

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100558/2021

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**Open Preliminary Hearing Held by Cloud Video Platform (CVP) on 17 August
2021**

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Employment Judge: Russell Bradley

Stephen Morton

**Claimant
In person**

Oilean (Training and Nurture) Ltd

**Respondent
Ms L Wilson
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

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1. It does not have jurisdiction to hear the claim of unfair dismissal. The claim is therefore dismissed.
2. It does not have jurisdiction to hear the claim of an alleged unlawful deduction of wages. The claim is therefore dismissed.

E.T. Z4 (WR)

3. The claim for a statutory redundancy payment is struck out under Rule 37 on the basis that it has no reasonable prospect of success.

REASONS

5 Introduction

1. In an ET1 presented on 5 February 2021 the Claimant maintained claims of unfair dismissal, for a statutory redundancy payment and for arrears of pay. They were resisted. The Notice convening this hearing provided that its purpose was to discuss whether the claims of unfair dismissal and for arrears of pay (treated as an alleged unlawful deduction from wages) were time barred and whether the claim for a redundancy payment had little or no reasonable prospect of success.
2. For the hearing a joint bundle of 15 items and 55 pages was lodged. The claimant lodged 4 additional documents of 6 pages. I had read the ET forms with their respective papers apart before the start of the hearing. I had also seen the claimant's early conciliation certificate.
3. Prior to discussing the claims and the purpose of the hearing, I drew to parties' attention the fact of my previous instruction as counsel by Ms Wilson's employer for clients of that practice in employment tribunal hearings. I noted that the last occasion of an instruction was in October 2019. Neither party had an objection to me determining the issues at the hearing.
4. In discussions prior to hearing evidence, the claimant confirmed that his claim of unfair dismissal was one of constructive dismissal. I noted that his ET1 asserted (box 9.2) that he felt he had been forced to resign. He also confirmed that his claim for compensation for unfair dismissal was for £7145.10 based on what is narrated in the first paragraph of box 9.2. The claimant also confirmed that his claim for an alleged unlawful deduction from wages (as per the third paragraph in 9.2) was for £31.66 based on an alleged failure to pay him for

2.26 hours of work at the rate of £14.01 per hour. This was said to have been omitted from his payslip in July 2020.

5. The pled basis of the claim for a statutory redundancy payment (the second paragraph at 9.2) was “*redundancy payment under TUPE*” where the claimant also set out his calculation of it based on 9 years’ service. I noted that in his paper apart at point 3, in bold, the claimant asserted his belief that his rights in terms of TUPE “*are being abused*”. In discussion prior to hearing his evidence and confirmed by him when he gave evidence, the claimant maintained that his employment with the respondent began on 14 January 2011 and ended on 4 August 2020. He remained an employee of the respondent between those dates. Ms Wilson accepted that in terms of section 136(1)(c) of the Employment Rights Act 1996 an employee could bring a claim for a statutory redundancy payment in circumstances where they had resigned. That said, it became apparent from the claimant’s position and his evidence that this claim was integrally connected with his belief that his employment had transferred under TUPE.
6. Notwithstanding indications suggesting the contrary (see boxes 9.1 and 10.1 of the ET1) the claimant did not make claims of discrimination or relative to the making of a protected disclosure.
7. While the respondent sought the alternative of a deposit order to strike out of the redundancy payment claim, Ms Wilson did not insist on it.

The issues

8. Reflecting the purpose of the hearing, and the relevant legislation, the issues for this hearing were:-
1. Was it reasonably practicable for the claim of unfair dismissal to have been presented in time?
 2. If it was not reasonably practicable to present it in time was it presented within a reasonable time thereafter?
 3. Was it reasonably practicable for the claim of an unlawful deduction from wages shown on a payslip of July 2020 to have been presented in time?

4. If it was not reasonably practicable to present it in time was it presented within a reasonable time thereafter?
5. Should the claim for a statutory redundancy payment be struck out on the ground that it had no reasonable prospect of success.

5 Evidence

9. I heard evidence from the claimant. To the extent that reference was made in his evidence or where both parties made reference to them in submissions, I took account of material within the bundles.

Findings in Fact

- 10 10. From the evidence the early conciliation certificate and the Tribunal forms, I found the following facts admitted or proved.
11. The claimant is Stephen Morton. He began employment with the respondent on 14 January 2011. On 4 August 2020 his employment ended summarily by way of resignation. By that time he was employed as business manager. He
15 was employed throughout that time by the respondent. By 4 August 2020 the respondent employed one other employee, Debbie Watson.
12. In about April 2020, ownership of the respondent changed from John Cran (see reference to him in the ET1 paper apart, page 2). The taxable income, the Income Tax, and National Insurance the claimant paid from 30 April 2020 to
20 30 April 2020 from information from the respondent was respectively £796.00, nil and £0.72 (see **page 3 of the joint bundle**). The taxable income, and the Income Tax, and National Insurance the claimant paid from 31 May 2020 to 31 May 2020 from information from Love Corporate Limited was respectively £796.00, nil and £1.40.
- 25 13. On or about 30 July 2020 the claimant was issued with a payslip (**page 44**). It disclosed that; £796.01 was paid to him on or about that date by electronic transfer; it was paid by the respondent; that payment was a net amount; the gross version was £878.99 representing 62.7400 hours; the hourly rate of pay was therefore £14.01; deductions were made for PAYE income tax and

employee national insurance contributions; the net amount reflected the reimbursement to the claimant of £21.72 for "office supplies".

14. By email on 4 August 2020 the claimant intimated his resignation. His email said, *"In light of recent events I have decided to resign with immediate effect. I am copying it to so many people because since Flora went on her "sabbatical" I have no idea who my line manager is. The reasons for my resignation are quite simple and I have raised them all before with no success*

- *Repeated data protection breaches*
- *Highly emotive/abusive emails*
- 10 • *I believe my rights in terms of TUPE are being abused. Amanda is right the sale of Oilean is in fact a takeover.*

If you wish to carry out a termination interview I will make myself available at an agreed date and time next week. I believe I am due 9.58 days holiday so please include them in my final pay check along with the attached extra hours and out of pocket expenses. Note I still have no access to my wage slip from last month."

15. The reasons contained in the bullets in the email were his reasons for resigning. By the time of his resignation the claimant believed that *"the sale of Oilean"* to which he referred had been the transfer of a business to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) applied. In contrast, the respondent asserted that the sale had been of the shares in the respondent by Mr Cran. In counter-contrast, the claimant believed that the share sale was a sham. The claimant believed that there should have been a discussion with him as an employee employed in the business transferring. He believed that under the TUPE rules he was entitled to be offered a redundancy payment.

16. In January 2021, the claimant approached HMRC to prepare his tax return. At that time, his return was due to reflect rental income from a rented property which he owned. At or about that time, he saw the information which is now on page 9 of the bundle. That information suggested to the claimant that; his employment had transferred to Love Corporate Limited; and that employment

had ended on 31 May 2020. On receipt of that information, the claimant believed that a number of people involved in running the respondent and/or Love Corporate had wanted rid of him.

5 17. The claimant began early conciliation on 22 January 2021. ACAS issued a certificate on 3 February. The claimant presented his ET1 on 5 February. In his ET1 paper apart the claimant says, "***/ am aware that I should have done this action sooner but I did not as I wanted to protect the other employee of Oilean who still works there, or may have transferred to Love Corporate.***" The reference to the other employee is to Debbie Watson.

10 18. In the period between 4 August 2020 and January 2021 the claimant was aware of the right to claim unfair dismissal. In that time, he knew about "***the three month rule***".

15 19. The reasons that the claimant did not start early conciliation and present the ET1 earlier than he did were two-fold. First, as the ET1 records he wanted to protect Debbie Watson. Second, he was prompted to start the process by information received from HMRC which suggested that no tax had been paid for him for periods in which he expected it to have been paid. It was a personal issue which arose because of the tax issue which had come to light in January.

20 **Comment on the evidence**

25 20. The claimant's evidence on his state of knowledge on the question of his claim of unfair dismissal and the timescale for doing so was unsatisfactory. In one part of his evidence, he accepted that he was aware of the right and of the three month rule sometime between August 2020 and January 2021. Later, when it appeared he understood the significance of making such a concession he suggested that he was unsure as to when he learned of the right and the rule. I preferred his evidence that he knew of his right and of the rule prior to January 2021. I did so for the following reasons. First, it was his evidence at a time when he appeared to be giving it unaffected by its likely impact on some
30 of the issues for this hearing. Second, in August at the time of his resignation,

he said that he believed his rights under TUPE were being abused. It is more likely than not that if he knew his rights under TUPE, he was aware of his right to claim unfair dismissal. Third, his ET1 states that he was aware that he should have "*done this action*" (meaning presented an ET1) sooner but delayed doing so to protect Ms Wilson. That tends to suggest that he was aware of his right and the rule earlier in time than February 2021 but did not exercise his right for his own reasons.

Submissions

21. Both parties made oral submissions. Ms Wilson emphasised that the claimant had confirmed in evidence that the reasons for his resignation were those within his email of 4 August. He did not start early conciliation for 5 months after that effective date of termination. She reminded me of the provisions of sections 111 and 23 of the Employment Rights Act 1996. In her submission, the claimant had not shown that it was not reasonably practicable for his claims of unfair dismissal and of a deduction from wages to have been presented in time. In her submission, the claimant had had ample opportunity to look into and begin the process that would have resulted in the claims being presented in time. She reminded me that one reason for the claimant's resignation was because he believed his rights under TUPE were being abused. This, she said, demonstrated that he knew of his rights under the Regulations but had not gone to ACAS until 22 January 2021. She submitted that the claimant's assertion within his ET1 that "*I am aware that I should have done this action sooner but I did not as I wanted to protect the other employee of Oilean who still works there, or may have transferred to Love Corporate*" does not equate with satisfying the question of it not being reasonably practicable to have begun the process in time. The claimant has not been able to explain what would have happened to Ms Wilson had he brought the claim in time, or how it was that he was protecting her by delaying. She reminded me of the claimant's evidence on the effect of the information which he received from HMRC in January 2021. In her submission the fact that that information suggested to him that certain personnel had wanted rid of him was irrelevant because it could not have been a reason for his resignation. In short, that information could not be relevant

because it came to him after his resignation. On her application to strike out the claim for a statutory redundancy payment, she accepted that it had been brought in time. But the claimant had not been dismissed and had not demonstrated the existence of a redundancy situation prior to his resignation.

5 She reminded that on his written case the claim was brought “*under TUPE*” but there had been no TUPE transfer. She accepted that the bundle did not contain (but could have contained) the share purchase agreement which would have been relevant evidence on the disputed issue of fact; was it a share sale or the transfer of an undertaking? In summary her position was; there was no

10 TUPE transfer; the claimant had failed to show a basis for a redundancy payment; and even if a redundancy payment was due “*under TUPE*” that claim was out of time. The claim was entirely misconceived had no foundation and should be dismissed.

22. In reply on the test under section 111 of the 1996 Act, Mr Morton posed the rhetorical question; how did he have any reason to take forward a claim when

15 he did not have the information about when his employment ended until he received it via HMRC in January 2021? That information was, he said, a screenshot of information from HMRC which showed that his employment with Love Corporate Limited ended on 31 May 2021. In his submission that

20 information, received at that time, made him question the actions of the respondent/Love Corporate and look at the information in a different light. In his submission he could not see how he could have brought the claim before the point in time that he received that information. He accepted however that that screenshot was not within the bundle. He also accepted that the

25 screenshots to which he had made reference in his evidence (**pages 3 and 9**) did not provide any material or information on the question of the termination of his employment with either the respondent or Love Corporate Limited. On his claim for a deduction from wages, he submitted that the issue had been raised by him in September 2020. He accepted that he must have known about

30 it prior to 30 September. He submitted that he had not progressed a claim until the point in time that he did for no reason other than the value of it. On his claim for a statutory redundancy payment, he submitted that his employment transferred under TUPE to Love Corporate with no consultation with him. He

referred to the information that he received from HMRC. He referred to page 44 of the bundle (wage slip for period ending 31st July 2020) which disclosed year to date deductions for income tax of £194.92, yet, he said, HMRC records show that this amount has still not been paid to HMRC. In his submission the respondent (to all intents and purposes) no longer exists, his employment along with other assets having transferred to Love Corporate. The idea of a share sale was a sham.

The law

23. Section 111(2)(a) of the Employment Rights Act 1996 provides (subject to following provisions) that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented to the tribunal before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
24. Section 23(2) of the 1996 Act makes similar provision in relation to a claim for an alleged deduction from wages.
25. Section 207B of the Act (which is referenced as one of the following sections) makes provision for the extension of those time limits to facilitate conciliation before institution of proceedings. Section 207B does not apply in this case given the claimant's failure to start early conciliation timeously.
26. It is for the claimant to demonstrate that the presentation of the complaint within time was not reasonably practicable (*Porter v Bandridge Ltd* [1978] ICR 943, CA at 948D-E).
27. Rule 37(1)(a) of the 2013 ET Rules read short for present purposes provides that a tribunal may strike out all or part of a claim on the ground that it had no reasonable prospect of success.
28. Section 136(1) and (2) of the 1996 Act provide that "(1) Subject to the provisions of this section and sections 137 and 138, for the purposes of this

Part an employee is dismissed by his employer if (and only if)— (a) the contract under which he is employed by the employer is terminated by the employer (whether with or without notice), (b) he is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. (2) Subsection (1)(c) does not apply if the employee terminates the contract without notice in circumstances in which he is entitled to do so by reason of a lock-out by the employer." Section 137 has been repealed. Section 138 has no application in this case.

29. Section 139(1) of the Act provides that "For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—(a) the fact that this employer has ceased or intends to cease —(i) to carry on the business for the purposes of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business —(i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."

30. The EAT has held that the striking out process requires a two-stage test in *HM Prison Service v Dolby* [2003] IRLR 694, and in *Hassan v Tesco Stores Ltd* [2016] UKEAT/0098/16. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In *Hassan* Lady Wise stated that the second stage is important as it is "a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit" (paragraph 19).

30 **Discussion and decision**

31. On the claims of unfair dismissal and for arrears of wages, the question of what is or is not reasonably practicable is a question of fact for the tribunal. Where the claimant has not started early conciliation in time one relevant question is; what was the reason for that failure? I have found as fact based on the claimant's oral evidence that the reasons that he did not start early conciliation (and present the ET 1) earlier than he did were two-fold. First, and as the ET 1 records, he wanted to protect Debbie Watson. Second, he was prompted to start the process by information received from HMRC which suggested that no tax had been paid for him for periods in which he expected it to have been paid. I have found that the claimant was aware of his right to make a claim of unfair dismissal and of the timeframe for doing so in the period from 4 August 2020 to January 2021. He was also aware of his claim for the alleged underpayment of wages in that time. On his own case, he did not start a process before January 2021 for that sum because of its modest value. That was the reason for the failure in respect of that claim. The claimant has not shown that it was not reasonably practicable to begin the early conciliation process in time for either claim. That being so, my view is that it was reasonably practicable for early conciliation to have begun in time on both claims which did not occur. The tribunal thus does not have jurisdiction to consider either of them. They fail to be dismissed.

32. The claim for a statutory redundancy payment is confused and confusing. The basis for it within the ET1 is that it is due "under TUPE. Three points occur. First, on the claimant's case if there had been a transfer of an undertaking and he had transferred under TUPE any claim could not be against the respondent because it would have been the transferor, any such claim being due against the transferee. Second, there was no evidence at all that would have allowed me to find as fact that a transfer under TUPE did indeed take place. Third, and in any event a redundancy payment is not due "under TUPE". The claimant's position in discussion with him and in his evidence was not clear. He appeared to suggest that he had a right to a statutory redundancy payment under TUPE. However, his position altered to having a right to be offered a redundancy payment. And it was more confused (and confusing) because he also seemed

to suggest that his claim was based on an alleged failure to consult him about the transfer at the time that it occurred. While such an alleged failure could be the basis for a claim to the tribunal (assuming it was supported by relevant facts) that claim is clearly not one for a statutory redundancy payment.

5 Separately, the claim as advanced by the claimant at this hearing made no reference to Chapter I of Part XI of the 1996 Act which is headed "*Right to redundancy payment*". While an employee can claim a redundancy payment in circumstances where he terminates the contract, nowhere in the claimant's case does he assert (or even allude to) circumstances which are relevant in

10 the context of that Chapter, or Part of the Act. There is no connection between the statutory basis on which a redundancy payment could be due and the claimant's case. On that basis, my view is that this claim has no reasonable prospect of success. Put another way, even if the claimant were to prove that his employment transferred to Love Corporate Limited under TUPE that factual

15 basis cannot result in a successful claim for a redundancy payment from the respondent (or from Love Corporate Limited for that matter). That being so, the first stage of the relevant part of Rule 37 is satisfied. Separately then, in my view the claim should be struck out and I exercise my discretion to do so. An enquiry into the factual basis which underpins this claim would inevitably

20 result in the dismissal of the claim. In the context of the overriding objective, my view is that it would neither be just nor fair for the respondent to be required to answer this claim at a final hearing where it has no prospect of succeeding. Striking it out now has the effect of saving that expense and is a proportionate way of disposing of it. The claim for a statutory redundancy payment is struck

25 out under Rule 37 on the basis that it has no reasonable prospect of success.

Postscript

33. After preparing the judgment and reasons above, I was sent by the tribunal office an email chain of four emails spanning the period 16 August (14.44) to 18 August (12.30). Only the latest of them (18 August from the claimant) post

30 dates the hearing. It is obvious that the claimant wished to bring to my attention certain matters which he considered relevant. None of them has altered my judgments on the issues. The claimant refers to Rule 69. I do not regard it as

relevant in the circumstances.

Employment Judge: Russell Bradley
Date of Judgment: 31 August 2021
Entered in register: 08 September 2021
and copied to parties

