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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102259/2017**

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**Held in Glasgow on 10 April 2018**

**Employment Judge: Mary Kearns**

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**Miss GV Pilarczyk**

**Claimant  
In person**

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**McCurrach UK Limited**

**Respondent  
Represented by:  
Mr L Lane  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal was to dismiss the claims.

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**REASONS**

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1. The claimant was employed by the respondent as a territory manager from 20 February 2016 until 28 April 2017. Having complied with the early conciliation requirements she presented an application to the Employment Tribunal on 2 August 2017 in which she claimed wrongful dismissal (notice pay), breach of section 10 of the Employment Relations Act 1999 (right to be accompanied at a disciplinary hearing) and holiday pay.

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**E.T. Z4 (WR)**

**Evidence**

2. The claimant gave evidence on her own behalf and lodged documents. The  
5 respondent also lodged documents (“R”) and referred to them by page  
number. The respondent called Patrick Bramich, its account controller and  
Natalie McIntyre, HR Shared Services administrator.

**Findings in Fact**

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3. The following material facts were admitted or found to be proved:-

4. The respondent is a field services agency, assisting various clients with sales,  
brand awareness and advocacy. The claimant was employed by the  
15 respondent from 20 February 2016 until 28 April 2017 as a territory manager.  
As such, the claimant’s role was to regularly visit supermarkets on behalf of  
the respondent’s client PepsiCo to carry out various tasks for example,  
checking that the supermarket was complying with PepsiCo’s promotions). A  
territory manager’s activity is recorded in several different ways. These  
20 include sign in books located in each of the supermarkets visited; ‘time in time  
out’ (“TITO”) information and ‘telematics’ information. Every supermarket has  
a sign in book for business visitors. Visitors sign in when they arrive and sign  
out when they leave. With regard to the TITO information, the respondent  
gives all its territory managers a tablet computer. They are required to use  
25 this to log in and log out of each supermarket visited. The respondent uses  
the information input by its managers to produce client reports to show clients  
which supermarkets the respondent has visited for them and how many visits  
have taken place. The respondent can also use the information to call up a  
report showing which supermarkets the manager has visited, together with  
30 the date and time of each visit. This is called a TITO report (R90 – 2).

5. In addition to the tablet, each territory manager has a telematic in their car which tracks where the car goes. The respondent can call up a report setting out where a particular car has been (R100 – 21).

5 6. On or about 19 April 2017 the claimant attended a disciplinary meeting chaired by Mr Patrick Bramich, the respondent's account controller. Kirsty Lane, divisional sales manager took minutes (R184 – 95). The claimant had requested that a colleague Jane Pilarczyk be permitted to accompany her at the disciplinary hearing and the investigating officer, Natasha Quick was supposed to arrange this. When the claimant attended the disciplinary hearing the arrangement for her companion had not been made and she was not present. Mr Bramich asked the claimant whether she was happy to proceed or not. The claimant said she was happy to continue with the meeting without the companion being present. The purpose of the meeting was to discuss a number of allegations. The first allegation was that the claimant had not accurately logged in to various supermarkets between 1 March and 7 April 2017 as follows:

15 7. Morrisons Crewe on 16 March 2017

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The address of Morrisons Crewe is 159 Richard Moon Street Crewe. The claimant's TITO report (R91) entered by her on her company tablet records that the claimant logged in to Morrisons Crewe from 12.45 to 2.00 pm on 16 March 2017. However, the Morrisons Crewe sign in book for that date (R53) does not contain any entry for the claimant. The sign in book therefore contradicts the claimant's tablet entry.

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8. Morrisons Crewe on 21 March 2017

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The claimant's TITO report (R91) records that the claimant logged in to Morrisons Crewe from 1.00 to 2.10pm on 21 March 2017. However, the store's sign in book for that date (R52) shows the claimant signing in at 12.25pm.

9. Morrisons Crewe on 6 April 2017

5 The claimant's TITO report entered by her on her tablet states that she logged  
in to Morrisons Crewe on 6 April 2017 from 2.15pm to 3.15 pm (R92).  
However, the sign in book of Morrisons Crewe for 6 April 2017 (R51) did not  
contain any sign in entry for the claimant. Also, her telematics report (R100 –  
101) records that on 6 April 2017 her car was stationary at Vernon Way,  
Crewe from 11.46 am to 2.44 pm and that it then journeyed from Vernon Way  
10 Crewe to Meigh Street Stoke on Trent from 2.44 pm to 3.39 pm. According to  
the telematics report, the claimant's car did not visit Morrisons Crewe at any  
time on 6 April 2017.

10. Tesco Extra Crewe on 1 March 2017

15 The claimant's TITO report (R90) records that the claimant logged in to Tesco  
Extra Crewe from 1.35 to 2.45 pm on 1 March 2017. However, the store's sign  
in book (R56) shows that the claimant signed into the store from 3.00 to  
3.45pm on that date. The sign in book is therefore not consistent with the  
20 information the claimant logged.

11. Tesco Extra Crewe on 16 March 2017

25 The claimant's TITO report (R91) records that she logged into Tesco Extra  
Crewe from 11.10 am to 12.25 pm on 16 March 2017. However, Tesco Extra  
Crewe's sign in book for 16 March 2017 (R55) contains no entry showing that  
the claimant logged into the store on that date.

12. Tesco Extra Crewe on 6 April 2017

30 The address of Tesco Extra is Vernon Way Crewe. The claimant's TITO report  
(R92) records that she logged into Tesco Extra Crewe from 12.33 to 2pm on  
6 April 2017. The store's sign in book (R54) shows that she signed in from

1.45 to 2.15 pm. Her telematics report for that date (R100 – 101) shows that her car was stationary at Vernon Way Crewe from 11.46 am to 2.44 pm. Thus the claimant's entries on her tablet are not consistent with the external records.

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Tesco Congleton on 4 April 2017

13. The address of Tesco Congleton is Barn Road, Congleton. The claimant's TITO report (R91) records that she logged in to Tesco Congleton from 15.40 to 17.10 pm on 4 April 2017. However, the sign in book for the store on 4 April (R57) has no entry to show that she was there. Her telematics report records that on that date her car remained stationary at Amber Court, Endon (the address of her parents) from 15.30 to 15.42 pm. It journeyed from there to Norton Park, Stoke on Trent from 15.42 to 15.52 pm and remained stationary there until 16.02 pm. Norton Park is a small retail park with a Macdonalds and an ALDI. From 16.02 to 16.09 pm her car then journeyed from Norton Park to Barks Drive, Stoke on Trent, a street round the corner from her home address at Yarnbrook Grove Stoke on Trent. The car then remained stationary there for the rest of the day. Thus, the external records contradict the information the claimant logged in to her tablet for 4 April 2017 and suggest she did not visit the store at any time that day as she claimed.

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14. Tesco Extra Longton on 17 March 2017

The claimant's TITO information for this date (R91) is inconsistent with the store's sign in book.

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15. Tesco Extra Longton on 4 April 2017

The address of Tesco Extra Longton is Baths Road, Stoke on Trent. The claimant's TITO report (R91) records that she logged into Tesco Extra Longton from 13.20 to 15.00 pm on 4 April 2017. The store sign in book for that date (R59) contains no entry by the claimant. The claimant's telematics report

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(R105 – 6) records that on 4 April 2017 discloses that she did not visit Tesco Extra Longton on that date.

16. Tesco Meir Park on 14 March, 28 March and 4 April 2017

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On all these dates the claimant's TITO report records that she logged into Tesco Meir Park. The store's sign in book contains no entry for the claimant on any of those dates. On 28 March the telematics report for her car showed that it did not visit Tesco Meir Park on that date. Indeed, the report showed that her car was stationary near her home for much of the afternoon, and that it journeyed during the afternoon to her child's school and back. The telematics report for the claimant's car for 4 April 2017 (R105 – 6) showed that it did not visit Tesco Meir Park on that date.

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15 17. Putting the evidence together for 4 April 2017 the claimant's TITO report showed that she had stated she was at the depot from 9:05 to 9:40; at Tesco Extra Hanley from 9.50 to 11.20; at Tesco Meir Park from 11.40 to 13.05; at Tesco Extra Longton from 13.20 to 15.00; and at Tesco Congleton from 15.40 to 17.10. The sign in books for Meir Park, Longton and Congleton show no visit from the claimant that day. The telematics report discloses that she did not visit those stores and that her car was stationary much of the afternoon near her home.

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18. The TITO information logged by the claimant via her tablet did not match the telematics report for her car for 27 and 28 March and for 3, 4, 5 and 6 April 2017. The claimant was unable to give the respondent a coherent explanation for this. However, at the disciplinary meeting the claimant suggested she had not received full copies of the documentation. Mr Bramich accordingly adjourned the meeting to enable the claimant to read over all the documentation provided to her. The disciplinary meeting was reconvened on 27 April 2017. The claimant was reminded of her right to be accompanied. The claimant did not attend the meeting. After waiting 40 minutes, Mr Bramich decided to proceed in the claimant's absence. In view of the over-whelming

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evidence and in the absence of any cogent explanation oral or written from the claimant Mr Bramish decided to dismiss her with immediate effect without notice or pay in lieu of notice by reason of gross misconduct. In view of the major discrepancies between the TITO information the claimant had recorded on her tablet and the store sign in books and telematic reports for her car Mr Bramich concluded that the claimant had knowingly recorded false information on her company tablet and in doing so had been dishonest. He concluded there was no realistic possibility that the discrepancies could have been an innocent mistake because there were so many of them. Mr Bramich communicated his decision and the reasons for it to the claimant in a letter dated 28 April 2017 (R228).

19. The claimant appealed against the decision (R237 – 8). Her appeal hearing was chaired by David Easson, Accounts Director and held on 27 April 2017. The appeal did not succeed and this outcome was relayed to the claimant in a letter from Mr Easson dated 19 July 2017.

### **Discussion and Decision**

#### **Wrongful dismissal**

20. In this case, the claimant claims wrongful dismissal. She had less than two years' continuous employment. She did not, therefore have the qualifying service to claim unfair dismissal. Her contract of employment entitled her to one week's notice. Her employment was terminated summarily without notice on grounds of gross misconduct. The claimant claims wrongful dismissal. It is her position that her summary dismissal was in breach of her contract of employment. The measure of her loss is one week's pay because the contract was terminable on one week's notice. However, the respondent states that the claimant was guilty of dishonesty amounting to gross misconduct. The respondent's case is that she was therefore in repudiatory breach of contract and the respondent was entitled to dismiss her with immediate effect.

21. I have to decide on a balance of probabilities who is correct as a matter of fact. I have carefully considered the claimant's evidence and representations. However, I have found that they do not withstand scrutiny. For example, the claimant said many times in her evidence that she had never said she was in Crewe on 4 April 2017. That is correct (R91). Her TITO report shows she stated she was at the depot from 9:05 to 9:40; at Tesco Extra Hanley from 9.50 to 11.20; at Tesco Meir Park from 11.40 to 13.05; at Tesco Extra Longton from 13.20 to 15.00; and at Tesco Congleton from 15.40 to 17.10. However, the sign in books for Tesco at Meir Park, Longton and Congleton show no visit from the claimant that day. Furthermore, the telematics report for her car discloses that she did not visit those stores and that her car was stationary much of the afternoon near her home apart from a visit to a small retail park. Thus, on balance, the evidence shows that she was not where she had claimed to be at the dates and times set out in the findings in fact above. In view of the major discrepancies between the TITO information the claimant had recorded on her tablet and the store sign in books and telematic reports for her car as demonstrated by the documentary evidence Mr Bramich concluded that the claimant had knowingly recorded false information on her company tablet and in doing so had been dishonest. He concluded there was no realistic possibility that the discrepancies could have been an innocent mistake because there were so many of them. I have reached the same conclusion. It follows that the claimant was in repudiatory breach of contract and the respondent was entitled to dismiss her with immediate effect. The claim for wrongful dismissal is accordingly dismissed.

Breach of right to be accompanied at disciplinary hearing

22. The claimant had requested that a colleague Jane Pilarczyk be permitted to accompany her at the disciplinary hearing and the investigating officer, Natasha Quick was supposed to arrange this. When the claimant attended the original disciplinary hearing the arrangement for her companion had not been made and she was not present. Mr Bramich asked the claimant whether she was happy to proceed. The claimant said she was happy to continue with

the meeting without the companion being present. Thus, the claimant waived her right to be accompanied under section 10 Employment Relations Act 1999.

5 Holiday pay

23. The respondent's holiday year runs from 1 January to 31 December. The claimant was entitled to 23 days' holiday plus 8 bank holidays per year. The claimant was dismissed on 28 April and had accrued 11 days' holiday entitlement from 1 January to 28 April 2017. Her holiday record (R252) shows that she had taken 6 days' holiday in 2017. She therefore had 5 days accrued but untaken upon dismissal. The claimant was paid her full basic salary without deduction for the months in which she took holiday (January and April 2017). She therefore received payment for the holidays she took. Her 5 days accrued but untaken holiday were paid to her in the sum of £326.85 per her May pay slip dated 28 May 2017 (R247). That payslip contained an adjustment (- £1,062.19) for an overpayment during a period of absence in her April pay and a correction to that figure (+£566.50). The pay slip also contained a negative net adjustment payment of £82.30 credited to the claimant, to which she was not entitled because a payslip cannot be run with a negative balance.

24. The respondent made an error in the May pay calculation in underpaying the claimant £371.76 in respect of her April suspension which should have been paid. This was corrected by a payment to her of £371.76 on 27 May 2017 outwith the normal pay run.

25. The claimant had carried over four days' holiday from 2017 with the permission of her manager. The respondent's HR Shared Services Administrator, Natalie McIntyre, who deals with their payroll was unaware of this until the claimant gave her evidence to the Tribunal. After checking with the manager concerned, the respondent acknowledged that the sum of £261.46 was due to the claimant in respect of 4 days' holiday carried forward

and accrued but untaken at termination. This sum was paid to the claimant after deduction of the negative net adjustment payment of £82.20 from the 28 May payslip and tax (£52.20) and National Insurance (£11.93). The net sum of £115.13 was paid to the claimant on 13 April 2017 via BACS transfer. As  
5 the claimant has now been paid all sums claimed to which she is entitled, the case is dismissed.

10 Employment Judge: Mary Kearns  
Date of Judgment: 24 April 2018  
Entered in register: 26 April 2018  
and copied to parties