



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110538/2019

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Held in Glasgow on 13 May 2022

Employment Judge L Wiseman

10 **Mr E McClung**

**Claimant  
In Person**

15 **Doosan Babcock Ltd**

**First Respondent  
Written  
Representations**

20 **NRL Ltd**

**Second Respondent  
Written  
Representations**

25 **Donald Ross**

**Third Respondent  
Written  
Representations**

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The tribunal decided to strike out the complaint of unfair dismissal in terms of rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 because the claimant does not have two years' qualifying service required to bring such a claim.

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### REASONS

1. The claimant presented a claim to the Employment Tribunal on the 2 September 2019 in which he complained of unfair dismissal and

discrimination because of religion or belief. The claimant noted on the claim form that his period of service was from 21 January 2019 to 7 June 2019.

2. An Employment Judge, during Initial Consideration, asked the claimant to explain the basis upon which he believed he could proceed with an unfair dismissal claim when he did not have the qualifying service to do so. The issue was subsequently listed for a preliminary hearing on the 10 January 2020 to determine whether the claim of unfair dismissal should be struck out, failing which a deposit ordered.
3. The preliminary hearing did not take place because the claimant confirmed his claim was brought under section 104 Employment Rights Act. A hearing subsequently took place at which it was decided the claim did not include a complaint under section 104 Employment Rights Act, and the application to amend the claim to include this claim was refused. The claimant appealed that decision to the EAT and has subsequently appealed the EAT decision to the Inner House.
4. The complaint of ordinary unfair dismissal remained outstanding and this preliminary hearing was arranged (in person at the claimant's request) to determine whether the claim should be struck out because the claimant does not have the necessary qualifying service to bring such a claim.
5. The respondents provided written representations which had been copied to the claimant prior to this hearing. The claimant provided a skeleton argument on the morning of the hearing, which was copied to the respondents.

### **Claimant's submissions**

6. The claimant accepted he does not have 2 years' service but argued the tribunal should not strike out the claim before hearing from the witnesses. This was particularly so because, on the balance of probabilities, the fair reason for dismissal was in doubt. Mr McClung referred to the "Drew Halley email" which indicated Donald Ross had told him he and the claimant had had words, but that he knew nothing of the claimant being paid off. Mr McClung submitted

it was the tribunal's job to hear from witnesses and to throw out his case before hearing any witness evidence was perverse.

7. The claimant referred to the cases of ***C White v Plymouth City EAT/2012; Balls v Downham Market High School 2011 IRLR 217; Tayside Public Transport v Reilly 2012 IRLR 755*** and ***Ezsias v Glamorgan NHS Trust 20017 EWCA Civ 330***.

8. The claimant submitted the Employment Judge was misdirecting herself and being perverse in striking out the unfair dismissal claim.

### **First Respondent's submissions**

9. Ms Miller submitted that in determining whether the claim should be struck out, the tribunal would require to consider whether the claimant meets the service requirement to bring such a claim against the first respondent or whether the claimant falls within one of the exceptions to that requirement in terms of section 108(3) Employment Rights Act.

10. There was also a dispute as to whether the claimant was employed by the first respondent or whether he was a self-employed contractor and therefore whether he is entitled to bring a claim of unfair dismissal against the first respondent, but that issue would not need to be considered if the tribunal find the claimant has less than 2 years' service. The first respondent reserved its position to pursue that argument if the unfair dismissal claim is not struck out.

11. The claimant accepts he had under 2 years' service with any of the parties including the first respondent. Section 108(1) Employment Rights Act requires that in order to claim unfair dismissal an employee must have been continuously employed for 2 years ending with the effective date of termination. The claimant began undertaking work for the first respondent on the 21 January 2019, and ceased to do work for the first respondent on the 7 June 2019. Therefore, the claimant does not meet that requirement.

12. Section 108(3) Employment Rights Act contains a list of exceptions, none of which apply to the claimant and which he does not appear to argue apply to him.

13. The claimant lacks the necessary 2 years' qualifying service and does not fall within one of the exceptions listed in section 108(3), accordingly the claimant is unable to bring a claim for unfair dismissal against the first respondent.

14. Ms Miller submitted the ordinary unfair dismissal claim should be struck out because it has no reasonable prospect of success (rule 37(1)(a) of the Employment Tribunal Constitution and Rules of Procedure Regulations 2013). Alternatively the tribunal should consider making a deposit order.

### **Second Respondent submissions**

15. Mr Livingston submitted the claimant's contract for services commenced on the 21 January 2019 and ended on the 7 June 2019. He does not meet the 2 years' service criteria to bring a claim of unfair dismissal, therefore the claim should be dismissed.

16. Mr Livingston further submitted the claimant had provided his services through his personal services company, McClung Strategy and Projects Ltd, and was neither an employee of the second respondent or the first respondent.

### **Third Respondent submissions**

17. Ms Finlayson submitted the claimant had, on the claim form, stated he had been employed from the 21 January 2019 to the 7 June 2019. The claimant accepted at the preliminary hearing on the 10 January 2020 that he did not have 2 years' continuous service. Section 108(1) Employment Rights Act requires that in order to claim unfair dismissal an employee must have been continuously employed for 2 years ending with the effective date of termination. The claimant does not meet that requirement.

18. The claimant is unable to bring a claim for unfair dismissal and the claim should be struck out in terms of rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

19. Ms Finlayson further submitted the third respondent is an individual employed by the first respondent. The claimant had never been employed or engaged

directly with the third respondent. An unfair dismissal claim is not a valid claim against the third respondent and should be struck out for this reason.

20. Ms Finlayson made an application for expenses incurred in the defence of the claim. It was submitted the claimant had acted unreasonably in continuing with a claim of ordinary unfair dismissal when he acknowledged he does not have 2 years' service. The claimant admitted at the preliminary hearing on the 10 January 2020 that he did not have 2 years' service and was advised by the Employment Judge that 2 years' service was necessary to pursue the claim. The claimant has acted unreasonably in the conduct of the proceedings by not agreeing for the matter to be dealt with on the basis of written submissions already made by the respondents to the tribunal on the matter in November 2021, which has resulted in further legal expenses being incurred. The sum of £709.32 was sought.

### **Discussion and Decision**

21. I referred to section 94 Employment Rights Act which provides that an employee has the right not to be unfairly dismissed by his employer. This section is subject to section 108 Employment Rights Act which provides that section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.
22. The claimant worked from the 21 January 2019 until the 7 June 2019. The claimant does not have a period of two years' service. Accordingly, the claimant cannot proceed with a claim of ordinary unfair dismissal.
23. I explained to the claimant that I did not have any discretion in this matter and that a tribunal does not have jurisdiction (that is, power) to hear a claim of unfair dismissal where the person does not have 2 years' continuous service.
24. I also explained to the claimant that his submissions were only relevant to the situation if his claim was allowed to proceed.

25. I decided to strike out the claim of ordinary unfair dismissal because it has no reasonable prospect of success in circumstances where the claimant does not have two years' qualifying service necessary to bring the claim.

5 26. The application for expenses made by the third respondent will be determined at the next preliminary hearing listed for the 1 June 2022.

10 Employment Judge: Lucy Wiseman  
Date of Judgment: 13 May 2022  
Entered in register: 13 May 2022  
and copied to parties

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