



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100849/2023

Held in Glasgow on 6 April 2023

Employment Judge B Campbell

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Mr B Haughey

**Claimant
In Person**

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Mears Group Plc

**Respondent
Represented by:
Mr K McGuire –
Counsel**

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JUDGMENT

The judgment of the Tribunal is that:

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1. The respondent was in breach of the claimant's contract of employment by terminating it without providing the full amount of notice required; and
2. The claimant has been compensated in full by the respondent and so no award of damages or other compensation is made.

REASONS

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Introduction

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1. This claim arises out of the claimant's employment with the respondent which was agreed to have commenced on 4 May 2021 and ended on 7 October 2022. The claimant's employment was summarily terminated on the latter date in writing.
2. The claim is one of breach of contract, specifically wrongful dismissal. The claimant alleges that his agreed notice period was twelve weeks. The

respondent maintained he was entitled to six weeks and paid him salary for the equivalent of that period in lieu of notice.

3. The parties had agreed a bundle of documents for the hearing and where relevant they are referred to below in the findings of fact. Numbers in square brackets are references to page numbers of the bundle.
4. Evidence was heard by the claimant on his own behalf and, for the respondent, Mr Rob McDonald and Mr Jason Lawrence, both Finance Directors with the respondent and both of whom had been the claimant's line manager at certain times.
5. The witnesses were each found generally to be credible and reliable, and any further comments about their evidence, particularly where it conflicted, are dealt with below.
6. On conclusion of the evidence the parties provided oral submissions which were noted in reaching the Tribunal's decision.

15 **Relevant law**

7. Every employee is entitled to notice of the termination of their employment. The starting point is section 86 of the Employment Rights Act 1996 which provides for minimum periods of notice based on the employee's length of service. By default an employee will be entitled to the notice provided for in that section.
8. An employer and an employee may agree that the employee will be entitled to more notice than section 86 provides, but not less. There is no requirement that a longer period of notice must be confirmed in writing, although practically it can be advantageous to do so in order to provide clearer evidence of the term.
9. An employer cannot as a rule terminate the contract before allowing the full notice period to elapse, unless the employee has committed a material breach of the contract. They may agree with the employee that in circumstances not involving the employee's material breach they have the power to bring the

contract to an end earlier and make payment equivalent to earnings for the period of notice not given. This payment is commonly referred to as pay in lieu of notice. It must be specifically agreed between the parties that the employer has this option. Otherwise they will be in breach of the contract by giving less notice than the employee's entitlement.

Legal issues

The legal questions for the Tribunal to determine were as follows:

10. What was the claimant's entitlement to notice of termination of his contract of employment?
11. How much notice was he given, or alternatively paid for in lieu of notice not given?
12. If he was paid in lieu, was the respondent entitled to do so under the contract?
13. Was any part of his notice entitlement not compensated for by way of notice or payment in lieu?
14. If so, how much and what is the financial value of such period under his contract?

Findings of fact

The following findings of fact were made based on the evidence presented to the Tribunal and as relevant to the issues above;

15. The claimant was an employee of the respondent between 4 May 2021 and 7 October 2022. On the latter date he was dismissed by the respondent. He was based within the respondent's Coatbridge office which deals with the provision of housing repairs and maintenance to North Lanarkshire Council. He worked as a Finance Manager on a full-time basis. His salary was £49,600 per annum and he received the use of a company car. His line manager initially was a Mr Rob McDonald, Finance Director and latterly another Finance Director, Mr Jason Lawrence, took over in that capacity.

Notice provisions

16. The claimant was issued with a written statement of his terms and conditions of employment [31-41] which he electronically signed on 14 April 2021 (the 'contract').
17. The contract contains notice provisions which were based on the claimant's length of service and summarised as follows:
- a. Less than 6 months' continuous service – 1 week's notice;
 - b. Between 6 months and 6 years – 6 weeks' notice; and
 - c. Between 6 and 12 years – 1 week for each completed year up to a maximum of 12 weeks.
18. The notice provision applied equally both ways – i.e. the claimant would always have to give, and be entitled to receive, the same amount. Therefore, according to this document at least, the claimant's entitlement to notice based on his service period at the point of his dismissal would be six weeks.
19. The contract did not include provision for the claimant to be dismissed with less notice than his entitlement and to be paid in lieu. It said that when either party wished to give notice to the other it should do so in writing where possible.
20. The contract was expressed to be governed and construed under the laws of England and Wales.
21. The contract also contained post-termination restriction provisions which sought to operate during the period following termination of the claimant's employment. Some were effective for three months and some for six months. The provisions prevented the claimant from soliciting or dealing with the respondent's clients with whom the claimant had dealt for six months, and also competing with the respondent or attempting to induce its employees to leave for a period of three months post-termination.
22. The claimant was initially concerned at having to agree to the restrictions as he was worried that should he leave the respondent, they may prevent him securing another job in the construction or facilities management sectors

where he had worked for some years. He raised this with Mr McDonald in July 2021 in a telephone conversation. His evidence was that Mr McDonald was sympathetic to his position and agreed to speak to the respondent's Human Resources department to see if the claimant's notice period could be increased to 12 weeks as a form of compensation. The claimant did not believe that any higher authority was needed to agree to the change. Mr McDonald's evidence was that no such conversation took place. He neither requested an increase in the claimant's notice period nor authorised it himself. He did not have authority to do so. He would have had to gain the permission of the respondent's Chief Finance Officer who was two levels above him, and the HR team.

23. The evidence of Mr McDonald is preferred to the extent there is a conflict on this point. It appeared to be an unusual request that the claimant would have been making. It would very likely have been documented in some way, but was not.

24. The hearing bundle contained a printout of the electronic HR file the respondent held for the claimant. It is organised by date and has entries covering various actions such as his recruitment date, requests for holidays and other absences from work, changes in line manager and changes in benefits [131-136]. Among a number of entries on 1 August 2021 is one which reads:

'Edit Notice Periods for Transfer: Brian Haughey – P0006165Finance Manager on 01/08/2021.'

The entry was 'initiated' – taken to mean added to the electronic file – on 10 August 2021.

25. The claimant took this entry to be evidence that his notice period had changed as discussed with Mr McDonald. He received a copy of his HR file after his employment ended. During his employment he received no document mentioning a change to his notice period.

26. Also, on 1 August 2021 the claimant's line manager changed from Mr McDonald to Mr Lawrence. There was an entry in the claimant's file with that date confirming the change. It was also initiated on 11 August 2021.

27. The entry the claimant referred to in his personnel file was unlikely to be a record of his notice period being extended. It appeared instead to be a note
5 connected to his change of line manager, in effect saying that the change had been made immediately.

28. Mr Lawrence's evidence was also that someone at his and Mr McDonald's level would not have authority to extend the notice period of someone who
10 worked for them. And finally, as detailed below, when the claimant raised the matter in the context of his employment being terminated, on more than one occasion he requested 12 weeks' notice. He did not assert that it was already an agreed term of his employment.

Termination of employment

15 29. For reasons which are not ultimately relevant to the claim, the respondent decided to bring the claimant's employment to an end in or around the beginning of October 2022. There were a number of verbal and email exchanges between the claimant and Mr Lawrence between Wednesday 5 and Friday 7 October 2022, culminating in a letter dated 7 October 2022 from
20 Mr Lawrence [61-63].

30. One of the claimant's emails to Mr Lawrence, dated 7 October 2022 but sent before Mr Lawrence's letter, ended with the following paragraph:

*'I know the decision reached was not an easy one but given there was no formal process and given the sudden impact of the events, I request
25 that I am given 12 weeks notice, starting today and ending on the 30/12, with use of my company car included in this period.'*

31. In his letter Mr Lawrence referred to having given the claimant notice of the termination of his employment by telephone the previous day. The claimant was said to be entitled to six weeks' notice with effect from then. Mr Lawrence
30 went on to say that he had now decided that the claimant's last day of

employment was 7 October 2022 – the date of the letter itself – and the claimant would not have to work for any additional part of his notice period. He would instead be paid in lieu of it. He was also to be paid in lieu of accrued but untaken annual leave. He was to make arrangements to return any company property he held, including his car. He was given the option to appeal against his dismissal within five days of the letter.

32. Within the letter Mr Lawrence stated:

'You have requested you are given 12 weeks' notice, with the use of your company car. I can confirm that this is not approved and you will be paid in line with your contract of employment.'

Appeal against dismissal

33. The claimant appealed against his dismissal by an undated letter which contained six enclosures [65-76]. Much of the letter was made up of the claimant's response to the reasons given by the respondent for ending his employment, and as such those parts are not relevant to this claim. In relation to the matter of notice, he said:

'The rejection of my offer of 12 weeks notice was expected as it is clear Mears wished to terminate the relationship, a decision that could possibly be described as premeditated given the circumstances.'

34. Later in the letter he added:

'I believe my original request of settlement of 12 weeks' notice given the initial evidence provided was fair and following production of yet more evidence supporting my case, I stand by my offer.'

35. Mr Lawrence notified his manager, Mr Andrew Smith, Group Finance Director, of the claimant's appeal against dismissal. He did so by email on 14 October 2022 [76], saying:

'Andrew,

Perhaps unsurprisingly Brian has appealed his notice.

In the original letter I have him his contractual notice which was 6 weeks. He is asking for 12 weeks' notice.

I am of a mind just to say yes given any appeal will have to be heard by you and it is just not worth your time.

5 *Can you let me know if you have an comments before I process it further please.*

Happy to discuss if you want some further information.

Regards

Jason'

10 36. Mr Smith responded later that day to say that the claimant should only be given his contractual notice, and that *'we should not fear an appeal'*. Permission to extend the claimant's notice to 12 weeks was therefore not given.

15 37. Pending his appeal the claimant had not returned his company equipment or car. A member of the respondent's HR team emailed him on 17 October 2022 to ask him to make arrangements to pass them back. He replied to say he would do so later that week. On 20 October 2022 he visited the office and returned his laptop, mobile phone and security fob. He did not return his company car at this time.

20 38. Mr Smith dealt with the claimant's appeal against his dismissal and there were email exchanges between the two on 21 October 2022 to clarify and agree the claimant's appeal grounds. There were further exchanges on 1 November 2022 to establish some of the background details.

25 39. Mr Smith confirmed his decision in relation to the appeal by letter dated 7 November 2022 103-105]. The decision taken by Mr Lawrence to dismiss the claimant was upheld. This was the final stage of the respondent's internal process and therefore the claimant's dismissal became permanent.

Emails dealing with return of company car

40. On 22 December 2022 Mr Lawrence emailed the claimant at his personal email address to say:

'Hi Brian,

Hope you are well.

5 *Could you please confirm when you will be dropping your car back at the NLC branch.*

Regards,

Jason'

10 41. Mr Lawrence received no apparent response to his email. On 10 January 2023 he emailed the claimant again to say:

'Hi Brian,

I have had no response to my previous email regarding your company car.

15 *This is now overdue for return. If I do not get a response by the end of this week Friday 13th I am afraid I will have no choice but to contact the police and report the vehicle as stolen.*

If you want to give me a call to discuss please do not hesitate to do so.

Regards,

Jason'

20 42. The claimant replied on 10 January 2023 to say:

'Hi Jason,

I'm surprised with the email below as I replied on Friday the 23rd December.

25 *The car is ready to be collected and has been for a while. Do you want me to contact Serena to arrange collection? I am away for a few days*

so I can arrange to leave the keys with family or make myself available from Wed 18th onwards.

Being there would be my preference so I can sign off the return of the car.

5 *Regards*

Brian'

43. Mr Lawrence responded to thank the claimant for his email and to say that he had not received an email from the claimant on 23 December 2022. He agreed that the claimant should arrange the return of the car directly with his
10 colleague Serena. He would pass her the claimant's email and ask her to take that forward.

44. The claimant returned his company car in January 2023.

45. The claimant was paid the equivalent of six weeks' notice. He seeks payment of the net equivalent of the further six weeks of notice he says was his
15 contractual entitlement.

Discussion and decision

What was the claimant's notice entitlement?

46. It is found that the claimant's notice entitlement at the point when he was dismissed was six weeks. This is what was expressed in the contract which
20 he signed to confirm he accepted.

47. The claimant's evidence was that his notice period had been extended to twelve weeks by agreement with Mr McDonald in July 2021. As discussed in the findings of fact above, it is not accepted on the evidence that Mr McDonald agreed such a change. In any event, he would not have had authority to agree
25 the change had he attempted to do so, and therefore any apparent change would have been void.

48. Mr McDonald's oral evidence is more consistent with the documentary evidence than the claimant's. In his communications with the respondent in

October 2022 he was either requesting or proposing to be given 12 weeks' notice. He did not state that he was already entitled to that amount, as he would have been expected to do had it been agreed with Mr McDonald the previous year. There is no documentary evidence suggestive of the notice period being extended from six weeks.

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49. The claimant believed that the respondent's position at various points after his dismissal pointed to acceptance of an entitlement to twelve weeks. That is to say, Mr Lawrence only made a firm demand for the return of the car on 10 January 2023. In his email on that date he said that the car was '*now due for return*'. He said those words suggested that up until then the return of the car was not overdue. When Mr Lawrence emailed the claimant on 22 December 2022, he merely asked the claimant to confirm when he would be dropping the car off at the branch. Had the claimant been entitled to twelve weeks' notice, and served that period, his employment would have ended on 30 December 2022 – at a point in between both emails.

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50. Whilst it was possible to read the emails in the way that the claimant did, the reality was that Mr Lawrence did not give the thought to his words that the claimant attributes him. It was not in his mind that the claimant had been entitled to twelve weeks' notice because he had already been asked to grant that and had been told by his manager that he could not. He merely made a gentle initial request for the car to be returned, followed by a firmer one three weeks later as the claimant had not complied.

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51. In any event it does not automatically follow that any employee who has the use of a vehicle and is then paid in lieu of notice would be entitled to continue using that vehicle for the duration of their notional notice period. It would be just as likely, if not more so, that they would have to return the vehicle immediately upon termination. That in fact is what the claimant was asked to do, and in response he returned every other item of company property he had but not the car.

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30 52. Mr McGuire for the respondent made reference in his submissions to *Chitty on Contracts, (34th Edition)*, as an authoritative textbook on the law of

contract in England and Wales. Section 4 of *Chitty* deals with variation of contracts and says that for a variation to be effective, there must be consideration – i.e. something offered by the party receiving the benefit in return for it. He argued that there would have been no consideration in the circumstances the claimant alleged because he was offering nothing in return for gaining improved notice terms. So for this reason, if not on the evidence, no effective variation took place. The claimant's response to this point was that as part of the extension of his notice entitlement he had agreed to increase the amount of notice he would have to give if resigning to twelve weeks from the initial six weeks. This was more beneficial to the respondent and represented the necessary consideration. It is accepted that the claimant would have been correct on this point had the evidence supported there having been an agreed variation in the way he asserted. But that is not the case and therefore the point is ultimately academic.

15 *What notice was the claimant given, or paid for in lieu?*

53. It was a matter of agreement that the claimant had been given no notice and his employment was terminated immediately by the letter of 7 October 2022. It was also agreed that he was fully paid for six weeks' notice. As this was his entitlement, he was owed nothing further.

20 *Was the respondent entitled under the contract to pay in lieu of notice?*

54. The contract contained no provision allowing the respondent to terminate the claimant's employment with less notice than six weeks, or none at all. The options were to have the claimant serve his notice period by working or there was the option to ask him not to perform his duties, commonly referred to as 'garden leave'.

55. An employer wishing to use the option of payment in lieu of notice must provide for it in the contract. If they do not, then by taking that step they will be in breach of the contract and the employee will be entitled to damages equivalent to their loss – *Delaney v Staples [1992] ICR 483*. Technically therefore the respondent breached the claimant's contract by cutting it short on 7 October 2022. He was wrongfully dismissed under common law.

56. The remedy for wrongful dismissal is damages in the amount which would have been payable had the contract been ended lawfully. This equates to earnings for the notice period, which the claimant received. He therefore sustained no overall financial loss.

5 *Was any part of the claimant's notice entitlement not compensated for?*

57. As detailed above, it was not in dispute that the claimant received the net equivalent of six weeks of salary. He was fully compensated financially for his notice entitlement.

Conclusions

10 58. The claimant's notice entitlement remained as it had been set out in his written contract for the duration of his employment with the respondent. At the point of termination it was six weeks.

15 59. He was wrongfully dismissed at common law by not being allowed to serve his notice period in the absence of a clause in his contract allowing the respondent to terminate early and make payment in lieu.

60. However, he has already been fully compensated for his losses arising from that act under the applicable principles and accordingly no award of damages or compensation is made.

20 **Employment Judge: B Campbell**
Date of Judgment: 05 May 2023
Entered in register: 05 May 2023
and copied to parties

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