



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4114003/19 (P)**

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**Held on 11 August 2020**

**Employment Judge N M Hosie**

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**Mr R Rodger**

**Claimant  
In Person**

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**Stork Technical Services (RBG) Limited**

**Respondent  
Represented by  
Ms J Packham,  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Judgment of the Tribunal is that the claim has “no reasonable prospect of success” and it is struck out in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

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**REASONS**

**E.T. Z4 (WR)**

**The claim**

1. The claimant submitted a claim form on 5 December 2019 in which he intimated complaints of unfair dismissal, for a redundancy payment and for breach of contract (notice pay). The claim was denied in its entirety by the respondent. In short, the respondent's position was that the claimant had not been dismissed and that his employment was continuing.

**Case management**

2. I conducted a preliminary hearing for case management purposes on 21 February 2020. The Note which I issued following that hearing is referred to for its terms. The claimant responded to my directions by e-mail on 13 March and the respondent's solicitor replied by e-mail on 20 March. The Tribunal received further representations by e-mail from the parties which led to a further case management preliminary hearing on 7 July. The Note which I issued following that hearing is referred to for its terms. It was agreed that I would endeavour to determine the issues between the parties "on the papers": on the basis of the parties' written representations.
3. In addition to the previous representations from the parties, I received further representations from the respondent's solicitor on 2 July, from the claimant on 7 July and from the respondent's solicitor on 15 July which included, by attachment, copies of relevant documents. I had regard to these and to previous representations from the parties in arriving at my decision.

**The facts**

4. Initially, I had a concern that there would be disputed facts which could only properly be determined by hearing evidence. That would have prevented me determining the issue "on the papers". However, when I considered the parties' written representations and the relevant documents, I was satisfied

that there was sufficient agreement, so far as the material facts were concerned, to enable me to make a decision without hearing any evidence.

5. I make the following findings in fact, therefore, relevant to the issues with which I was concerned.
6. The claimant commenced his employment with the respondent as an “Ad-Hoc Scaffolder” on 20 July 2011.
7. On 15 October 2018, the respondent sent a notice of redundancy to the claimant with an eight-week notice period, ending on 9 December 2018. However, the notice period was extended to 4 January 2020.
8. During the notice period, the claimant applied for the role of a “Permanent Retained Contract Scaffolder” (“a PRC Scaffolder”). This role was offered to the claimant on 17 December by the respondent and accepted by him. He started work in that role on 4 January 2020, prior to the completion of his notice period which had been extended until that date.

## 20 Discussion and decision

### Relevant law

9. S.138 of the Employment Rights Act 1996 (“the 1996 Act”) is in the following terms: -

#### **“138 No dismissal in cases of renewal of contract or re-engagement**

(1) *Where –*

- (a) *an employee’s contract of employment is renewed, or he is re-engaged under a new contract of employment in pursuance of an offer (whether in writing or not) made before the end of his employment under the previous contract, and*

- (b) *the renewal or re-engagement takes effect either immediately on, or after an interval of not more than four weeks after, the end of that employment,*

*the employee shall not be regarded for the purposes of this Part as dismissed by his employer by the reason of the ending of his employment under the previous contract.*

- 5 (2) Subsection (1) does not apply if –
- (a) *the provisions of the contract as renewed, or of the new contract, as to –*
- (i) *the capacity and place in which the employee is employed, and*
- (ii) *the other terms and conditions of his employment, differ wholly or*  
10 *in part) from the corresponding provisions of the previous contract,*  
*and*
- (b) *during the period specified in sub-section (3) –*
- (i) *the employee (for whatever reason) terminates the renewed or new*  
*contract, or gives notice to terminate it and it is in consequence*  
*terminated, or*
- 15 (ii) *the employer, for a reason connected with or arising out of any*  
*difference between the renewed or new contract and the previous*  
*contract, terminates the renewed or new contract, or gives notice to*  
*terminate it and it is in consequence terminated.*
- 20 (3) *The period referred to in sub-section (2)(b) is the period –*
- (a) *beginning at the end of the employee’s employment under the previous*  
*contract, and*
- (b) *ending with –*
- (i) *the period of four weeks beginning with the date on which the*  
25 *employee starts work under the renewed or new contract,*
- (ii) *such longer period as may be agreed in accordance with subsection*  
*(6) for the purpose of retraining the employee for employment under*  
*that contract: and is in this Part referred to as the “trial period”.*
- 30 (4) *Where subsection (2) applies, for the purposes of this Part –*
- (a) *the employee shall be regarded as dismissed on the date on which his*  
*employment under the previous contract (or, if there has been more*  
*than one trial period, the original contract) ended, and*
- (b) *the reason for the dismissal shall be taken to be the reason for which*  
35 *the employee was then dismissed, or would have been dismissed had*  
*the offer (or original offer) of renewed or new employment not been*  
*made, or the reason which resulted in that offer being made.*
- 40 (5) *Subsection (2) does not apply if the employee’s contract of employment*  
*is again renewed, or he is again re-engaged under a new contract of*  
*employment, in circumstances such that subsection (1) again applies.*
- (6) *For the purposes of subsection (3)(b)(ii) a period of retraining is agreed in*  
*accordance with this subsection only if the agreement –*

(a) is made between the employer and the employee or his representative before the employee starts work under the contract as renewed, or the new contract,

(b) is in writing,

5 (c) specifies the date the period of retraining ends, and

(d) specifies the terms and conditions of employment which will apply in the employee's case after the end of that period."

10 10. An employer may avoid liability for a redundancy payment, altogether, therefore, if a redundant employee accepts an offer of alternative employment (subject to the employee's right to a four-week trial period), or if the employee unreasonably refuses an offer of suitable employment.

15 11. Applying the provisions of s.138 to the present case, the claimant had been given notice of dismissal because of redundancy. The respondent had made an offer of re-engagement *before* his employment ended. His new employment as a PRC Scaffolder started immediately after his old job as an Ad-Hoc Scaffolder ended.

20 12. As the claimant accepted the offer of new employment and did not give notice of termination, within the four-week period, he is treated as not having been dismissed. This means that the question of a redundancy payment, unfair dismissal or breach of contract (notice) does not arise. Indeed, in his e-mail of 13 March 2020, in response to my direction, the claimant confirmed that he had, "continued to *work for the respondent*".

30 13. Although this was disputed by the claimant, I was satisfied that the PRC Scaffolding role was an offer of "suitable alternative employment". The work is the same. The only difference between the PRC role and the Ad-Hoc role is that as a PRC Scaffolder the claimant has a minimum guaranteed number of working days per annum. The respondent's solicitor submitted that, "*the duties, responsibilities and skills required as well as flexibility of the role, location for carrying out the work and the remuneration payable are the same.*" That was not disputed by the claimant. Further, in terms of his PRC

contract, he enjoys continuity of employment back to 2011 when he started with the respondent as an Ad-Hoc Scaffolder.

14. In any event, even if the roles were different and the claimant was re-engaged in a different role, s.138 of the 1996 Act also relates to re-engagement. There is a statutory right to a “trial period” of four weeks where the job is a different one, or where it is the same job, but the terms and conditions are different. In that event, if the employee decides against the job and leaves during the trial period, he is treated as having been dismissed and he will be entitled to a redundancy payment. In the present case, the claimant did not resign from his new role within a four-week period. He remains employed by the respondent in the capacity of a PRC Scaffolder, with continuity of employment.
15. Accordingly, there was no dismissal.
16. I arrived at the view, therefore, that the claim has, “no reasonable prospect of success”. It is struck out, therefore, in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

<b>Employment Judge</b>	<b>Nick Hosie</b>
<b>Date of judgement</b>	<b>24 August 2020</b>
<b>Date sent to parties</b>	<b>25 August 2020</b>