



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103730/2020 Preliminary Hearing at Dundee on 15 December 2020

Employment Judge: M A Macleod

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Paul Randall

Claimant
In Person

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David Ritchie (Implements) Ltd

Respondent
Represented by
Mr K Duffy
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claimant's claim is dismissed for want of jurisdiction.

REASONS

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1. The claimant presented a claim to the Employment Tribunal on 11 July 2020 in which he complained that he was unfairly dismissed by the respondent, and that he had sustained a breach of contract at their hands.
2. The respondent submitted an ET3 response in which they denied that the claimant had been unfairly dismissed, and argued that the Tribunal lacked jurisdiction to hear the claim on the basis that the claimant lacked the necessary qualifying service upon which to found a claim of unfair

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dismissal, in terms of section 108 of the Employment Rights Act 1996 (ERA).

3. A Preliminary Hearing was listed to take place on 15 December 2020, in person, in the Employment Tribunal in Dundee. The claimant appeared on his own behalf, accompanied and assisted by his partner, Ms Benson. The respondent was represented by their solicitor, Mr Duffy.
4. The claimant gave evidence on his own behalf.
5. A joint bundle of productions was presented to the Tribunal and relied upon by the parties in the hearing.
6. Based on the evidence led, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

7. The claimant commenced employment with the respondent in September 2019. In his ET1, the claimant stated that his employment began on 23 September 2019, though in evidence suggested that this was not correct. The respondent's ET3 identify the claimant's start date as 9 September 2019, and this is reinforced by his Statement of Employment Particulars, signed by him on 23 September 2019, which states at paragraph 4 that *"Your employment with the Company began on 09-09-19. Your period of continuous employment for the purposes of the Employment Rights Act 1996 also began on 09-09-19."*(52)
8. The claimant's employment therefore began on 9 September 2019.
9. The effective date of termination of the claimant's employment by the respondent was 15 May 2020. The claimant met with the respondent's Operations Manager, Ian Bodman, on that date, and was informed verbally that his employment would end on that date. Mr Bodman then wrote to the claimant on 21 May 2020 to confirm the position (59):

"Dear Paul,

Following our meeting held in my office on Friday 15th May 2020 I have taken the decision to terminate your employment on the ground of poor performance. This is not a decision I have taken lightly but is based on your effectiveness over the past seven months. You are not required to work your notice as I do not believe it would be in either parties' best interest.

Your entitlement to one week paid notice and any other monies owed to you will be paid into your bank account as usual.

Should you wish to appeal my decision please inform me in writing within 7 days.

Yours sincerely,

Ian Bodman

Operations Manager"

10. The claimant received a payment in respect of notice following his dismissal.

Submissions

11. For the respondent, Mr Duffy presented a written submission, in which he argued, firstly, that the claimant lacked the necessary minimum qualifying service upon which to base a claim for unfair dismissal, and secondly, that no amendment to the claim should be permitted to disapply the requirement for the qualifying period of employment.

12. He referred to section 94 and section 108 of ERA. Mr Duffy then referred the Tribunal to section 103A of ERA, as an example of a claim for unfair dismissal for which the claimant would not require to prove that he had two years' continuous service.

13. Mr Duffy set out the principles on which a Tribunal should determine an application to amend a claim, referring to the well-known authorities **Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] IRLR 661** and **Ladbrokes Racing Ltd v Traynor UKEAT/0067/06**.

14. He pointed out that the claimant's employment began on 9 September 2019 and ended on 15 May 2020.

15. He went through the claimant's claim, and set out a number of reasons why the claimant says his dismissal was unfair, namely:

- 5 1. He was given no prior written warning to attend a meeting at which he was dismissed;
2. He was not given time to find someone to witness the meeting;
3. He was not informed that the meeting could end in his dismissal;
4. The meeting was conducted on a one-to-one basis;
- 10 5. He was not approached by any other member of management on being dismissed;
6. He was given no opportunity for improvement or to defend his position;
7. He was not informed of his statutory right to appeal against the decision to dismiss him;
- 15 8. He was the newest employee and still gaining experience; and
9. Due to Covid-19, he had little or no help for further training.

16. None of these, he said, gave rise to a claim for automatically unfair dismissal, pointing to the absence of any averments of the claimant raising a health and safety issue or a protected disclosure.

20 17. He pointed out that following dismissal, the claimant submitted a 5 page letter appealing against the decision (60-64).

18. On 12 August 2020, the claimant was ordered by the Tribunal to provide reasons as to why his unfair dismissal claim could continue despite his lack of service, and he responded with a 13 page document of closely typed text (25-37), and in addition, a further 7 page document on 13 December 2020 (80-86).

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19. Mr Duffy submitted that the claim is contained within the four corners of the claim form, and that the additional documents do not form part of the claim before the Tribunal. In any event, he said, none of the averments within the additional particulars disapply the requirement of two years' service in order to allow an unfair dismissal claim to proceed. However, Mr Duffy submitted that if the Tribunal disagreed, it would not be just and equitable to allow the claimant, by submission of the additional particulars, to amend his claim to include a claim of automatically unfair dismissal.

20. Mr Duffy invited the Tribunal to find that the claim cannot proceed on the basis that the Tribunal lacks jurisdiction to hear it.

21. The claimant made a short oral submission. He said that in bringing his claim, he wanted to highlight that the respondent had breached his contract in various ways. He referred the Tribunal to the document, starting at 25, in which he responded to the Tribunal's request for further particulars. He argued that the 2 years' limit is in place on the assumption that the employer has provided the environment necessary to allow employees to fulfil their contracts properly.

22. He complains about the working environment, the manner in which his dismissal was brought about, his appeal and the breach of his contract.

23. He stressed that the way he was treated in the working environment was detrimental to him, and affected his ability to carry out the work which he was allocated.

24. With regard to the manner of his dismissal, he said that he was under a lot of stress at the time, had concerns about the way the system was operated and raised them with his supervisors, and was unaware that he was to be dismissed until he attended the meeting on 15 May 2020. He said that if an employee needs 2 years' service to obtain statutory rights, an employee can be let go in any shape or form without the employer following any procedure and it can be damaging to an employee in a lot of ways.

25. With regard to the appeal, he said that points came up in the appeal meeting whose handling he disagreed with. He felt that dates were plucked out of the air by the respondent suggesting that he had attended certain meetings, which he had not.

5 26. The claimant invited me to read his submissions to the Tribunal in support of his claim.

Discussion and Decision

10 27. Section 108(1) of the Employment Rights Act 1996 provides that “*Section 94 [the right not to be unfairly dismissed] does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.*”

28. Section 108(3) goes on to provide that subsection (1) does not apply if any of a number of sections subsequently set out apply.

15 29. In considering this matter, it is appropriate to focus on an unfair dismissal claim under section 94, and then on whether the claimant has made, or is seeking to make, a claim of automatically unfair dismissal, which may come under one of the exceptions in section 108(3).

20 30. So far as a claim of “ordinary” unfair dismissal is concerned, the claimant lacks the minimum qualifying service necessary to found such a claim. He was employed from September 2019 until May 2020, a period of some 9 months, and less than the period of two years ending with the effective date of termination required under section 108.

25 31. The claimant’s arguments in submission focused on the unfair consequences of having to demonstrate two years’ service upon employees, who would be deprived of their statutory rights if their employer acts unfairly to dismiss them.

32. While the claimant’s sense of injustice is doubtless sincere, the Tribunal must apply the law as it stands, and I have no discretion to ignore the plain terms of section 108 in an unfair dismissal claim. The Tribunal lacks

jurisdiction to hear the claimant's claim of unfair dismissal, and accordingly it must be dismissed.

5 33. Mr Duffy, then, spent some time discussing the true nature of the claim, in order to discern whether it might be suggested that there is a complaint of automatically unfair dismissal to be found in either the ET1 or the further particulars provided, and then focused on arguing that if there were such a claim, it should not be permitted to proceed by way of an amendment to the claim.

10 34. The claimant, for his part, made no reference to automatically unfair dismissal. In the claim form, there is no such claim foreshadowed, as Mr Duffy submitted.

15 35. The further documents provided by the claimant do not, in my judgment, comprise an attempt to widen the claim or introduce a new head of claim. They simply expand upon the many reasons why the claimant believes he was unfairly treated by the respondent, but it is not possible to discern, within these documents, which I have read carefully, any basis upon which it might be suggested that the claimant is seeking to make a claim that he was dismissed following the assertion of a statutory right, the making of a protected disclosure or for a health and safety reason, to take three instances.

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25 36. Accordingly, it is my judgment that the claimant's claim is restricted to one of unfair dismissal (he having accepted that he was paid his notice pay following dismissal, his breach of contract claim thereby falls), and that since he lacks the minimum qualifying service required by section 108, his claim must fail.

30 37. The claimant presented himself well before the Tribunal in this hearing, and sought to impress upon me the strong sense of injustice he feels about the way in which he was treated by the respondent. The Tribunal is unable to make any judgment about this claim, however, because it falls outwith the jurisdiction granted to it by statute. It is appreciated that this may be very frustrating to the claimant, but it is important for him to note that the Tribunal

requires to apply the law as it stands, and doing so in this case leads to the conclusion that his claim must be dismissed.

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Employment Judge:
Date of Judgment:
Date sent to parties:

Murdo MacLeod
14 January 2021
15 January 2021

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