



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102941/2023**

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**Held via Cloud Video Platform (CVP) in Glasgow on 18 December 2023**

**Employment Judge J Young**

10 **Mr Maciej Michalik**

**Claimant  
Represented by:  
Mr D Ferrol -  
Consultant**

15 **SBFM Limited**

**Respondent  
Represented by:  
Mr S Pybus -  
Solicitor**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Judgment of the Employment Tribunal is that the respondent shall pay to the claimant the sum of Three hundred and sixty nine pounds (£369) without deduction of tax as damages for breach of contract by the respondent.

### **REASONS**

1. In this case, the claimant presented a claim to the Employment Tribunal complaining of wrongful dismissal and breach of contract. He also made a claim for holiday pay and albeit that payment was delayed, it was resolved by the date of the hearing.

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2. The respondent denied wrongful dismissal maintaining that the claimant had been dismissed for gross misconduct and so no notice pay or other payment was due.

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### **Documentation**

3. There was duplication in the production of documents. The claimant produced documents paginated 1-10 (C1-10) consisting of a copy of his contract of employment and correspondence with the respondent between 21 December

2022 and 1 February 2023. The respondent produced a file of documents paginated 1-54 (J1-54) consisting of the employment contract, employee handbook, photographs, correspondence between the claimant and respondent and witness statement of Colin Fairweather.

5 4. Additionally, the respondent had responded to a request for specification of the gross misconduct relied upon on in the dismissal of the claimant which arose out of a crash into a safety barrier at the premises of Gist, a customer of the respondent.

5. In that email of 17 October 2023, the respondent advised:

10 *“In response to why the company believed this act constituted gross misconduct, the employee was dismissed due to the following reasons:*

1 *1 The site has an entry barrier with a speed limit of 5 miles per hour. This barrier has a pedestrian crossing immediately in front of it.*

15 *2 The claimant crashed into the barrier and caused significant damage to his car and to the barrier. A claim was made against the claimant’s insurance by the client for the damage.*

*3 The claimant was driving at an excessive speed and without due care and attention, we were lucky that no one was crossing the road at the time.*

20 *4 The barrier was not working the night before the accident and the claimant tried to argue during his meeting that the company and the client should have emailed him to inform him that the barrier was now operational.”*

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6. The issues for the Tribunal were:-

(i) Was summary dismissal without notice justifiable?

(ii) Was the disciplinary procedure contractual?

5 (iii) Was the dismissal in breach of the disciplinary procedure?

(iv) What damages flow in respect of breach of either (i) or (iii) above?

### The hearing

7. At the hearing, I heard evidence from the claimant and Colin Fairweather being a Hygiene Manager with the respondent.

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8. From the documents produced and evidence led, I was able to make findings in fact on the issues.

### Findings in fact.

15 9. The respondent offers commercial cleaning and facilities management services for businesses across the UK and Ireland.

10. The claimant was employed by the respondent as a cleaner in the period 18 August 2022 to 12 January 2023 when his employment was terminated. It  
20 was agreed that he was paid £369 per week.

11. The claimant drove his own car to customer addresses. In December 2022, the claimant was engaged to work at Gist premises on a Monday, Tuesday, Wednesday and Sunday of each week from 21:00 hours to 06:00 hours. Around 20:40 on 28 December 2022, he drove to work for the start of his shift.

25 12. The road conditions were "*not good*". He was aware that there was a safety barrier at the entrance to the car park but this had not been working "*for a few weeks*".

13. Approximately 30 feet from the barrier, the entrance road takes a 90 degree left hand turn with an incline to the barrier. In normal circumstances, the barrier would automatically lift on a vehicle coming to a halt. A pedestrian crossing is placed about 1-2 metres behind the barrier which is reflective. The speed limit in the area was 10mph. The claimant crashed into the barrier and caused damage to his car being scoring/dent on the pillar of the car and bonnet and a smashed windscreen. The cost of repair to the claimant's car was approximately £500. There was also damage to the barrier with the metal stand uprooted from the concrete and the barrier "*bent back*".
14. Photographs taken at the time (J40-45) show the car at rest on the pedestrian crossing with the metal stand uprooted and damage to the car windscreen pillar and bonnet. It would appear that the area was reasonably well lit at the time. No CCTV footage was available.
15. The claimant advised the onsite manager and gave a statement. The customer made a claim on the claimant's insurance for the damage caused to the barrier. The onsite manager phoned Mr Fairweather who visited the site at approximately 06.30 the following morning as he came on shift and he was able to survey the damage caused.
16. The claimant worked his shift on the day in question and the following days.
17. In a letter of 31 December 2022, the claimant was invited to an "*investigation meeting*" on 3 January 2023 (C5). However, that invitation went to the claimant's "spam" folder and was not seen by him. A further email invitation was then sent on 9 January 2023 (C6) inviting the claimant to an "*investigation meeting*" on Thursday 12 January 2023. The meeting was to be conducted by Mr Fairweather with notes being taken by Mr O'Donnell. The claimant was advised that he could bring a work colleague and that "*following the meeting, the information and statements will be reviewed and you will be notified in due course of any further action that may be taken. Should any further action be deemed necessary, this can be of a disciplinary nature.*"

18. The claimant attended the meeting on 12 January 2023. He confirmed that there had been an accident. He denied going too fast to make the collision unavoidable.
- 5 19. The position of Mr Fairweather was that given the layout, speed limit, position of the car, damage to the barrier and the car, that the claimant must have been driving too fast and was therefore unable to stop. It was fortunate that there was no one on the pedestrian crossing as the final position of the car was well onto the crossing. He advised that the claimant had explained the barrier had not been working for a few weeks prior to the incident and  
10 appeared to be stating that it was *“not his fault that it was now working”*. He found that frustrating. While notes were taken at the meeting they were not produced.
20. In evidence that claimant advised that his *“ABS was turned on”* and the car *“did not stop as quick as it should have.”*
- 15 21. In a letter of 13 January 2023, the claimant was advised that further to the *“disciplinary hearing”* of 12 January 2023, the claimant was dismissed for *“failure to comply with site safety requirements”*. It was stated that his explanation showed *“disregard to the site requirements of our client and instead tried to apportion blame for the accident on matters that you were  
20 aware of and should have acted accordingly in a safe manner as required by the site.”*
22. The letter advised that having reviewed the circumstances and responses at the meeting the claimant’s actions constituted *“gross misconduct according to the company’s disciplinary rules and procedures”* and the claimant was  
25 dismissed with effect from 12 January 2023 and was not entitled to notice or pay in lieu of notice.
23. The claimant was advised he would be paid any outstanding wages including accrued but untaken holiday pay and that he had the right of appeal against the decision and if he wished to take that option, he should write to the HR  
30 department within 5 days (C8).

24. The claimant appealed by letter of 15 January 2023 (C9) and requested a copy of the Company handbook, copy of all statements and notes taken during the investigation and a clear explanation of his failure to comply with site safety requirements.
- 5 25. The claimant received no response to that request for appeal hearing albeit he followed the matter up with a reminder on 1 February 2023 (C10).
26. There was produced by the respondent a witness statement of Colin Fairweather (R52-54) which was stated to have been prepared following a “*Microsoft Teams discussion*” with the respondent’s HR business partner.
- 10 This statement advised that the claimant was invited to attend an investigation meeting on 3 January 2023 which was “*undertaken by myself*”. It also stated that following that meeting, the claimant was invited to attend a “*formal disciplinary meeting on 12 January 2022*” and from the information received, Mr Fairweather took the view that the claimant was guilty of gross misconduct and effected dismissal. That statement did not comply with the facts of the
- 15 matter in terms of meetings with the claimant. It was explained by Mr Pybus (who took the statement) that was his “*mistake*”.
27. The claimant took a pre-arranged holiday in Poland for three weeks in April and on return sought further employment and was successful in obtaining a
- 20 position from the beginning of April 2023.

### **Company policies and procedures**

28. The claimant entered into a Contract of employment with the respondent (C1-4). This included a probationary period of six months and advised that if he could not “*reach the required standards, your employment will be terminated with the required notice.*” The notice periods were in line with the statutory
- 25 requirement giving the claimant one week’s notice until completion of two years’ service. The contract advised that in the event that an employee’s conduct or performance fell below certain standards then “*disciplinary action may be taken*” and a more “*detailed explanation of the procedure and rules is contained in the employee handbook.*” A right of appeal against disciplinary
- 30 decision was provided.

29. The handbook was accessible to employees through the company web platform. That handbook (R5-39) set out the details of behaviour which the respondent would view as gross misconduct and likely to result in dismissal without notice. The list was stated to be *“not exhaustive”* and included  
5 *“serious or gross negligence”* and *“serious breach of health and safety policies and procedures”*.
30. The disciplinary procedure (R30-31) advised that disciplinary action would only be taken after *“full investigation of the facts”*. The procedure envisaged disciplinary action as being informed of any allegations and a disciplinary  
10 hearing with a right to be accompanied. It was stated that the respondent *“reserved the right to vary the disciplinary procedure dependent on either the seriousness of the allegations of misconduct or capability to be addressed, or if you only have a short amount of service”*. The procedure also contains a right of appeal against disciplinary decisions.

## 15 **Discussion and conclusions**

31. An action for wrongful dismissal is a common law action based on breach of contract. It is different from a complaint of unfair dismissal. The reasonableness or otherwise of an employer's actions is irrelevant. The Tribunal has to consider whether the employment contract has been  
20 breached. If it has and dismissal is a result then it is wrongful.
32. Where an employee's contract has been terminated without notice, the damages period is equivalent to the period of notice that should have been given by the employer. In terms of the respondent's procedures, they are entitled to terminate the contract without notice in the event of gross  
25 misconduct by the claimant. It maintains that the circumstances surrounding the crash into the barrier was an act of either gross or serious negligence or serious breach of health and safety requirements.
33. The circumstances would support that conclusion. It was undisputed that the speed limit in the area was 10mph. The road configuration meant a sharp  
30 bend and incline to the barrier. It was not reasonable for the claimant to assume that there would be no barrier or indeed nobody on the pedestrian

crossing. Failure to stop at the barrier by the claimant was of not of course deliberate but the surrounding circumstances would support the conclusion that he must have been driving at an excessive speed at that point to account for the nature of the damage to his vehicle, the barrier and its metal support.

5 The position of the car subsequent to the collision would support the excessive speed into the car park area. That would be an act of serious or gross negligence entitling the respondent to dismiss without notice.

34. Where an employer's breach of contract consists of a failure to follow a contractual procedure for dismissal, damages are similarly calculated on the basis of putting the employee back into the position he or she would have been if the employer had not dismissed for breach of contract. In other words, the employee must be put in the position he or she would have been in if the employer had carried out the contractual procedure. That would have the effect of allowing damages for the amount of time it would have taken for the employer to follow the correct procedure.

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35. I considered that the discipline procedure was contractual. The preface to the respondent handbook (R30) does indicate that the provisions within the handbook "*together with your contract of employment sets out your main terms and conditions of employment*". The discipline procedure was referred to in the contract with the claimant being referred to the handbook for detail. In its fundamentals an employee was entitled to a disciplinary hearing after investigation and to be told of the allegations he/she would face at such a hearing. That is a clear provision.

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36. The position of the respondent was that they were entitled to rely on that clause in the procedure which stated that it reserved the right to "*vary the disciplinary procedure dependent on either the seriousness of the allegations of misconduct or capability to be addressed, or if you only have a short amount of service*" and that "*if you are a short service employee or are still within the probationary period, you may not be issued with any warnings before dismissal.*"

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37. I did not consider that the respondent did exercise that right to vary the procedure. There is nothing in the ET3 response which would indicate that position. There was no indication in any correspondence that they chose to exercise that right. The letters to the claimant purported to conform to that procedure. Their initial letters invited the claimant to “*an investigation meeting*” which would conform to their procedure in fact finding and depending on the facts lead to a subsequent disciplinary hearing before any dismissal for gross misconduct. The letter of dismissal referred to a purported disciplinary hearing which of course did not take place but indicates that the respondent considered it was following the procedure and not exercising any right to vary the procedure. That indeed was the position outlined by Mr Fairweather in his statement which he “*believes to be true*” wherein he advises of investigation followed by discipline hearing. If the respondent was exercising a right to vary the procedure that would have been a very different statement. One or other of Mr Fairweather or Mr Pybus would have been able to state that the procedure was being varied had that conscious decision been taken. I considered that reliance on the clause on shorter service was after the event and there was no exercise of variation before dismissal.
38. I consider there was a breach of the contract in following the disciplinary procedure and in that respect the dismissal wrongful. The issue would be then recompense and that would be measured against the time it would have taken for a disciplinary hearing to have been held prior to any dismissal for gross misconduct. The conclusion is that there was support for a dismissal on the grounds of gross misconduct without notice but that could have only taken effect from the time of a disciplinary hearing. Thus, to put the employee back into the position he would have been had the correct procedures been followed, it would involve damages for the time it would have taken for the company to put in place a disciplinary hearing subsequent to the investigation meeting. I consider it reasonable to assume that period would have been one week at which point the respondent could have dismissed lawfully for gross misconduct. The failure to implement an appeal procedure would not be an issue that would allow the claimant to make any further recovery of damages. At that stage the contract would have been lawfully terminated.

39. That represents one week's pay to the claimant to put him in the position he would have been in had there been lawful termination. That is the sum of  
5 £369 which is the amount awarded

J Young

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**Employment Judge**

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**2 January 2024**

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**Date**

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**Date sent to parties**

**8 January 2024**

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