



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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Case Nos: 4104838/19 & 4107185/19 Preliminary Hearing at Edinburgh on 4  
October 2019

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Employment Judge: M A Macleod

Gareth Lush

Claimant  
In Person

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Quorum Cyber Security Limited

Respondent  
Represented by  
Mr K Scott  
Solicitor

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that:

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1. The claimant's claim of unfair dismissal under section 94 of the Employment Rights Act 1996 is dismissed for want of jurisdiction;
2. The parties are directed to provide submissions to the Tribunal as to why the Tribunal should not strike out his claim of automatically unfair dismissal under section 103A of the Employment Rights Act 1996, in order to allow that matter to be determined; and that issue is continued for further consideration following the making of submissions.

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### **REASONS**

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1. In this case, the claimant presented a claim to the Employment Tribunal on 15 April 2019, in which he ticked the boxes showing that he wished to claim unfair dismissal and unlawful deductions from wages against the respondent.

2. The respondent resisted all claims, and presented an Employers' Contract Claim (ECC) which is now registered under case no: 4107185/19.
3. The case was allocated to a Preliminary Hearing in order to address the issue of whether the Tribunal had jurisdiction to hear a claim of unfair dismissal. The Preliminary Hearing took place on 4 October 2019. The claimant appeared on his own behalf, and the respondent was represented by Mr K Scott, solicitor.
4. Each party presented a short bundle of documents, to which some reference was made during the brief hearing.
5. The reason why the Tribunal had identified a preliminary issue relating to jurisdiction is that in his claim form, the claimant sets out his dates of employment as being from 2 July 2018 until 5 April 2019, a period of less than the minimum two years' qualifying service upon which he could base a claim of unfair dismissal under section 108(1) of the Employment Rights Act 1996.
6. The parties each set out their respective positions in brief submissions before me, and it is helpful, while summarising those submissions, to include reference to the pleadings as set out to date.
7. Firstly, the claimant accepted that he has less than two years' qualifying service with the respondent, and therefore that an unfair dismissal claim is ordinarily unavailable to him. When asked why he considered himself to be unfairly dismissed by the respondent, he said that he was unfairly dismissed because the reason to select him for redundancy was not for cost savings by the respondent, but for some other reason. He said he did not know what that other reason was, but he believed that it is either down to the respondent wishing to avoid paying his commission or due to the concerns he had raised with them about the lack of governance in the company. He said he raised those concerns verbally in January 2019, and in an email to one of the Board directors on 19 February 2019.

8. He went on to say that he believed that the claim was one of automatically unfair dismissal.

9. Reviewing the terms of the ET1, in section 8.2, the second paragraph reads:

5           *"I still don't understand why I was made redundant and not the newly hired  
Sales Director (whose role I had been doing in addition to other  
responsibilities). Prior to the 5<sup>th</sup> March, I was aware that the company had  
cash flow problems. I had raised verbally and in writing concerns about the  
lack of governance or risk management by the board and the way the  
10           company was funded by an unsecured loan from another company  
(Quorum Network Resources) tow of the directors owned without any formal  
loan agreement or interest being charged. There was also no formal  
agreement for subletting the office from the same company. I had  
suggested that these actions were illegal."*

15           10. Mr Scott responded by confirming that it is clear that these concerns are  
referred to in paragraph 8.2 of the ET1, and that if the claimant is seeking to  
argue that the reason or principal reason for his dismissal was the making  
of protected disclosures, there is no requirement upon him to have two  
years' qualifying service.

20           11. In the respondent's ET3, it is apparent that they anticipated that such a  
claim may have been made. They denied, in paragraph 4 of the paper  
apart to the ET3, that the claimant had made a qualifying disclosure, and  
went on in paragraph 9 to say that if the claimant were found to have made  
a protected disclosure, any disclosure was not made in good faith but to  
25           advance his own personal position with the respondent's business; and in  
paragraph 10, that it was denied that he was dismissed for making a  
disclosure, protected or otherwise.

30           12. However, he went on to point out that the claimant wrote to the Tribunal in  
response to the respondent's ET3, and in particular to the ECC submitted  
therein. The Tribunal had also requested his clarification as to whether he  
was making an unfair dismissal claim.

13. In that letter, dated 18 June 2019, the claimant made the following statements:

5 *“3. As stated in my claim..., I have not made a protected disclosure. Under advice from a lawyer I used prior to raising this with ACAS, I was advised to claim for unfair dismissal and a Whistleblower claim because, in the absence of any other logical reason why I was chosen to be made redundant, it was suspected that this could be a reason.”*

10 *“4. As I have stated, many times, I have not said that I made a qualifying disclosure. I am questioning if my concerns raised to the board about improprieties by the board were a factor in choosing to make my role redundant and no one else’s...”*

*“8. As stated before, I have never stated that I made a protected disclosure.”*

15 *“My decision to include a Whistleblower claim is neither vexatious nor abusive. It was under advice from my legal representative...”*

14. When asked about this, the claimant confirmed that the position is that he has not made a protected disclosure. He had a belief that the respondent’s Board was concerned that he was going to do so. He described this as one of the theories he had come to. He simply could not understand why the respondent chose to make him redundant and leave a less experienced colleague in employment. He said he was intending to make disclosures, and if he had done so it would have been in the public interest.

15. Mr Scott concluded by saying that he considered the claimant’s position, while understandable in an unrepresented party, was a new articulation of the claim rather than what had been set out to date.

16. He went on to say that the claim in respect of protected disclosures, if the Tribunal has jurisdiction to hear it, has no reasonable prospect of success. The respondent disputes that there has been any disclosure of information. Concerns or allegations have been expressed. It is necessary for the

claimant to show that he reasonably believed these matters to have been in the public interest.

### **Discussion and Decision**

5 17. The purpose of this hearing was to allow the Tribunal to determine whether or not it has jurisdiction to hear a claim of unfair dismissal by the claimant.

18. It is quite clear that the claimant lacks the necessary minimum two years' qualifying service to make an unfair dismissal under section 94 of the Employment Rights Act 1996, by virtue of section 108(1). As a result, that claim must fall for want of jurisdiction.

10 19. The complicating matter in this case, however, is that there is another facet to it, which is that in the claim submitted by the claimant, it is apparent that he is seeking to explain the reason for his dismissal as being related to "concerns" he raised prior to the decision to dismiss him, about matters which he considered to be "illegal".

15 20. On the face of it, the claimant was seeking to make an argument that the reason for his dismissal was that he had made protected disclosures.

21. Section 103A(1) of the 1996 Act provides:

20 *"AN employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

22. The respondent, in fairness, understood this, and directed part of their ET3 to denying this claim, if it were made.

25 23. The difficulty for the claimant is that when he saw the ET3, he then wrote to the Tribunal on 18 June 2019, and said, more than once, in unambiguous terms, that he had not made a protected disclosure.

24. He explained to this Tribunal that his position was that he had not made a protected disclosure, but that the respondent dismissed him because they feared or believed that he was going to do so.

25. On the face of it, this claim has no basis. Section 103A(1) provides that a dismissal shall be regarded as unfair if the reason or principal reason for that dismissal is that the employee “made” a protected disclosure; not that he was planning to make, or believed to be about to make, a protected disclosure, but that he had already done so.

26. This presents a difficulty for the claimant. However, it also presents a concern for the Tribunal. This hearing was identified to the parties as one which would deal with jurisdiction. That related to whether or not the claimant had the necessary minimum qualifying service upon which to base a claim of unfair dismissal. Under section 94, he does not, and such an unfair dismissal claim must fail because the Tribunal plainly lacks the jurisdiction to hear it.

27. The issue of jurisdiction itself does not arise in relation to the claim of automatically unfair dismissal. There is no doubt that the claimant presented a claim of automatically unfair dismissal in his ET1, without expressly referring to it as such.

28. In my view, what I am now confronted with is, in effect, a request by the respondent to strike out the claim on the basis that it has no reasonable prospect of success, because the claimant has expressly stated that he had not made protected disclosures prior to his dismissal.

29. I must, therefore, review the powers and obligations of the Tribunal in light of Rule 37 of the Employment Tribunals Rules of Procedure 2013. Rule 37(1)(a) provides:

*“At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds:*

*(1) that it is scandalous or vexatious or **that it has no reasonable prospect of success;**” (Tribunal’s emphasis)*

30. However, Rule 37(2) also provides that *“A claim or response may not be struck out unless the party in question has been given a reasonable*

*opportunity to make representations, either in writing or, if requested by the party, at a hearing.”*

31. It is my judgment that the claimant has not had that reasonable opportunity. He is an unrepresented, unqualified party. He came to this hearing with the understanding that it was related to jurisdiction; he could not have known that there was a risk that his claim, or part of it, might be struck out because it had no reasonable prospect of success.

32. I consider that there is a risk of prejudice to the claimant if I were simply to strike out his claim without his having a reasonable opportunity to respond to the suggestion that, on the basis set out above, his claim of automatically unfair dismissal has no reasonable prospect of success.

33. I am inclined to seek to avoid further expense and delay, and therefore I propose that the claimant be given 14 days from the date of this Judgment to set out any reasons why he proposes that his claim of automatically unfair dismissal should not be struck out on the basis that it lacks any reasonable prospect of success. The respondent will then have 14 days thereafter within which to respond to that submission, and the Tribunal will then conclude its decision on this point.

34. It is open to either party to ask for a hearing on this point.

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35. The claimant's claim of unfair dismissal is dismissed for want of jurisdiction. The claim of automatically unfair dismissal under section 103A is not struck out at this stage, but the parties are now aware that this will be considered by the Tribunal and must make submissions on this point in order to allow the matter to be properly determined.

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**Date of Judgement: 4<sup>th</sup> October 2019**  
**Employment Judge: M MacLeod**  
**Date Entered in Register: 7<sup>th</sup> October 2019**  
**And Copied to Parties**

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