



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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Case Nos: 4104838/19 & 4107185/19 Per Written Submissions

Employment Judge: M A Macleod

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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**

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The Judgment of the Employment Tribunal is that the claimant's claim that he was automatically unfairly dismissed under section 103A of the Employment Rights Act 1996 on the grounds that he had made a protected disclosure is struck out on the basis that it has no reasonable prospect of success, under Rule 37(1) of the Employment Tribunals Rules of Procedure 2013.

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### **REASONS**

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1. A Preliminary Hearing took place on 4 October 2019 in this case, following which the Tribunal issued a Judgment dismissing the claimant's claim of unfair dismissal under section 94 of the Employment Rights Act 1996 for want of jurisdiction, and directing parties to provide written submissions as to why the Tribunal should not strike out the claimant's claim of automatically unfair dismissal under section 103A of the 1996 Act. The

issue was continued for further consideration following the making of written submissions.

- 5 2. The parties were therefore given 14 days from the date of that Judgment (4 October 2019) to present written submissions to allow the Tribunal to determine whether or not the claim of automatically unfair dismissal has reasonable prospects of success.

### **Claimant's Submission**

- 10 3. The claimant wrote to the Tribunal on 15 October, a letter received on 18 October (and therefore in time).

4. He confirmed that he accepted the Tribunal's Judgment that his claim of unfair dismissal was dismissed, but wished to put forward reasons why his claim of automatically unfair dismissal has a reasonable chance of success and should not be struck out.

- 15 5. He said that he had two theories as to why he was selected for redundancy: firstly, that the company was seeking to avoid paying commission that he was due; and secondly, that the company was concerned that he would make a protected disclosure.

20 6. He went on to reiterate, from previous statements, that "I have always stated that I had not made a protected disclosure". His position is that he theorised that the respondent's board of directors suspected that he might. He also sought to correct an error in paragraph 14 of the Judgment, when it was recorded that the claimant said that he was intending to make disclosures; he confirmed that "I had no intention of making a protected disclosure".

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7. He went on to say, very fairly, that having read the Judgment and having carried out further research, he believes that the respondent has a valid argument that his claim is not sufficient to give the Tribunal jurisdiction to

allow him to claim automatically unfair dismissal, under the second of theories put forward.

5 8. However, he wanted to stress that he should have provided an argument for the first theory, namely that the respondent wished to avoid paying commission.

10 9. The claimant explained that one of the board members had openly questioned his commission plan, despite it having been signed off by the Managing Director in July 2018. He said he was asked by the Managing Director verbally around the same time if he would forgo his commission entirely for an undefined period. He refused, on the basis that his commission plan was contractually part of his salary package, and not discretionary or optional. He suggested that the business could spread the commission payments to him over a three month period in arrears to assist with cashflow.

15 10. The claimant said, then, that: *"It is quite clear to me that the board had no intention of paying my commission, therefore constituting a breach of my contract and my statutory employment rights, specifically making an illegal deduction of my pay. As I understand it, this constitutes an automatically unfair reason, and I would request that you consider this argument."*

20 11. The claimant acknowledged that this argument is closely linked to his claim for the unpaid commission, but that if the Tribunal were to agree to include the claim for automatically unfair dismissal in the main hearing, both claims will hinge around the validity of his claim for the unpaid commission.

### **Respondent's Submission**

25 12. Mr Scott, for the respondent, submitted his comments to the Tribunal on 29 October 2019, having received the claimant's submissions from the Tribunal.

13. He submitted that the claimant has clearly stated that he has not made a protected disclosure and had no intention of making one, and therefore the

Tribunal has no jurisdiction to hear any complaint under section 103A of the 1996 Act.

14. Mr Scott submitted that the claim should be struck out under Rule 37(1)(a) of the Employment Tribunals Rules of Procedure (or alternatively Rule 27,  
5 as having no reasonable prospect of success, because:

1. The claimant has repeatedly and unambiguously informed the Tribunal that he has not made a protected disclosure. The claim falls at that point.
2. In any event, the claimant has not made a disclosure of information in terms of section 43B(1) of the 1996 Act; and
- 10 3. In any event, the claimant could not reasonably be considered to have believed any such disclosure to be in the public interest, the point of contention being an alleged breach of his individual employment contract in connection with commission payments already before the Tribunal.

15 15. Alternatively, Mr Scott observed that the claimant's articulation of his claim is in effect an application to amend his claim, which is, or would be, objected to by the respondent and is time-barred anyway. Mr Scott submitted that it could not be said that it was not reasonably practicable for the claimant to have presented the amendment in time, or if it was not  
20 reasonably practicable, the claim has not been presented within such further time as the Tribunal should consider reasonable.

### **Decision**

16. The claimant has now suggested that the claim of automatically unfair dismissal is based on two separate though related points: firstly that he was  
25 selected for redundancy because the respondent suspected that he was about to make a protected disclosure, and secondly that he was selected for redundancy because the respondent wished to avoid paying him his contractual commission payment.

17. Section 103A of the 1996 Act provides: “ *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.*”

5 18. The Tribunal, in my judgment, only has jurisdiction to hear a claim under section 103A if it can be founded upon a protected disclosure which has been “made” by the claimant.

10 19. The claimant has repeatedly clarified his position, that he has not made a protected disclosure; he has gone further, in his submissions now presented, by confirming that he did not intend to make a protected disclosure.

15 20. Without making a protected disclosure, the claimant does not qualify for the right to make a claim under section 103A. Mr Scott, perhaps adopting a “belt and braces” approach, has also identified difficulties with the issues raised by the claimant as not meeting the definition of a protected disclosure under section 43B, but that submission is, with respect, unnecessary, rendered redundant by the claimant’s clear statement that he did not make a protected disclosure.

20 21. That being the case, there is no foundation for a claim under section 103A. In fairness to the claimant, it must be noted that he, quite candidly, accepted that the respondent’s argument on this point has some force.

25 22. What, then, is the claimant seeking to claim? On the basis of the ET1, currently before the Tribunal, the claimant is left with a claim that he was unlawfully deprived of a contractual bonus payment. That claim remains and survives these discussions and hearings, on the basis that there are no jurisdictional barriers preventing the Tribunal from hearing the evidence and determining that issue.

23. In his submission on this matter, the claimant appears to be suggesting that he still wishes to make a claim that he was automatically unfairly dismissed, apparently on the grounds that the respondent deliberately decided to terminate his contract in order to avoid a contractual obligation owed to him.

5 24. Mr Scott was alert to the possibility that this may amount to an alteration of the grounds on which the claimant's complaint to this Tribunal is based, and objected to any application to amend sought by the claimant at this stage.

10 25. The difficulty for the claimant, and indeed as a consequence for the respondent and the Tribunal, is that the precise statutory basis of such a claim has not been articulated by the claimant in his claim form nor in his submission to this Tribunal.

15 26. The purpose of this decision is to address the question of whether or not the claimant's claim of automatically unfair dismissal based on protected disclosures has any reasonable prospect of success. I am unable to reach any conclusion on whether or not another type of automatically unfair dismissal claim may have reasonable prospects of success since no such alternative claim is currently before the Tribunal.

20 27. It is therefore my conclusion that if the claimant wishes to set forth before the Tribunal a complaint that his dismissal was for an unlawful reason on other grounds than that he had made a protected disclosure, it is open to him to make application to amend his claim, but he should note that it is essential that in doing so he sets out the facts upon which he wishes to base that claim, the statutory provision on which he relies in making such a claim, and the reason why he is presenting this claim now and not when he  
25 presented his ET1 to the Tribunal.

28. So far as the outstanding matter before me is concerned, it is my judgment that the claimant's claim that he was automatically unfairly dismissed by the respondent on the grounds of having made a protected disclosure, under section 103A, has no reasonable prospect of success, and is bound to fail.

5 On that basis, that claim is struck out under Rule 37(1)(a).

**Judgement Date: 15 November 2019**

**Employment Judge: Murdo Macleod**

10 **Entered Into the Register: 18 November 2019**

**And Copied to Parties**