matters put to him carefully and methodically by Counsel. I was confident he

5 had not been tricked into these admissions. Indeed, he seemed to readily accept the factual position put to him without realising the potential consequences of this actions. His claim had, no longer any, any reasonable prospects of success. Leading further evidence was, in these circumstances, pointless.

10 48. Finally, I would observe that while the result, at first blush at least, appears somewhat harsh and bearing in mind that the evidence from all the other witnesses not yet been heard, it seems likely, given the Tribunal's rejection of the Claimant's own evidence about not working for Petrodollar (yet continuing to have a work visa from them and to be listed in their website as their Chief Operating Office) that the Respondent's primary position would have been likely to have been vindicated and a finding made that he had not devoted the 'whole of his working time' as required by Clause 4 to furthering the Respondent's interests and was thus in material breach of contract in this respect also.

15	Employment Judge	James Hendry
20	Date of Judgment	22nd of February 2021
	Date sent to parties	22nd of February 2021