



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: S/4123544/18 Held on 15 April 2019

Employment Judge: Mr N M Hosie

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Mr Riaan Duvenage

Claimant
In Person

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NSL Limited

Respondent
Represented by:
Mr A Fox –
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that the breach of contract complaint is dismissed for want of jurisdiction.

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REASONS

1. I issued a Judgment in this case on 1 April 2019 (copied to the parties on 3 April) in the following terms:-

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“The Judgment of the Tribunal is that the claimant’s application to strike-out the Response in terms of Rules 37(1)(a), (b) and (e) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, is refused.”

2. In the Reasons for my Judgment, I said this with regard to the claimant's breach of contract complaint:-

“Breach of Contract

5 28. *I am bound to say, that I had some difficulty understanding the claimant's submission in this regard as it is clear from the relevant statutory provision, namely Article 3(c) of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994, that an Employment Tribunal only has jurisdiction to consider a breach of contract claim which has arisen or is outstanding on the*
10 *termination of employment. The claimant remains in the claimant's employment. I am minded, therefore, to dismiss this complaint for want of jurisdiction. The claimant is directed to make further representations in this regard, should he wish to do so, within 14 days, failing which I shall dismiss this complaint.”*

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3. The claimant responded by e-mail on 4 April 2019 at 21:35 with an attachment which is referred to for its terms.

4. In support of his submission that the breach of contract complaint should not
20 be dismissed, he referred to the following cases:

“Sarker v. South Tees Acute Hospitals NHS Trust [1997] UKEAT 493_96_2503
Capek v. Lincolnshire County Council [1998] UKEAT 1314_96_2904
Grant v. ASDA UKEAT/0231/16/BA
25 **Bone v. Fabcon Projects Ltd [2006] ICR 1421**
AMA (Newtown) Ltd v. Law [2013] SLT 959
Miller Bros & Another v. Johnston [2002] UKEAT407011403
Oni v. Unison Trade Union UKEAT/0092/17/LA”

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5. By way of conclusion the claimant said this:-

“In the premises:

It is submitted that:

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(a) *The Tribunal erred in disregarding relevant authority which was before the Tribunal at the time of considering the application;*

5 (b) *the Tribunal's threat of striking-out the claimant's claim for want of jurisdiction is based on a misdirection;*

(c) *The Tribunal's interpretation of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 is at odds with the authorities;*

10 (d) *The "Unless Order" is a consequence of the misdirection and misinterpretation of the Order*

(e) *The Tribunal should reconsider its Judgment in terms of Rule 71, particularly in the light of the binding authority and the Tribunal's error.*

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WHEREFORE:

The claimant seeks a decision or Judgment:

- 20 ***1. Discharging the Tribunal's "Unless Order" and***
- 2. Withdrawing the Strike-Out Notification in respect of the Claimant's breach of contract claim;***
- 25 ***3. A substantive reconsideration of:***
- a. the Tribunal's Judgment on 1 April 2019 in terms of Rule 71;***
- b. The Strike-Out Application in respect of the respondent's***
- 30 ***Response to the claimant's breach of contract claim.***
- 4. Further and/or alternative relief."***

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Respondent's Response

6. The respondent's solicitor responded by e-mail on 12 April 2019 at 11:53 in the following terms:-

5 *"We write in response to the Tribunal's e-mail below and the claimant's application for the Tribunal's Judgment to be reconsidered. The Respondent understands from the Claimant's application that he only seeks for the Tribunal to reconsider the proposal to strike-out his breach of contract claim.*

10 *For the avoidance of doubt, the Respondent objects to the claimant's application.*

Breach of contract claim

15 *As detailed in the Respondent's original response to the Claimant's strike-out application, particularly in relation to Article 3(c) of the Employment Tribunal's Extension of Jurisdiction (Scotland) Order 1994, we submit that the Tribunal's view in relation to this matter as detailed in its Judgment dated 3 April 2019 is correct. Article 3(c) states that an Employment Tribunal only has jurisdiction to consider a breach of contract claim which is arisen or is outstanding on the termination of employment. As the Claimant remains in employment with the Respondent, the Tribunal does not have jurisdiction to hear this claim and therefore is entitled to strike-out this part of the Claimant's claim.*

25 *In the case of **Sarker**, the Claimant's employment contract was found to have been terminated and her employment had ended, so the Tribunal had jurisdiction to hear her claim. That is not the situation here. We submit that the purpose of the Order was to allow a Claimant bringing a claim for unfair dismissal to bring a claim for a breach of contract in the same forum.*

30 *In the case of **Capek**, the Claimant had been informed of his dismissal and given notice, but he brought the breach of contract claim before his employment was terminated. The Court of Appeal found that the Tribunal did not have jurisdiction to hear the Claimant's claim for a breach of contract before his employment had been terminated. The Court considered that "the clear purpose of the extension to the Tribunal's jurisdiction over contract claims was to reduce the need for duality of proceedings in the Courts and in the Tribunals arising out of the same dismissal." The position was supported*

35 *by the Employment Appeal Tribunal in **Miller**.*

40 *In **Capek**, Mummery LJ, at paragraph 42 states:*

45 *In contrast Article 3 of the 1994 Order provides that a termination of employment is necessary to trigger the jurisdiction of the Tribunal. In those circumstances it makes sense that the time prescribed for presenting a complaint should begin with, but not before, the date of termination and that*

a start date as well as an end date should be specified for presenting a complaint.

5 *We submit that, in any event, there needs to be a dismissal or the termination of an employment contract before the Employment Tribunal has jurisdiction to hear claims for a breach of contract. This is supported also by Article 7 of the Order, which states that:*

10 *'Subject to Articles 8A and 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented:*

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

15 *(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated,*

20 *Article 7 above suggests that, in order to bring a breach of contract claim in the Employment Tribunal, the employment first needs to have come to an end, and then can a claim can be pursued."*

Discussion & Decision

7. Although the Tribunal has now received intimation of the claimant's Appeal to the Employment Appeal Tribunal, given the nature of the Appeal I am of the view that that I am able proceed to consider and determine this particular issue, without prejudice to the Appeal. However, thereafter, I shall sist the claim pending the outcome of the Appeal.

8. As I understand the claimant's position, he opposes the proposed dismissal of the breach of contract complaint. Strictly speaking, this is not a reconsideration in terms of Rule 71 in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) 2013 ("the Rules of Procedure"), as I have not issued a Judgment in this regard. Nor have I issued an "Unless Order" which the claimant refers to.

9. Nevertheless, I decided that I could proceed to determine this issue having regard to the "overriding objective" in Rule 2 of the Rules of Procedure.

10. As I recorded in my Judgment at Para. 28 the terms of the 1994 Order are clear. The contractual jurisdiction of Employment Tribunals is governed by s.3 of the Employment Tribunals Act 1996 and the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 SI1994/1624. Under s.3(2) of the 1996 Act and Article 3 of the Order, for the Tribunal to be able to hear a contractual claim brought by an employee, that claim must arise or be outstanding on the termination of the employee's employment.
11. The relevant case law is consistent with that and I was satisfied that the submissions by the respondent's solicitor in his e-mail of 12 April were well-founded and I take no issue with them. They are an accurate account of the law.
12. I am bound to say that I had some difficulty understanding the claimant's submissions, particularly in light of **Sarker** and **Capek**. The Court of Appeal confirmed in **Capek v. Lincolnshire County Council [2000] ICR 878** that an Employment Tribunal does not have jurisdiction to hear a claim for breach of contract if it is presented **before** the effective date of termination of the employee's contract of employment. By virtue of Article 7(a) of the Order, the Tribunal only has jurisdiction if the claim was presented within a period of three months beginning with the effective date of termination, even if the claim relates to matters arising before termination that are still outstanding at the date of termination. The Court found that the Order clearly indicated that the Tribunal's jurisdiction is confined to those cases where the complaint is presented within the period between two fixed points in time: the start date, which is the effective date of termination, and the end date, which is the end of the period of three months beginning with the effective date of termination.
13. I am of the view, therefore, that the Tribunal does not have jurisdiction to consider the claimant's breach of contract complaint and it is dismissed.
14. Finally, for the sake of completeness, I record that the claimant made further representations by way of an attachment to his e-mail of 16 April at 11:50 headed: *"Reconsideration Application: Claimant's response to the*

5 *respondent's response*". Having regard to the "overriding objective" in the Rules of Procedure, I do not require further comment from the respondent's solicitor. These further representations are nothing to the point and my view remains that the Tribunal does not have jurisdiction to consider the breach of contract complaint for the reasons already given.

Reconsideration

10 15. In the attachment to his e-mail of 4 April the claimant requested: "A *Substantive reconsideration of the Tribunal's Judgment on 1 April 2019 in terms of Rule 71*".

15 16. The basis for this was not clear. However, having considered my Judgment and Reasons for it again, I am satisfied that I have not fallen into error. I am of the view, therefore, that there is, "*no reasonable prospect*" of my Judgment being varied or revoked. Nor are there any "*special reasons*" for doing so. Accordingly, the claimant's application in this regard is refused in terms of Rule 72 of the Rules of Procedure. It is not necessary in the interests of justice to reconsider my Judgment.

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Further procedure

25 17. As I recorded above, the claim is now sisted pending the outcome of the claimant's Appeal to the Employment Appeal Tribunal.

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| Employment Judge: | Nicol Hosie |
| Date of Judgment: | 16 April 2019 |
| Entered in the Register: | 18 April 2019 |
| And Copied to Parties | |