



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: S/4118317/2018

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Held at Edinburgh on 21 December 2018

Employment Judge: W A Meiklejohn

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Mr Darren Metcalfe

Claimant
Represented by Mrs E
Metcalfe, Claimant's wife

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1st For Fencing (Erectors & Consultants) Limited

Respondent
Represented by Mr I Burke,
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 of unfair dismissal is struck out as having no reasonable prospect of success under Rule 37(1)(a) contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

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REASONS

1. This case came before me for a Preliminary Hearing on 21 December 2018. The purpose of the Preliminary Hearing was to consider deposit/strike out, with particular reference to the length of continuous service and the prospect of establishing an automatically unfair reason for dismissal. Mrs Metcalfe represented her husband, the Claimant. Mr Burke appeared for the Respondent.
2. The Claimant's employment with the Respondent commenced on 3 April 2017. According to the Claimant, his employment ended on 9 August 2018 being the date upon which he says he received the Respondent's letter of dismissal dated 13 April 2018. According to the Respondent, the Claimant's employment ended on 13 April 2018 being the date of the letter of dismissal.
3. The date upon which the Claimant became aware that his employment had been terminated is a matter which will need to be determined at the Final Hearing. However, it was clear that even if the Claimant's position was to be preferred, he did not have continuous service of 2 years at the date of termination and accordingly the Tribunal did not have jurisdiction to deal with his ordinary unfair dismissal claim.
4. The Tribunal would only have jurisdiction if this was found to be an automatically unfair dismissal. Mrs Metcalfe advised that the Claimant relied on section 104 of the Employment Rights Act 1996 ("ERA") (assertion of statutory right) because he had sought payment of statutory sick pay ("SSP") from the Respondent.
5. Unfortunately for the Claimant, the Tribunal could only potentially have jurisdiction to hear the Claimant's unfair dismissal claim if the statutory right asserted was a "relevant statutory right" as defined in section 104(4) ERA. Non-payment of SSP did not qualify as a relevant statutory right and so the claim could not proceed on this basis.
6. It occurred to me that the Claimant might, in claiming SSP from the Respondent, have made a protected disclosure so that potentially the Tribunal might have

jurisdiction under section 103A ERA. Unsurprisingly (a) Mrs Metcalfe was happy to adopt this line of argument and (b) Mr Burke opposed it.

5 7. Mr Burke argued that there was nothing in the Claimant's ET1 which gave notice of or even hinted at a potential protected disclosure/whistleblowing claim. His issue had been non-payment of SSP.

10 8. After a short adjournment to consider matters, and to review the bundle of documents which Mrs Metcalfe had lodged at the start of the Hearing, I decided that the Claimant's unfair dismissal claim should be struck out as having no reasonable prospect of success.

15 9. In terms of Rule 37(1)(a) a Tribunal may on its own initiative or on the application of a party strike out all or part of a claim on the grounds –

“that it is scandalous or vexatious or has no reasonable prospect of success.”

No question of “scandalous or vexatious” arose here.

20 10. From the timeline provided by the Claimant (pages 1-3 of the bundle) it was apparent that the Claimant had pursued his entitlement to SSP with Her Majesty's Revenue and Customs and had raised the matter (as an alleged unlawful deduction of wages) with the Respondent on 2 August 2018 (page 32). This led to the Respondent sending to the Claimant a copy of the letter dated 13 April 2018 (page 36) intimating termination of his employment. It was the Claimant's position that he had not received this letter in April 2018 and that it was created as a document on 25 June 2018 (pages 37-38).

30 11. The Claimant's assertion that the letter had been created on 25 June 2018 was not consistent with an argument that the Claimant had been dismissed because he made a protected disclosure. The letter of dismissal referred to the Claimant's alleged failure to “follow sickness call in procedures”. Even if the Claimant is

ultimately successful in arguing that his employment was not terminated until 9 August 2018 (when he says he first received the letter), the terms of the letter do not support a contention that the reason or principal reason for the Claimant's dismissal was that he made a protected disclosure.

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12. An allegation by the Claimant that the Respondent was failing to comply with its legal obligations in relation to SSP might potentially qualify as a protected disclosure within the meaning of section 43B ERA, although there might be an argument as to whether the disclosure could be said to be in the public interest. However in my view it was extremely unlikely that (a) in the absence of any reference to this in the ET1 and (b) having regard to the terms of the letter of dismissal, an Employment Tribunal would be persuaded that the reason or principal reason for the Claimant's dismissal was that he had made a protected disclosure. Accordingly this argument had no reasonable prospect of success.

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Employment Judge: Meiklejohn
Date of Judgment: 22 December 2018
Entered into the Register: 28 December 2018
And Copied to parties

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