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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110429/2021

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Hearing held in Glasgow on 7 December 2023

Employment Judge R Mackay

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Mr Steven Whitelaw

**Claimant
In Person**

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Desmond Maguire Ltd

**Respondent
Represented by:
Mr Bryce, Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal that the claimant's claim for breach of contract succeeds and the respondent shall pay to the claimant the sum of **ONE THOUSAND FOUR HUNDRED POUNDS (£1,400)** as damages. This is a gross sum. The respondent shall be liable to account to HMRC for any income tax or national insurance contributions which may be due on the award such that the claimant receives the net amount.

REASONS

Background

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1. The claimant originally brought complaints of unfair dismissal and breach of contract. He did not have the requisite qualifying period to claim unfair

dismissal. On that basis, the claim proceeded to consider the contract claim alone. In short, the claimant seeks payment in lieu of his contractual notice period. Parties agreed that this amounted to £1,400 gross.

2. The respondent defended the claim on the basis that the claimant was not entitled to notice by virtue of his repudiatory breach of contract, and the respondent having dismissed in response to that repudiatory breach.
3. Counsel for the respondent accepted that the burden of proof lay with the respondent.
4. The Tribunal heard evidence from Mr James Hardy (a senior operative) and Mr Desmond Maguire (director) for the respondent. The claimant also gave evidence.
5. A joint bundle of documents running to over 100 pages was submitted. On the morning of the hearing, both parties sought to introduce additional evidence. For the claimant, this involved audio recordings of conversations involving Mr Maguire. Having heard parties, the Tribunal agreed to admit this evidence as well as a further document submitted by the respondent.

Observations on the Evidence

6. The Tribunal found the claimant to be a credible and reliable witness. He was clear and consistent in his account. He did not seek to embellish his evidence or to exaggerate. He made appropriate concessions during the course of his evidence.
7. The Tribunal had more difficulty with the evidence of Mr Maguire. At times, his answers to questions appeared rehearsed, with a determination on his part to convey certain messages. He was prone to exaggeration on a number of points and aspects of his evidence appeared somewhat implausible. Specific areas of concern relevant to the claim are highlighted in the Findings in Fact section which follows.

8. Mr Hardy had no part in the decision to dismiss the claimant. As such, his evidence was of more limited value.

Findings in Fact

9. The respondent is a funeral director operating in Glasgow. It has around four employees. The claimant was engaged as an operative on around 27 October 2020. His employment was terminated without notice on 24 May 2021.
10. The claimant was provided with a contract of employment shortly after the commencement of his employment. He was also provided with a copy of a disciplinary procedure (appended to the contract). The disciplinary procedure provides for dismissal without notice in the event of gross misconduct. Examples of gross misconduct set out include:
- (1) Serious insubordination;
 - (2) Serious breach of health & safety rules;
 - (3) Bringing the company into disrepute: and
 - (4) Deliberating causing damage to company property.
11. The respondent operates a fleet of vehicles, most of which are designed for use at funerals. One of its vehicles is a minibus. Each of the vehicles has a personalised number plate commencing "DEZ".
12. Mr Maguire's evidence was that "everyone in Glasgow" would identify a vehicle with that number plate as being related to his business such that any reputational damage would ensue if it was not in good condition. The Tribunal considered this to be a significant exaggeration of the likelihood of that happening.
13. On or around 3 May 2021, the respondent agreed that the claimant could use its minibus for personal use on the basis that his own vehicle was unavailable. Both Mr Hardy and Mr Maguire had concerns about the lack of cleanliness of

the vehicle during the time it was provided to the claimant. Both expressed their concerns verbally with the claimant. Mr Maguire had the belief referred to that the personalised number plate would be associated with his business and that an unclean vehicle would reflect badly on the business.

5 14. The respondent was engaged in the provision of funeral services to a client on 11 May 2021. Due to a shortage of vehicles sent to the client, the claimant was asked to use the minibus to transport bereaved family members to the funeral. He did so. It was clear from the evidence of both of the respondent's witnesses that the claimant was blamed for not arranging the requisite
10 number of cars. They also had concerns over the state of the minibus when it was called into use at short notice.

15 15. The claimant subsequently drove the van back to the respondent's premises. He was accompanied in the van by Mr Hardy. On entering the van, Mr Hardy noticed a warning light on the dashboard. He did not raise this with the claimant. He later mentioned the issue of the warning light to Mr Maguire.

16. The following day, Mr Maguire went to see the vehicle. The claimant was present. On putting the key into the ignition, a warning light came up. A message to the effect that the brake pads were worn also appeared.

17. A dispute on the evidence arose as to what was said to the claimant about
20 driving the vehicle thereafter. He gave evidence that his wife (also a director) arrived and stated that the vehicle "had no brakes" and should not be driven. The claimant's evidence was that no such instruction was given.

18. The Tribunal preferred the evidence of the claimant. The evidence of Mr
25 Maguire was unreliable. First, his account is not wholly consistent with the respondent's pleadings. In the ET3, it is suggested that Mr Maguire made an announcement to all staff that the minibus was not to be driven until further notice. In his evidence, he did not refer to a staff announcement and, as noted, indicated that his wife had issued the instruction not to drive the vehicle. In addition, the suggestion that there were no brakes was a clear
30 exaggeration at a time when the extent of the issue had not even been

identified. That is also inconsistent with Mr Maguire's own evidence about the state of the vehicle prior to its assessment by a mechanic the following day (referred to below), and his willingness for the mechanic to drive the vehicle. It is implausible that he would allow this if the risk was as material as suggested.

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19. Whilst the Tribunal was satisfied that Mr Maguire was annoyed by the issue, and raised concerns (which from the audio recordings produced he could clearly do in very strong terms), it was not satisfied that a clear instruction not to drive the vehicle was given.

10 20. The claimant drove the vehicle home later that day. He drove back to the respondent's premises the following morning and parked the vehicle outside.

21. Mr Maguire had, in the meantime, contacted a mechanic and asked him to collect the vehicle and carry out an inspection. The mechanic attended at the premises on 12 May and drove the vehicle away. He subsequently reported to Mr Maguire that repairs to the brakes were needed.

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22. A dispute in the evidence arose as to the extent of the damage. The claimant's evidence was that, aside from the warning light, which had only recently come on, there was nothing to suggest from driving the vehicle that there was any issue with the brakes. Mr Maguire gave evidence that the mechanic's assessment was that the brake pads were completely worn such that the brakes were "metal on metal". Elsewhere in his own evidence, however, he said that there was nothing to suggest any problem, aside from the warning light, on 11 May. He gave evidence that he was "100% sure" that there was no noise or other signal that the brakes were worn to that extent on 11 May. On being questioned as to how the brakes could deteriorate to such an extent within the space of one day, he put forward the proposition that driving from Glasgow to Edinburgh with the brakes on might create such a deterioration. There was no suggestion that this had happened. His account was, therefore, implausible, such that the claimant's

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evidence is preferred. Mr Maguire sought to exaggerate the position materially.

23. By letter dated 20 May 2021, the claimant was invited to a disciplinary hearing. The allegations against him were as follows:

- 5 (1) Undertaking duties for another Funeral Director, while employed by [the respondent];
- (2) [The claimant] failed to report a warning light on a company vehicle regarding brakes that was solely in [his] charge which is a serious breach of health & safety;
- 10 (3) [The claimant] continued to drive the vehicle which has resulted in damage to the vehicle and this has resulted in a financial loss to [the respondent];
- (4) Serious insubordination using/taking an unroadworthy vehicle after being clearly instructed not to drive the vehicle.

15 24. Although it was clear from the evidence of both of the respondent's witnesses that the cleanliness of the minibus and the failure on the part of the claimant to ensure adequate vehicles at the funeral on 11 May were major areas of concern for them, and formed a large part of the evidence they gave, these were not expressed as part of the disciplinary allegations. Neither was the
20 allegation of bringing the respondent into disrepute which seemed to be a material concern for Mr Maguire.

25. The first of the four allegations relates to an unrelated matter. Mr Maguire had received information to the effect that the claimant had worked elsewhere without permission.

25 26. A disciplinary hearing took place on 24 May 2021. Based on the minutes produced, most of the meeting involved a narration of the allegations by Mr Maguire rather than asking the claimant questions or seeking explanations from him.

27. By letter the same day, Mr Maguire wrote to the claimant dismissing him without notice. He stated that the dismissal was for the second, third and fourth allegations, the first having been withdrawn (although it is clear from his evidence that Mr Maguire remained suspicious about this).

5 **Relevant Law and Submissions**

28. Mr Bryce helpfully prepared a skeleton argument which he lodged in advance of the hearing. In relation to outlining the submissions for the respondent, he prepared a fair summary of the relevant law.

29. Section 86 of the Employment Rights Act 1996 (“**ERA**”) contains the right of
10 an employee to receive minimum notice after certain periods of service.

30. Section 86(6) ERA provides:

“This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.”

15 31. As noted above, Mr Bryce accepted that the legal onus to show the conduct - a repudiatory breach by the employee - rests with the respondent.

32. Section 86(6) ERA applies equally to the requirement to pay any greater contractual notice (as is the case here) (***British Heart Foundation v Roy*** UKEAT/00049/15/RW).

20 33. At Paragraph 8 of that case, the EAT held:

*“If an employer, knowing of the repudiatory conduct, dismisses an employee for it, the employer is, by doing so, accepting the employee’s breach as terminating the need for it, the employer, to continue to perform its side of the bargain which is the employment contract. In short, if an employee is guilty
25 of repudiatory conduct ... an employer is entitled to dismiss that employee without notice. The employer, by doing so, is not in breach of the contract. It is the employee’s breach which causes the termination.”*

34. In his submissions, Mr Bryce focused on what he said was the most material breach of the claimant, the alleged insubordination by driving the vehicle after having been instructed not to do so. The claimant made a brief submission in reply, asking for payment of £1,400 gross.

5 **Decision**

35. The Tribunal first considered whether the claimant had been in repudiatory breach of contract.

36. In its written and oral evidence, the respondent put forward a variety of potential breaches.

10 37. Dealing firstly with those set out in the letter of dismissal, the first is the alleged failure to report a warning light on the vehicle which was “solely” in the claimant’s charge. In assessing this allegation, it is not accepted that the claimant was solely in charge of the vehicle in circumstances where a more senior colleague accompanied him and after having witnessed a warning light
15 appear. The issue of the warning light was in fact reported by that colleague shortly thereafter. Moreover, the respondent’s evidence as to the state of the brakes was, as noted above, found to be exaggerated. This does not, therefore, amount to a serious breach of health and safety and does not amount to a repudiatory breach of contract.

20 38. The second alleged breach was the claimant having continued to drive the vehicle resulting in damage and financial loss to the respondent. There was no evidence whatsoever of the claimant having caused damage to the vehicle, nor was there any evidence as to financial loss. The Tribunal had trouble with the material inconsistency in the respondent’s evidence. On the
25 one hand, it was suggested that prior to 12 May 2021, there were no noticeable issues with the brakes and that on the following day they were damaged to the extent that metal was rubbing against metal. This allegation is not, therefore, well founded.

39. The third allegation, serious insubordination in driving the vehicle after having been instructed not to, is answered by the findings in fact of the Tribunal to the effect that no clear instruction was given to the claimant. Had a clear instruction been given, and disregarded, that might well amount to a repudiatory breach, but the Tribunal's finding is that no such clear instruction was given.

40. For completeness, the Tribunal considered certain of the other allegations put in evidence. First, so far as the claimant causing reputational damage to the respondent is concerned, there was no evidence whatsoever of this. Secondly, questions as to the cleanliness of the vehicle, whilst clearly a major concern for the respondent, were not matters which could amount to a repudiatory breach of contract.

41. Having established no repudiatory breach of contract, it is not strictly necessary for the Tribunal to consider the reason for the claimant's dismissal. It did, however, for completeness consider whether, if wrong in its assessment of the serious insubordination point, the claimant was dismissed for that reason. It was not satisfied that the claimant was in fact dismissed for that reason. The evidence presented as a whole identified a range of issues, some of which were the subject of the disciplinary process and some which were not. It was clear from the evidence that the claimant was dismissed for a variety of factors. It seemed to the Tribunal that the principal issues in the mind of the decision maker were the suspicion that the claimant was working elsewhere (albeit that this was not given as a reason for dismissal), combined with frustrations over the claimant's general failures to ensure the vehicle lent to him remained in a clean and well functioning state.

42. The respondent did not have an obligation to dismiss fairly as a matter of law and it was legitimate for them to reach the conclusion that they no longer wished to employ the claimant due to the range of issues which had arisen. That does not, however, remove the need to pay notice in circumstances where, as here, an established repudiatory breach was not the reason for dismissal.

Remedy

43. As agreed by the parties, the claimant is entitled to £1,400 in lieu of notice. The respondent shall be liable for any income tax or national insurance contributions which may be due on this gross sum before payment is made.

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R MacKay

Employment Judge

19 January 2024

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Date of Judgment

Date sent to parties

24 January 2024

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