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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111662/2021 (V)

Held on 28 January 2022 (By CVP)

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Employment Judge: B Campbell

Mr A Izatt	**Claimant** **In Person**
Energetics Design & Build Limited	**Respondent** **Represented by:** **Ms Laura McKenna** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

1. the complaint of breach of contract has no reasonable prospects of success, and is struck out under rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013; and

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2. the complaints of unfair dismissal and direct age discrimination, either not being within the tribunal's jurisdiction or having been withdrawn by the claimant, are dismissed.

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BACKGROUND

1. The claim was set down for a hearing today to determine whether the claim had sufficient prospects of succeeding to be allowed to proceed to a full hearing on its merits.

2. The claim arises out of the claimant's employment with the respondent which began on 16 March 2020 and ended on 14 July 2021. The claimant was a senior manager within the respondent's business.

3. Initially the claim form presented to the Tribunal included complaints of:

    a. Unfair dismissal (under section 94 of the Employment Rights Act 1996 ('ERA')), that is to say a 'standard' claim of unfair dismissal for which a period of at least two continuous years of service is required;

    b. Unlawful direct discrimination based on age, contrary to section 13 of the Equality Act 2010; and

    c. Breach of contract at common law.

4. A case management Preliminary Hearing took place on 10 December 2021. It was conducted by telephone and the claimant and Ms McKenna participated. At that hearing it was explained to the claimant that his claim of unfair dismissal could not proceed as he had not completed a sufficient period of continuous service with the respondent. He accepted that.

5. Also at the hearing, the clamant intimated that he was no longer insisting on his claim of direct age discrimination. The judge was mindful that the claimant should not feel he had to make a decision too rashly, and it was left that the claimant would write to the Tribunal to confirm that this was his intention. There was no available record of his doing so, but he confirmed at today's hearing that he was no longer proceeding with that complaint.

6. As a result of the above it is not necessary to describe those two complaints in any detail.

7. The complaint of breach of contract was explained by the claimant. He accepted the respondent's position that he had been dismissed on

performance related grounds, but asserted that he had a contractual right to be given a warning about any underperformance before being dismissed. No such warning was given to him. He believed there was a term in his written contract of employment to this effect, but the document was not to hand.

5 8. The respondent's position in relation to the claimant's complaint of breach of contract was that the claimant had been dismissed within the terms of his contract, that no warning was required in order to do so, and that the complaint had no reasonable prospect of success, and so should be struck out rather than proceed to be decided on its merits. The point was made that the
10 claimant was paid in lieu of his full entitlement to notice, which was three months under the contract. The claimant agreed he had received that payment.

9. The judge agreed to arrange today's hearing to determine that application. He ordered that Ms McKenna prepare a hearing bundle, which she did. This
15 contained among other things the claimant's written contract at pages 44 to 65. It was anticipated that the strike out application could be dealt with by way of submissions with reference to the contract. This is the way this hearing proceeded.

10. The parties were in agreement that the relevant clause of the contract was
20 clause 18, headed 'Termination of Employment' and found on pages 56 and 57 of the bundle.

11. Ms McKenna's submission was that clause 18.1.1 was the provision relied on by the respondent. It stated that, after completion of any probationary period (which the claimant had done), *'…You or the Company may terminate*
25 *your employment by giving three months' written notice'.*

12. Since the respondent had paid the claimant the equivalent of three months' salary in lieu of notice, they did not required to give him a warning. A warning before dismissal was only required, explicitly in the contract at least, if the respondent wished to terminate the claimant's employment under clause
30 18.1.2, which was for one or more of a list of particular reasons, and crucially

without any notice or payment in lieu. The respondent did not choose that option.

13. Ms McKenna stated that as there was no other apparent basis for the claimant being entitled to a warning before his dismissal, his claim had no reasonable prospects of success and should be struck out. In doing so she recognised that strike out was an option to be used sparingly and only where clearly justified in the circumstances. She made reference to the EAT decision in ***Cox v Adecco and others UKEAT/0339/19/AT*** and stressed that she accepted that the potential for unfairness towards an unrepresented claimant was particularly high. Nevertheless, this case was so clear-cut that strike out was appropriate.

14. The claimant explained the basis of his claim. He referred to clause 18.1.2 of the contract, which contained a requirement to give him a written warning before dismissal for being *'guilty of continuing unsatisfactory conduct or performance of your duties, after having received a written warning from the Company or Board of Directors relating to the same.'* He believed that this was the term the respondent followed in dismissing him, save that they had not given him a written warning.

15. After a brief adjournment I was able to reach a decision on the application which I confirmed to the parties orally. I noted the terms of clause 18 of the contract. I found that Ms McKenna's submission was correct. The respondent had relied on clause 18.1.1 and so did not need to issue the claimant with a written warning. I noted that that provision could be read along with clause 18.4, which allowed the respondent to make payment in lieu of any notice to be given to the claimant. Thus it was not a breach to pay the claimant for the equivalent of his notice period rather than allow him to serve it.

16. The claimant had mistakenly understood the respondent to have followed clause 18.1.2, which would have required him to be given a warning. But that provision involved termination with no notice or payment in lieu. The claimant accepted he received three months of notice pay.

17. As such, on the evidence available the respondent appeared to have acted within the terms of the claimant's contract by dismissing him as they did.

18. In reaching this decision I was mindful of the guidance of the EAT in ***Cox***. The claimant was not under any evident pressure throughout today's hearing and was able to articulate his position clearly, and understand what Ms McKenna and I were saying. He had already attended one hearing before, and knew well in advance the issue which would be discussed and the document which was the subject of that discussion – i.e. his own contract of employment. Further, the matter did appear clear-cut. The contract terms were plain and not open to ambiguity. It was difficult to see how they could be read any differently in the context of other evidence not before the tribunal, if there was any. The claimant accepted that there were no other documents having a bearing on the issue. I could not see this as a case where, by amending his written grounds of claim, he could bring a more promising complaint into focus. The claim was not one of discrimination, where the hearing of evidence in full is particularly important as a matter of course.

19. As a result I considered the complaint had no reasonable prospect of success both on its merits and in terms of any losses arguably sustained, and that it was appropriate to strike it out giving recognition to the time and public cost of a hearing, during times where the claim was competing with others in the system to be heard.

20. To the extent that the original complaints of unfair dismissal and age discrimination are still live in any sense, those are now formally dismissed.

Employment Judge: Brian Campbell
Date of Judgment: 09 February 2022
Entered in register: 14 February 2022
and copied to parties