

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No S/4104904/2016

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Held in Glasgow on 22 and 23rd May 2017

Employment Judge: Ms L Doherty

Mr M Williamson

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**Claimant
Represented by:
Ms Mileham –
Partner**

Energy and Carbon Management Limited

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**Respondent
Represented by:
Mr Philp –
Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

(1) the claimant's complaint of wrongful dismissal is dismissed;

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(2) the claimant's complaint for non-payment of wages under section **23** of the Employment Rights Act 1996 (ERA) is dismissed.

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REASONS

1. On 29 August 2016 the claimant presented complaints of discrimination, wrongful dismissal (breach of contract), and of failure to pay wages.

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2. The discrimination claim is no longer before the Tribunal, but the claims in respect of breach of contract and failure to pay wages are.

3. The issues in this case are set out in a note of a case management discussion which took place in January 2017.

Breach of Contract claim

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4. It is the respondent's position that the claimant by his conduct was in fundamental breach of his contract of employment, and they were therefore entitled to summarily dismiss him.

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5. This is not accepted by the claimant, and it is his position that he was not in a fundamental breach of contract and having completed his probationary period, was entitled to three months' notice from the respondents as provided for in terms of Clause 18 of his contract of employment.

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6. The respondent's position is that in the event the Tribunal finds that they were not entitled to summarily dismiss the claimant, he is only entitled to one month's notice, that being the notice which he gave at the point when he resigned.

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7. The issues before the Tribunal in connection with breach of contract claim are therefore as follows:-

(1) Were the respondents entitled to summarily dismiss the claimant?

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(2) If not, were the respondents obliged to give the claimant three months' notice in terms of Clause 18 of his contract of employment or to pay him the balance of the notice given by him on resignation, and

(3) What, if any, further damages are due to the claimant?

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Non-payment of Wages

8. The non-payment of wages element for this claim relates to payments of commission payments which the claimant claims are due. The issues for the Tribunal are:-

5 (i). firstly, was the claimant entitled to be paid commission in terms of his contract of employment?

(ii). If so, how much was payable to the claimant and;

10 (iii). If so, when was the commission properly payable to the claimant, and it was not paid at that time, has the claim for payment been brought in time, or is it time barred?

9. The Tribunal heard evidence from the claimant. For the respondents, Mr
15 Hickling a Business Development Manager gave evidence.

10. The parties lodged a joint bundle of documents. Included in those documents, were the transcripts of three telephone conversations which had taken place with the claimant and Mr Hickling and a Ms Farrell. The
20 claimant and Ms Mileham had the opportunity of listening to the tape recordings of these telephone conversations prior to the commencement of the Hearing, and were in a position to agree the transcripts produced in the bundle.

25 **Findings in Fact**

11. The respondents are a company of energy consultants, working with commercial businesses with a view to selling energy products, managing energy purchasing, and providing compliance advice. The respondents
30 business generates income by earning commission on providing energy contracts, agreeing fees for services provided, and agreeing share and saving agreements with clients. The respondents have 22 employees, and are based in Sussex.

12. Around January 2015, the respondents recruited the claimant into their business, as their Business Development Manager with responsibility the geographical area of Scotland.

5 13. The claimant had discussions with Mr Hickling, Mr Worbey, the Managing Director, and Mr Anderson, the Chairman of the Company. He was recruited after telephone discussions followed by a face to face meeting.

14. The claimant was issued with a contract of employment (page 61 to 70).
10 That contract provided (Clause 18), a notice period of three months of the expiry of the probationary period.

15. It also provided at Clause 19, a Disciplinary Procedure, which stated:-

15 *“The Company’s Disciplinary Procedure, Code of Conduct and Standards are set out in the Employee Handbook. You are strongly advised to familiarise yourself with them.*

The Company reserves the right to discipline or dismiss you without following the disciplinary Procedure if you have less than a certain minimum period of continuous service as set out in the Employee Handbook.”

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25 Clause 20 provides for Disciplinary and Dismissal Appeals and states; *“if you are dissatisfied with any disciplinary or dismissal decision taken in respect of you, you may appeal to the Managing Director. Further details on Disciplinary and Dismissal Appeals are set out in the Employee Handbook.”*

30 16. Included at in the policy is a non-exhaustive list of behaviour which in the respondent’s view is Gross Misconduct, likely to result in dismissal without notice. Those include, theft, dishonesty or fraud.

17. The Employee Handbook also includes a policy about claiming Expenses (page 82). This provides:-

5 *“The Company will bear all reasonable costs incurred by you in the execution of your duties subject to the procedures detailed below being adhered to. Expenses are unlikely to be paid if you do not adhere to these procedures. Failure to follow the procedures details in this document will be investigated. If considered to constitute misconduct disciplinary procedure may be invoked which may result*
10 *in summary dismissal.”*

The policy goes on to provide that *“expenses must be submitted each month on a Company Expenses Form (available from Finance) with a full description and details provided and signed by you and countersigned as*
15 *follows:-*

- *Claims up to and including £75.00 – your line manager.*
- *Claims in excess of £75.00 – your line manager plus either*
20 *the Chairman, Managing Director, or Financial Controller.*

The Handbook also provides under the heading Disciplinary Policy and Procedure:-

25 *“The Company reserves the right to discipline or dismiss you without following the Disciplinary Procedure if you have less than 24 months’ continuous service.”*

- 30 18. The claimant’s contract of employment provides for a six month probationary period.

19. The contract provided at Clause 6, the claimant's basic pay was £38,000 payable per annum on or around the last working day of each month by BACS in arrears.

5 20. It also provided:- *"The Company will pay sales commission for new business generated by you in accordance with the schedule specified in Appendix 1."*

21. Appendix 1 to the contract is produced at Page 69.

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22. It provides that *"The Company will pay you monthly commission in accordance with the following reward mechanism'*

23. There then follows two tables. The first table contains two columns. On the right hand column is a series of figures under the heading *"Accumulative annual Fee"*, and in the left hand column, *"Percentage Sales Commission"*. The Table provides that 2% sales commission will be paid on an Accumulative Annual Fee generated between £0 to £50,000; 3% commission will be paid on an Accumulative Annual Fee generated from £50,001 to £100,000; 4% sales commission will be paid on Accumulative annual Fees of £100,001 to £250,000 etc, up to 10% sales commission, paid on Accumulative Annual Fees generated of £250,001 to £300,000.

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24. The second table in Appendix 1 comprised of three columns, which are *Calendar Month; Percentage; and Monthly Target Fee;* and set it out the claimant's targets from January 2015 to December 2015. The claimant's overall target was fixed at £300,000 for the year.

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25. These targets increased from January to September 2015, and then began to decrease again, to reflect the fact the claimant's had was commencing in his employment and thereafter to reflect the energy purchasing profile of the clients the claimant would be selling to.

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26. The claimant's monthly target for January and February was £3,000; £9000 for March, and £24,000 for April (all 2015).
27. The Accumulative Annual Fee was the total amount of revenue generated for the business from the first year of the contracts signed with clients, even if the contract was of a longer duration than one year. The Accumulative Annual Fee was calculated with reference to at the Initial contract value or ICV. It was the ICV which attracted commission, as opposed to the TVC (Total Contract Value). This was explained to the claimant at the point of interview and he knew it was the ICV which attracted commission, albeit his experience in other jobs in the industry was that was the TVC could also attract commission.
28. The Accumulative Annual Fee referred to in the appendix 1, represented the total Initial Contract Value (ICV) of contracts which the claimant secured with clients in a year, on which commission was paid, and the claimant understood this.
29. The claimant worked from home and was line managed by Mr James Hickling whose position within the Company was more senior than that of the claimant on account of his length of service. The claimant reported directly to Mr Hickling, and spoke with him on the telephone every one or two days.
30. In addition to these telephone conversations, there was also a reporting structure in place, whereby the claimant had to report on a weekly basis on sales and prospects, so that Mr Hickling could convey that information to a management meeting, which took place on Monday of each week.
31. Mr Hickling had access to the client's Outlook Calendar, on which the claimant recorded his appointments. Mr Hickling also had responsibility for sanctioning the claimant's travelling expenses.

32. Travelling expenses were submitted on a template, an example which is produced in the bundle at Page 96.

5 33. The claimant got off to a slow start in sales in terms of sales. The first sale which attracted commission was recorded in March 2015, for Brentwood Hotel, which had an initial contract value (ICV) of £972.

10 34. The respondents became concerned about the claimant's failure to achieve targets, and held a review meeting with him in March 2015. At that meeting Mr Hickling told the claimant the respondents proposed to reduce his target from £300,000 to £250,000, but that he would not become eligible to receive payment of commission, until he had achieved £50,000 worth of sales. The claimant agreed to this and responded '*no worries*'.

15 35. By the end of 2015, the claimant was still significantly below his target. He had achieved sales with a total ICV value of £20,178 against a modified target of £250,000.

20 36. The respondents held a meeting with the claimant on 18 December 2015 at their offices in England, the purpose of which was to review his performance in 2015, discuss his target for 2016, and his commission structure for commission in 2016. The claimant accepted that he had not achieved sales targeted in 2015. A target of £250,000 was fixed for 2016, with a target of around £20,000 each month being set.

25 37. The claimant was also advised that the respondents would not pay commission until he had achieved sales of £50,000, and they would revisit this at the end of the first quarter, in March 2016. The claimant agreed to what was proposed at the review meeting.

30 38. The claimant did not achieve sales with an ICV value of 50,000 by the end of the March 2016 and therefore the respondents did not review their position in relation to payment of commission.

39. The ICV of the sales which the claimant achieved during the totality of his employment with the respondents, was £64,732, and the claimant did not achieve sales with a total ICV value of £50,000, either in the period from the commencement of his employment until the end of 2015, or from the beginning of 2016 until the date of his dismissal in July 2016.
40. The claimant was at no time during the currency of his employment paid commission.
41. During the currency of his employment, and after his employment came to an end (until the issue of the Tribunal claim) the claimant did not ask the respondents for payment of commission.
42. On or around 7th July, the claimant submitted an expenses claim form, in respect of travel expenses (page 96). He included on that form a claim for expenses of £38.16 for a trip said to have taken place 30th June 2016 to visit Barr Construction.
43. On the same claim form, there was also a claim for a return journey said to have taken place on 1st July 2016, to visit a Marex Parquay, of Scottish Salmon Company. The amount claimed in respect of travel expenses in respect of this trip was £53.02.
44. It was said on the form, that the reason for the journey on both occasions was "*a new business meeting.*"
45. The expenses claim form was signed by the claimant. Mr Hickling was responsible for approving the claimant's travelling expenses.
46. Mr Hickling had access to the claimant's Outlook Calendar which indicated what meetings he was scheduled to attend and with whom. The outlook calendar (page 91C) was populated with an entry for the 30^h of June with the following information "*Bill Weir (Managing Director) / Ali Sheikh*

(Chartered Energy Manager) Now left ... Gavin Mooney (Commercial Director). The company was Barr Construction.

47. There was also an entry for the 1^h of July which contained the following
5 *"Marex Parquay (Operations & Facilities Manager)*. The company was Scottish salmon Co.
48. There was an occasion previously, when Mr Hickling understood the claimant had spent the weekend in Huddersfield. The claimant submitted
10 travelling expenses for travel to a meeting in Huddersfield on the Friday of that weekend, which had not generated any business. Mr Hickling had a discussion with the claimant, in which he asked the claimant to consider whether or not he wished to claim these travelling expenses, which were quite considerable, and the claimant subsequently did not pursue the claim.
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49. Mr Hickling had two telephone calls with the claimant on the 12th July 2016, the first of which took place at 16:46, and the second which took place at 15:57. The transcripts of the phone calls are produced in the bundle (Pages 89 to 116).
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50. In the course of the first telephone call, Mr Hickling asked the claimant about the trip to Scottish Salmon and asked if he was trying to talk to someone at Head Office. The claimant said that he was trying to speak to a Fiona Larkin at Head office. Mr Hickling asked if he had meet Mr Parquay.
25 The claimant responded *"Yeah I met with him last year as well..."*
51. Mr Hickling asked the claimant if he had a meeting with him last week. The claimant said yes but now everything was centralised, and went on to say that Associated Sea foods were combining with Scottish Salmon and they
30 are basically now one company, to centralise procurement. The claimant said he had the name of the person he needed to contact (a Fiona Larkin) who acted for the two companies.

52. Mr Hickling then asked the claimant why he went to see Marex Parquay and it was Fiona Larkin that he should have spoken to, and queried why he had gone to see Marex Parquay if it was not him who could make the decision. The claimant said it was a recent thing.

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53. Later in the conversation, Mr Hickling asked the claimant about his visit to Barr Construction.

54. The claimant had e-mailed Mr Hickling in relation to the Barr Construction meeting on 30th June as follows:-

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“Today I attended a 1NB meeting with Barr Construction Ltd (5Gig). The M.D, Bill wasn’t present in the meeting who I had originally arranged it with. Instead I met with his colleague Ali (Chartered Energy Manager). Orchard are still present within the company – LOA validity Feb 17’ and supplier contracts expire Oct 17’ across all sites. Ali is passing on to Bill information and I am to reschedule a further meeting in a fortnight’s time for Bill to attend and make a decision. I mentioned of course our LOA was supersede Orchard’s in the event if they did come with us for the procurement.”

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55. Mr Hickling had become suspicious about this as the entry in the claimant’s Outlook Calendar, which noted that Mr Ali Sheikh had left, and he telephoned Barr Construction at some point prior to speaking to the claimant on 12th July. Mr Hickling was told by Barr Construction that Mr Ali Sheikh had left over two years previously. Mr Hickling also asked whether there was a record of the claimant having signed in for a visit to Barr Construction, but the receptionist said she could find no record of the claimant having signed in for a visit.

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56. During the telephone call Mr Hickling asked the claimant about his meeting with Barr Construction, and asked him if he saw Ali Sheikh. The claimant said yes he saw Ali Sheikh, and that Barr had signed contracts up to October 17 with Orchard. The claimant went on to say that he was only

prepared to move if the respondent under-cut Orchard and he gave a figure for an upfront fee which was being paid, and information about a number of sites, and their energy usage.

5 57. Mr Hickling asked the claimant if he went to Ayrshire (the Barr site), and the claimant said he thought so. Mr Hickling then said he had an issue with the claimant saying that he met Ali Sheikh because he no longer worked with Barr construction. The claimant said that Ali Sheikh was the Environmental Officer at that point.

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58. Mr Hickling challenged the claimant on this, and said that the claimant was claiming for a meeting which took place on 30th June with Ali Sheikh when Mr Sheikh had left 2 years ago. The claimant reiterated that it was Ali that he met with. Mr Hickling told the claimant that he had telephoned Barr Construction, who told him that Mr Sheikh had left 2 years ago.

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59. The claimant then said that he had been calling the person he met by the wrong name, because he was the Environmental Officer, and he said he never met Mr Sheikh before. Mr Hickling said Mr Sheikh had not worked for Barr for two years The claimant said he had no idea about that, and was only going on historic data. He questioned who he had met, if he was not the Environmental Officer.

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60. Mr Hickling told the claimant that this put the respondents in a difficult position. The claimant had confirmed in an email that he met with Mr Sheikh.

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61. The claimant said he thought he had been meeting Ali Sheikh and he called the person that he met Ali all the way through, and he felt stupid about it. He said he did not know who he met. He went on to say he was “papped off” with someone, and he made the assumption it was Ali, and he had just left him with the relevant documentation and that was it. He was only at a 10 minute meeting, and he made the assumption that it was Ali that he was meeting with.

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- 5 62. Mr Hickling told the claimant, that if he was lying, there was no way back, and he went on to say that he did not think the claimant was telling the complete truth on a few things. The claimant asked what, and Mr Hickling asked him to tell him what other lies he had told.
63. They then went on to be a discussion about the claimant's personal life and Mr Hickling went on to ask the claimant about something outside of work.
- 10 64. Towards the end of the conversation, Mr Hickling told the claimant that he would need evidence of who he had seen at Barr Construction. The claimant responded that it could have been the receptionist for all he knew. The meeting consisted of him walking into the front door, Bill Weir not being available, and the claimant leaving documentation with someone. The claimant went on to accept he was caught out and he wouldn't even class the meeting with Barr as a meeting it was just a walk through the front door. He denied that Ali was a fictional character in his head and said he was his contact was with Barr and he had met him before. Mr Hickling queried why Ali Sheikh's name was on the agenda even before the claimant went to the meeting. He pointed out that there was also a third name in the agenda, Gavin Mooney, the Commercial Director.
- 15 20 25 65. Mr Hickling then went on to ask the claimant if he actually met Marex Parquay and the claimant said no, he said that he went to Loch Fyne Oysters instead.
- 30 66. Mr Hickling then asked him why he had told him earlier in the meeting that he had seen Marex Parquay, when he hadn't. The claimant said that when he found out it was centralised, he went straight to see Martin Paterson at Loch Fyne Oysters, spearheading this along with Fiona Larkin. Mr Hickling said to the claimant he was asking him to pay money for trips which had been fraudulently made up. The claimant said all he was trying to do was to prove that he was doing work and trying to get appointments.

67. The second phone call between the claimant and Mr Hickling was around issues in the claimant's personal life, involving the claimant and his partner. Before the end of this telephone call Mr Hickling said to the claimant "*you are going to end up not having a job as of tomorrow, you are not going to have a house, you are going to have problems with your car mate and all this stuff, because you love someone. It might be free living in prison but that is going to be the next alternative for you if in it. You are going to be if you carry on with her.*"
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68. On the morning of the 13th July, Mr Hickling e-mailed the claimant stating; "*following yesterday's conversation please can you amend and re-submit your expenses claim form appropriately.*" (Page 117).
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69. The claimant re-submitted his claim form omitting claims for journeys to Barr Construction, and Scottish Salmon (page 119).
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70. Mr Hickling also spoke with Sandra Farrell, who provides a financial and HR function in the respondent's organisation. She expressed the view that in the event the claimant was attempting to claim for travelling expenses for journeys which he had not undertaken, this would amount to a fraudulent claim, and could constitute gross misconduct.
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71. Ms Farrell and Mr Hickling considered the Employee Handbook, and sought advice from RBS Mentor. They decided to arrange a telephone meeting with the claimant, and e-mailed him to that effect on the afternoon on 13th July.
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72. Very shortly after that e-mail was sent to the claimant, he e-mailed the respondents tendering his resignation (page 122).
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73. In that letter, he stated:-

“After due consideration I feel it only forcefully prudent to submit my formal letter of resignation, giving one months’ notice as of the date of this letter, from my position as Business Development Executive.

5 *I will continue to carry out my roles and responsibilities as the company dictates and sees fit for the full duration of my 1 months’ working notice, as per noted and stated within my contract of employment. My final day of employment will therefore be 13th August 2016.*

10 *The primary and principle for my decision is one based upon prolonged, aggravated and forceful opinions in reference and regards to my long term partner, Diana Mileham. It has become more and more apparent that over a sustained period of time that certain*
15 *individuals, more notable than others my direct line manager, James Hickling, have expressed their personal opinions and unwavering disregard for my personal relationship choices and decisions. Just one example being;*

20 *That on Tuesday 12th July 2016 at approximately 15:57 during a recorded 18 minute telephone conversation with James he said, and I quote; “you’re a smart man Mark, she is no good for you and you could end up losing your job tomorrow because of her”. I feel that this was an extremely unfair and further unjust attack on my partner*
25 *and I, and in turn indicated to me that this was an ultimatum.*

The continuous verbal attacks on my partner and myself, not to mention James continuously viewing my partners Facebook page, have affected my working mentality, environment, relationship and in
30 *turn had a direct impact on my work. The constant pressure of conforming to how he and others perceive my personal life and what opinions they’ve vocally announced and what choices they would prefer I take have subsequently had this adverse effect on me.*

This biased basis for conflict, directly related to my partner and personal life choices, has been and is, the only reason for my decision herewith.

5 *I trust that salary, expenses, outstanding holiday pay etc. will be paid in the usual way. Please confirm by return.”*

74. The telephone call scheduled with Ms Farrell, Mr Hickling, and the claimant took place after that letter was received, and an agreed record of what was
10 said in that letter was produced at Page 123/124.

75. Ms Farrell advised the claimant this was an investigatory meeting. The claimant asked if he could have a representative present, and was told no. Ms Farrell asked the claimant about the claim for travelling expenses to Barr
15 Construction on 30th June. The claimant replied “no comment”. He was asked if he was confirming whether or not the meeting took place, and replied “no comment.” When Ms Farrell asked the claimant to discuss the other meeting which she said he had attended at Scottish Salmon Co, on 1 July, and the claimant replied “no comment.” Ms Farrell told the claimant
20 that if he replied with no comment, then the respondents would note he had been given the opportunity to explain but decided to reply with no comment. The claimant said the situation from this perspective was that everything was detailed within the letter of resignation which highlighted the main points, and he did not feel the need to explain the reasons why.

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76. Ms Farrell said the claimant submitted a claim form which he omitting these two journeys, and asked if he intended to claim them at a later date, and the claimant replied “no comment.”

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77. At the end of that telephone conversation, Ms Farrell and Mr Hickling discussed the situation, and again took legal advice. They reached the conclusion that the claimant had submitted travel expenses for trips which he had not undertaken and therefore made fraudulent claims. They

discussed the matters with the respondents Chairman, Mr Henderson. Mr Hickling took the decision that that the claimant's employment should be terminated immediately on the grounds of gross misconduct for fraudulently claiming travelling expenses for meting he had not attended and Mr Henderson signed a letter dated 14th July dismissing the claimant. The claimant was not offered the right to appeal.

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78. After he received this letter, the claimant wrote to the respondents on 14th July, seeking to appeal the decision to dismiss him (Page 130). In his letter of appeal, he relied on the respondent's failure to follow a formal disciplinary procedure, and his position was that he had been wrongfully and unfairly dismissed. In his letter, the claimant sought one months' notice pay, any outstanding expenses, and holiday pay. The claimant e-mailed the respondents again on the 19th July (page 131) making "*a further request for my one months' notice pay, expenses and outstanding holiday pay.*"

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79. The respondents responded on 19th July by letter, signed by Sandra Farrell, advising the claimant that as he had less than 21 months' continuous service, the company was exercising its right not to follow the full Disciplinary Procedure in connection with this dismissal.

80. The claimant was paid one month in advance, but at no point, during his employment, was he paid commission.

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81. The claimant claimed for travelling expenses from the respondents for two meetings and two journey's, one to Barr Construction, and one to Scottish Salmon, which did not take place.

Note on Evidence

82. There are a number of conflicts in the evidence of the claimant, and Mr Hickling in this case, notwithstanding that much of the documentation, in

particular the transcripts of the telephone calls, were agreed. Overall the Tribunal found Mr Hickling to be a generally credible and reliable witness. For the reasons which are dealt with more fully below the Tribunal was not satisfied that the claimant's evidence was not, in all aspects, credible or reliable.

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Wrongful Dismissal

83. In relation to the claim of wrongful dismissal the relevant contested issue was whether the claimant had submitted claims for travelling expenses on two occasions for journeys which he had not undertaken.

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84. In a claim of wrongful dismissal, it is relevant for the Tribunal to determine what actually occurred, not simply what an employer could reasonably conclude it had occurred, and therefore the Tribunal considered the evidence before it, in reaching its determination on this issue.

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85. The Tribunal firstly considered the position in relation to the travelling expenses claimed for the meeting which was said to have taken place between the claimant and Scottish Salmon on 1st July.

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86. It was the claimant's evidence that he did not meet with Marex Parquay and Scottish Salmon, but he did travel to Loch Fyne, because the companies, Scottish Salmon and Loch Fyne, had amalgamated. He explained that he did not amend the travelling expenses because Loch Fyne's premises were very close to Scottish Salmon, the postcode would have been approximately the same, and therefore there had been no material difference between the journey time for expenses claimed, regardless of whether he visited Scottish Salmon, or Loch Fyne. Both in his evidence before this Tribunal, and in the course of his telephone call with Mr Hickling the claimant said that it was a recent thing that the companies had amalgamated.

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87. That however in the Tribunal's view that did not explain why the claimant initially told Mr Hickling that he had met with Marex Parquay, when patently he had not. Indeed the claimant accepted later in his telephone conversation with Mr Hickling that this meeting had not taken place. Even if
5 it was a recent amalgamation between Loch Fyne and Scottish Salmon, the Tribunal considered it likely that the claimant would have known before he embarked on his trip, and most certainly after he had undertaken it, that it was not Marex Parquay that he was going to see. It was therefore unexplained, why, if the claimant had legitimately undertaken a journey to
10 Loch Fyne, he would not have submitted the correct details, both for the meeting, and the travelling expenses, or why he would have lied in the first place about meeting Marex Parquay.

88. The claimant suggested that Mr Hickling had asked the claimant to submit
15 his expenses excluding these two journeys in question, but that was not correct. There was no reference to this in the telephone conversation between the claimant and Mr Hickling. Mr Hickling email asked the claimant to re-submit the travelling expenses appropriately. Had the claimant legitimately undertaken this journey, there was no reason why it could not or
20 should not have been included. All of this together with the fact that the claimant did not re-submit the travelling expenses to include the journey to Scottish Salmon, case very considerable doubt on his position that he had undertaken this journey in the first place, and the Tribunal was satisfied on balance that he had not done so. In reaching this conclusion the Tribunal
25 did not consider too much could be taken from the exchange about travelling expenses for the Huddersfield trip between the claimant and Mr Hickling, the terms of which appeared to the Tribunal to be fairly self explanatory.

30 89. The Tribunal also considered in the evidence in relation to travelling expenses claimed for the journey which was alleged to have taken place to Barr Construction.

90. The claimant's credibility as to whether he had undertaken this trip was seriously undermined, in that at the beginning of his telephone conversation with Mr Hickling, and in his e-mail, to Mr Hickling, he misled him, as to what had taken place. The fact that he did so, cast considerable doubt on the version of events which he subsequently gave to Mr Hickling, and to the Tribunal, in relation to what had taken place. The Tribunal also took into account, that the claimant resigned, very shortly after he received notice of the fact that his being asked to attend a telephone meeting to discuss his travel expenses. The claimant's letter of resignation cites as the reason for his resignation, unwarranted comments about his personal life. The Tribunal was satisfied that there was a discussion between the claimant and Mr Hickling in relation to the claimant's personal life in the course of which Mr Hickling offered comment; it was not satisfied however that this explained why the claimant resigned.

91. It was put to Mr Hickling in cross-examination that the comment, quoted in the claimant's letter of resignation, suggested that it was pre-determined that the claimant was to be dismissed, and this was because the claimant's partner was seen as a threat. However the Tribunal was satisfied that the comment made by Mr Hickling was made in the context of the overall discussion about difficult personal circumstances which the claimant was experiencing and not much could be taken from it. On balance, the Tribunal was prepared to infer that the reason the claimant resigned, was because of his concerns about the travelling expenses which had been submitted.

92. The Tribunal was fortified in this conclusion, in that at the investigatory meeting, the claimant refused to make any comment on what was put to him. Had the claimant legitimately undertaken the journeys, it did not appear to the Tribunal to be plausible that he would not have used this opportunity to explain his position.

93. Taking all these factors together, the Tribunal was satisfied, that as a matter of fact, the claimant had not undertaken journeys to Barr Construction, or Scottish Salmon, that he had submitted claims for travelling expenses in respect of journeys which he had not undertaken.

Commission

5 94. The main issue which the Tribunal had to determine was what discussions had taken place between the parties in relation to the commission structure both at the commencement of the contract, and in the course of the contract.

10 95. Firstly, the Tribunal was satisfied that the claimant was aware, at the point where he commenced working with the respondents, and was issued with his contract of employment, that commission was paid on the basis of the ICV (Initial Contract Value), and not on the total value of the contract which was signed. Mr Hickling gave clear evidence on this, which the Tribunal accepted.

15 96. The claimant's position was that he should have received commission on the total value of a contract. The effect of this would have been, that the claimant sold a contract with duration of more than one year, it's the total value attracted payments of commission.

20 97. The Tribunal was satisfied that the Accumulative Annual Fee in Appendix 1 of the contract of employment was calculated with reference to income generated from the first year of the contracts sold by the claimant, and the claimant was aware of this.

25 98. The Tribunal was also satisfied that the claimant was aware that he was not entitled to commission in relation to service agreements signed with customers, albeit service agreements might later generate business for the respondents. The claimant accepted that this was the case in cross-examination.

30 99. The Tribunal was fortified in its conclusion on this point in that albeit the claimant produced a table with his assessment of commission due, he accepted that the figures supplied by the respondents in respect of the

sales which attracted commission, were in principle (and subject to arithmetical checking) correct.

5 100. The second issue was whether there had been a discussion with the claimant, around the end of March 2015, in which he was advised that his target would be reduced, but that he would have to achieve a trigger point of £50,000 worth of sales, before he became entitled to be paid commission. The claimant accepted that his target was reduced to £250,000, but could not recall the conversation in which he was advised that commission
10 payments could only be triggered after he achieved sales of £50,000.

101. It was Mr Hickling's evidence that such a conversation took place, and the claimant had responded '*no worries*'.

15 102. Tribunal was satisfied that this conversation had taken place. Mr Hickling's recall of it was clear, and was to be preferred to that of the claimant, who was unable to confirm or deny that element of the conversation, but simply could not recall it.

20 103. Mr Hickling also gave evidence to the effect that a conversation took place in relation to targets in the December 2015, when the claimant was again told that commission would not be payable until the claimant achieved sales of £50,000. The claimant could recall a conversation taking place, but could not recall this was said. The Tribunal was satisfied that the evidence
25 of Mr Hickling on this point was to be accepted.

104. It was the claimant's evidence that he raised non-payment of commission throughout the currency of his employment, but was "fobbed off" with excuses. Mr Hickling denied that commission had been raised by the
30 claimant, or that he had demanded payment for commission which had been earned.

105. The Tribunal preferred the evidence of Mr Hickling, to that of the claimant, both in relation to the discussion which were alleged to have taken place about non-payment of commission, and in relation to the meeting at the end

of March where commission was discussed, and the meeting in December where commission was again discussed.

5 106. In reaching its conclusion, the Tribunal took into account that the claimant was never paid commission at any point during the currency of his employment. The Tribunal would have expected the claimant to have actively pursued payment of commission during the currency of his employment had it been due, as indeed he said he did. That position however was rendered incredible in that at the point when the claimant
10 resigned, he did not raise any issue of non payment of commission. This did not feature either as a reason for resigning or in his request for payments which were due such a notice or holiday pay. The tribunal did not find the position that the *etc* at the end of the claimant's letter of resignation was intended to cover commission to be persuasive one. There is no
15 mention of commission or a reference to *etc* in the claimant's subsequent correspondence seeking payment of notice and holiday pay.

20 107. The Tribunal considered it likely that had the claimant considered commission was due at the point when he resigned, then he would have made his position in relation to this clear. The fact that there was no reference to commission in his letter of resignation, and subsequent correspondence sent to the respondents in circumstances where the claimant had clearly not been paid commission throughout his employment, supported the conclusion that Mr Hickling's version of events was preferred
25 over that of the claimant.

Submissions

30 108. Ms Mileham for the claimant took the Tribunal to the claimant's length of service and to his pay and notice period. She submitted that he was wrongfully dismissed. The claimant had accepted that meetings did not take place, but he did not accept that he did not make the journeys claimed for.

109. The only reason that he had not signed in to Barr Construction, was because there was no need to sign in due to the brevity of their meeting. The claimant had travelled to Loch Fyne, and the claimant had been asked to re-submit his travelling expenses, which is what he did. During his
5 evidence the claimant explained he made the journeys claimed for.
110. In relation to the commission payments Ms Mileham took the Tribunal to the terms of the contract for which the claimant was issued, and which had been signed by him at the respondents, when he commenced working.
10 There was no written notification there had been change in the contract. The claimant was entitled to payment of commission, and to three months' notice.
111. Mr Philp for the respondents made submissions as to the relevancy of some
15 of the evidence which was heard on the basis of fair notice.
112. In relation to the substance of the claim he submitted the claimant had been guilty of dishonest conduct, justifying summary dismissal. If that was incorrect, he was in any event only entitled to one month's notice. Even if
20 he was entitled to three months' notice the claimant had failed to mitigate his loss.
113. In relation to payment of commission, Mr Philp submitted that the contract had been varied by agreement and the claimant was told that the
25 commission structure was changed to the effect that he required to achieve sales of £50,000 before he became contractually entitled to receive the payment of commission.
114. If there was no expressed variation of agreement, then the variation could
30 be implied by the claimant's conduct. There had been no request for commission throughout the claimant's employment, and he had been paid each month, receiving payment for his basic salary only.

115. The respondent was entitled to conclude that the claimant was guilty of attempting to fraudulently claim travelling expenses, and summarily dismiss the claimant. The claimant was not contractually entitled to insist that the respondents adhered to the terms of their disciplinary policy, as the respondents reserved the right not to follow this policy in circumstances where the claimant had less than 2 years' service.

116. The additional payments which the claimant claimed had no substance in law.

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Consideration

Wrongful Dismissal Claim

117. As identified above, the first question for the Tribunal is were the respondents entitled to summarily dismiss the claimant?

118. In considering whether the claimant was wrongfully dismissed, the question for the Tribunal is whether he was dismissed in breach of his contract of employment. In terms of his contract of employment, the respondents could have lawfully dismissed the claimant with three months' notice (leaving aside any argument raised by the fact that the claimant had himself resigned at the point where he was dismissed, on a month's notice) and the question for the Tribunal then is whether the respondent wrongfully (unlawfully) dismissed the claimant by dismissing him summarily, and giving him no notice of dismissal.

119. The respondent's dispute that they were required to give the claimant notice of termination of employment, on the basis that by his conduct, he was in default and they were entitled to summarily dismiss the claimant.

120. In order to amount to a repudiatory breach of contract, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract. The degree of misconduct necessary in order

for the employee's behaviour to amount to a repudiatory breach is a question of fact for the Tribunal.

5 121. In considering this, the Tribunal considered whether the conduct complained of was such that it undermined the trust and confidence which is inherent in the contract of employment, so that the employer should no longer be required to retain the employee in that employment.

10 122. In this case the respondent's cite as the conduct the claimant's dishonesty. In considering this, the Tribunal considered applying an objective standard, whether the claimant's conduct was dishonest according to the ordinary standards of reasonable and honest people, and must the claimant have realised that his actions were dishonest by that standard?

15 123. The Tribunal was satisfied in this case that the claimant had submitted claims for travelling expenses for journeys which he had not undertaken, and that such behaviour on his part, judged against that objective test, was dishonest. The Tribunal was also satisfied applying this objective element that the claimant must have realised that his actions were dishonest by that standard. This is reinforced, in that the claimant had the respondents disciplinary and expenses policies. The disciplinary policy provided that dishonesty had the potential to be regarded as gross misconduct and the respondent's expenses policy provided that failure to follow the policy may be considered to be misconduct, and may result in summary dismissal.

25 124. The Tribunal notes the claimant's submission to the effect that the respondents did not follow their disciplinary procedure at the point when they dismissed him. That correct, however, the claimant had less than two years' service which triggers the statutory right to bring an unfair dismissal claim. The claimant's contract of employment reserves to the respondents the right to depart from that policy, in circumstances where an employee has less than two years' service, and that is what they did in this case. The respondents were therefore not contractually bound to follow the disciplinary policy prior to taking the decision to dismiss the claimant, as the claimant's

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lacked the necessary qualifying service in terms of the contract, and their failure to follow procedure is irrelevant to the complaint of wrongful dismissal.

- 5 125. The Tribunal was satisfied that the claimant's conduct in claiming for travelling expenses for two journeys which he had not in fact undertaken, amounted to conduct which was a fundamental breach of contract on his part, which justified the respondents summarily dismissing him, without notice and therefore the claim for breach of contract is dismissed.

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Non-Payment of Wages

126. Under Section **23** of the Employment Rights Act 1996 a claimant can present a claim to an Employment Tribunal that an employer has made a deduction from wages in contravention of Section **13** and **18** of that Act. The wages in question in this case are commission payments, which are said to be due by the claimant.

127. The first question for the Tribunal as identified at the Preliminary Hearing in January 2017 was the claimant entitled to be paid commission in terms of the contract of employment.

128. This requires the Tribunal to determine the terms of the contract between the claimant and the respondent with regard to payment of commission.

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129. The Tribunal was satisfied that at the point when the claimant commenced employment, he was issued with a contract of employment, and that the claimant was entitled to receive payment of commission in terms of Clause 6, and Appendix 1 (Page 62 and 69 of that contract).

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130. For the reason given above, the Tribunal was satisfied that an Accumulated Annual Fee in Appendix 1 was calculated with reference to the Initial Contract Value, which was the contract value in the first year of the contract which was sold, even if the contract was for a longer period.

131. In terms of the contract under which the claimant was originally employed he received 2% commission in all sales between £0 and £50,000.

5 132. It was the respondent's position that the contract was varied, so that it was agreed in March 2014 that the claimant would not be eligible to receive commission payments, until such times as he had achieved £50,000 worth of sales.

10 133. For the reasons given above, the Tribunal was satisfied that the claimant was told by his employer about this change in terms of his eligibility to earn commission and that he had agreed to it.

15 134. The Tribunal then considered in light of the written contract, and the evidence as to the discussion which had subsequently taken place, whether the claimant's contract had been varied in that the contractual entitlement to receive commission payments was altered, so that the claimant had to achieve sales of an Accumulative Annual Fee of £50,000 before he became eligible to be paid commission.

20 135. The terms of individual contracts can be changed either if the employer and employee agree on the change, or the employee may accept a change by his conduct (for example by carrying on working under the changed contract without protest).

25 136. The Tribunal was satisfied, on the basis of Mr Hickling's evidence that the claimant was told that his target would be decreased, but that his threshold for achieving commission would be increased in March 2015, and that he agreed to that. That being the case, notwithstanding the terms of the
30 written contract, and the fact that the variation was not expressed in writing, the Tribunal was satisfied that there had been an agreed variation of the contract in relation to the threshold in respect when the claimant became contractually entitled to be paid commission and that this was increased to an Accumulative Annual Fee of £50,000.

137. If the Tribunal was wrong in that, then it was satisfied that the claimant was told that his commission threshold would be alerted to £50,000 and continued to work with the respondents after he had been told in March, that he would not earn commission, unless he achieved an Accumulative Annual Fee of £50,000. At no point during the currency of his employment did the claimant receive payment of commission. The Tribunal was prepared to infer from those facts, that the claimant was aware of the change, and if he had not expressly agreed to it, agreement to change in the contract term relating to the threshold for payment of commission could be implied.

138. Having reached that conclusion, the Tribunal then considered whether the claimant had achieved sales of £50,000 at any point from March 2015, to the end of 2015, or from the beginning of 2016, until the point of his dismissal.

139. There was an issue as to the value of the contracts which the claimant sold which attracted commission, however for the reasons given above, the Tribunal was satisfied that the claimant was entitled to commission only in respect of the first year's value of the contracts he sold. Even if it had been his experience that this was not the practice in other companies within the industry, there was clear evidence from Mr Hickling on this point as referred to above, and the claimant accept in cross-examination, that subject to checking the calculations, the figures for the purpose of calculating commission produced by the respondent at Page 161B were in principle correct.

140. Having reaching this conclusion, the Tribunal were satisfied that no payment of commissions is due and therefore the claim under Section 23 of the ERA is dismissed.

141. The Tribunal notes that the claimant intimated a number of other claims, in the additional information which was produced in response to an Order from the Tribunal. This is set out at Page 49, under the heading "Amount Being Claimed".

142. The claimant's claims compensation due to employment being cut short before 2 years' service and based on his annual salary, of £50,000; and loss of earnings for a period of 6 months of £9,500, in respect of his salary
5 for that period, less 3 months' notice pay. There is no legal basis for these claims, as damages of breach of contract (which claim was in any event unsuccessful) can only be found within the parameters of the contract itself.

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Employment Judge: Laura Doherty
Date of Judgment: 06 June 2017
Entered in register: 08 June 2017
and copied to parties

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