



IN THE EMPLOYMENT TRIBUNALS (SCOTLAND) AT EDINBURGH

**Judgment of the Employment Tribunal in Case No: 4120981/2018 Issued
Following Open Preliminary Hearing Held at Edinburgh on 8th April 2019**

Employment Judge: J G d'Inverno, QVRM, TD, VR, WS (Sitting Alone)

Mr A Morana

**Claimant
In Person**

DBM Building Contractors Limited

**Respondent
Represented by
Mr D Maguire, Solicitor
Allcourt Solicitors
Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:

(First) That the claimant lacks Title to Present and the Tribunal Jurisdiction to Consider, both in terms of section 108(1) of the Employment Rights Act 1996, his complaint of unfair dismissal brought in terms of sections 94 and 98 of the Employment Rights Act 1996.

(Second) That the claimant's complaint of unfair dismissal is dismissed for want of Jurisdiction (lack of two years' qualifying service).

(Third) That the claimant's remaining complaint of breach of contract (unpaid wages and contractual notice pay) are appointed to a Final Hearing of one day's duration to proceed at Edinburgh before an Employment Judge sitting alone and commencing at 10 am on the 20th of June 2019; **and directs that Confirmation of Hearing Notice be issued to parties representatives in that regard forthwith.**

REASONS

1. This case called for Open Preliminary Hearing at Edinburgh on the 8th of April 2019. The claimant appeared in person, the Respondent Company was represented by Mr Maguire, Solicitor.

The Issue

2. The Preliminary Issue requiring investigation and determination at the Open Preliminary Hearing was one of Title to Sue and Jurisdiction, namely:-

(First) Whether, in terms of section 108 of the Employment Rights Act 1996, the claimant possessed Title to Present and the Tribunal Jurisdiction to Consider his complaint of unfair dismissal advanced in terms of section 94 and 98 of the Employment Rights Act 1996 ("ERA 96"/"the 1996 Act")

3. Each party lodged a Bundle of Documents; for the claimant extending to some 11 pages and for the respondent 4 pages including the claimant's letter of appointment and his main terms and conditions of employment.
4. The claimant gave evidence on oath on his own behalf and addressed the Tribunal in submission. For the respondent Mr Maguire relied upon the dates of employment and averments regarding the reason for the claimant's dismissal, which were set out in the initiating Application Form ET1 and which were admitted by the respondent. He further addressed the Tribunal in submission.

Findings in Fact

5. On the pleadings and oral and documentary evidence presented, the Tribunal made the following essential Findings in Fact restricted to those relevant and necessary to the determination of the Preliminary Issue.
6. The claimant, whose date of birth is 3rd September 1984 commenced employment with the respondent on a three month trial period on 16th May 2018, in the appointment of Senior Site Manager at the site occupied by the respondent at Aviemore.
7. The letter of engagement issued by the claimant to the respondent dated 8th April 2019 is copied and produced at R1. The claimant's main terms and conditions of employment which form part of his contract of employment are copied and produced at R2 and R3.

8. The claimant had no periods of previous employment with the respondent. The date upon which the claimant's period of continuous employment with the respondent commenced was 16th May 2018.
9. The claimant's 12 week trial period concluded on 8th August 2018. The claimant's employment had continued beyond the end of his trial period.
10. The claimant's written main terms and conditions of employment provide at:-

"2.8 Period of Notice

Except in cases of summary dismissal, the period of notice to terminate your employment is as follows:

One month from company and two months from you."

11. On 10th of August 2019 the claimant was summarily dismissed by the respondent on the alleged ground of gross misconduct (being on duty under the influence of drink and allowing to other employees to be on site under the influence of drink).
12. The claimant received no notice of dismissal. Neither did he receive any pay in lieu of notice.
13. The Effective Date of Termination of the claimant's employment was 10th August 2018.

14. As at the Effective Date of Termination of his employment the claimant had been continuously employed with the respondent for a period of twelve weeks and two days.
15. On 10th September 2018 the claimant entered early conciliation with ACAS.
16. On 2nd of October 2018 ACAS issued an Early Conciliation Certificate.
17. On 2nd October 2018 the claimant presented complaints of unfair dismissal and breach of contract (notice pay and other payments including non-payment of wages and non-reimbursement of expenses).
18. The complaint of unfair dismissal, properly construed, is one that proceeds in terms of sections 94 and 98 of the ERA 1996.

Summary of Submissions

19. The respondent's representative relied upon the dates of dismissal and the reason for dismissal set out by the claimant in the initiating Application ET1 at sections 5.1 and 8.2 paragraph 6 respectively. These averments, he advised, were the subject of admission by the respondent and on that basis he invited the Tribunal to find regard as established in fact:-

that as at the Effective Date of Termination of the claimant's employment with the respondent; that is to say as at 10th August 2018;

- (a) the claimant had been employed for a continuous period of twelve weeks and two days; and,
- (b) had been summarily dismissed for reason of alleged gross misconduct being that of being on duty in his appointment of Senior Site Supervisor while under the influence of alcohol

20. He separately made reference to the respondent's averments in which they give notice that they also rely upon their offer to prove that the claimant allowed two other employees to be on site while under the influence of alcohol.

21. Mr Maguire submitted that, on a proper construction of the averment set out in the claimant's Application including the material averments which were the subject of admission by the respondent, the claimant's complaint of unfair dismissal could be seen as one which proceeded in terms of sections 94 and 98 of the ERA 1996. In his submission there was nothing in the circumstances of dismissal given notice of, either in the Application Form ET1 or in the Response Form ET3, which could be said to bring the circumstances of dismissal within any of those not subject to the terms of section 108(1) of the 1996 Act.

22. On that basis and standing the fact that the claimant's twelve weeks and two days of continuous service fell short of the two years required in terms of section 108(1)

of the 1996 Act, he submitted that the claimant lacked the requisite Title to Sue (present a complaint of unfair dismissal in terms of section 94 of the ERA 1996) and he moved the Tribunal to dismiss that complaint for want of Jurisdiction (qualifying period of service).

Submission for the Claimant

23. The claimant confirmed in evidence that his dates of continuous employment were indeed those set out in his Form ET1 namely 16th of May 2018 to 10th of August 2018, that is a period of twelve weeks and two days. He further confirmed that the respondent summarily dismissed him, on 10th August 2018 for reason of alleged gross misconduct accusing him of being on duty and in charge of the site while under the influence of alcohol.
24. He asked the Tribunal to note that as at the date of his dismissal the trial period of three months (twelve weeks) to which he was subject in terms of his contract of employment had expired and that his employment had continued beyond the date of the end of the trial period.
25. He made clear that he disputed, as a matter of fact, that he was under the influence of alcohol. He made the point that no test for alcohol in his bloodstream was made by the respondent at the time at which they concluded that he was guilty of that gross misconduct or at the time of his dismissal.
26. He made reference to what he alleged were prior breaches of contract on the part of the respondent in relation to, not finding him accommodation.

27. He asserted that he was entitled to one month's notice of dismissal in terms of clause 2.8 of his written terms and conditions of employment. (While the respondent's representative had agreed that that clause identified a contractual entitlement of one month's notice of termination, he had also pointed out that the clause made clear, in its terms, that it did not apply to cases of summary dismissal.)
28. Although asked whether there was in particular anything that he wished to say by way of response to the respondent's representative's assertion that he lacked qualifying service for the purposes of presenting a section 94 unfair dismissal complaint, the claimant did not identify any matter which would counter that submission.

The Applicable Law, Discussion and Disposal

29. Section 94 of the Employment Rights Act 1996 confers upon employees the statutory right not to be unfairly dismissed in the following terms:-

“94 The Right

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Sub-section (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239)”

30. Section 108(1) of the ERA 1996 provides as follows:-

“108 Qualifying period of employment

(1) Section 94 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.

(2)”

31. As agreed between the parties and separately found in fact the claimant was summarily dismissed for reason of alleged misconduct. The complaint of unfair dismissal which he makes is one presented in terms of section 94 and 98 of the 1996 Act. The right not to be unfairly dismissed contained in section 94 is qualified by the terms of section 108(1). The right is not conferred on employees who have less than two years continuous qualifying service as at the Effective Date of Termination of their employment. While there are certain exceptions to the prerequisite of two years qualifying service, including for example cases of “automatic unfair dismissal”, there is nothing in the facts given notice of in this case, whether those which are not in dispute or those which are averred by either

the claimant or the respondent, which would place the complaint within one of those exceptions.

Disposal

32. On the evidence presented and on the application of the relevant law to the essential Findings in Fact which I have made at Open Preliminary Hearing, I hold that the claimant lacks Title, in terms of section 108 of the ERA 1996 to present a complaint of unfair dismissal in terms of sections 94 and 98 of the Act; and I dismiss the complaint of unfair dismissal for want of Jurisdiction (lack of qualifying service).
33. There remains outstanding the claimant's complaints of breach of contract and his associated claims in respect of; non-payment of alleged contractual notice entitlement and non-payment of wages and for reimbursement of expenses.
34. The above, breach of contract, complaints are now allocated to a Final Hearing of 1 day's duration to proceed at Edinburgh before an Employment Judge sitting alone and commencing at 10 am on the 20th of June 2019; **Confirmation of Hearing Notice should be issued to parties representatives in that regard forthwith.**

Employment Judge: Joseph D'Inverno
Date of Judgement: 11 April 2019
Entered in register: 12 April 2019
And copied to parties