



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4112366/19

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Held on 17 November 2020

Employment Judge J M Hendry

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Mr D Fotheringham

**Claimant
In Person**

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Lawrie (Demolition) Ltd

**Respondent
Represented by
Ms A Neukirch,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claim for unfair dismissal having no reasonable prospects of success is struck out.

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REASONS

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1. The claimant in his ET1 sought a finding that he had been unfairly dismissed by his employers from his post as a Demolition Site Supervisor on 9 July 2019. He explained in his ET1 *“I was forced to resign from my post as a Demolition Supervisor because I was laid off unlawfully and had no other option than to resign so that I could receive a redundancy payment in order to have an income to pay bills”*.

E.T. Z4 (WR)

2. The respondent company in their ET3 contested that the claimant had been unfairly dismissed. Their position was that they had not given the claimant cause to resign and that he had voluntarily resigned to take advantage of his entitlement to redundancy.
3. There was a considerable delay in bringing the case to a hearing caused by the Corona Virus Pandemic. However, telephone hearings took place for case management purposes on 6 May and 15 September 2020. The claimant was given leave to lodge Better and Further Particulars setting out more fully the circumstances around his resignation. This he did by e-mail dated 27 June.
4. The respondent had, at the outset of the case, made an application for strike-out. A hearing took place on 17 November 2020 in relation to that matter.

Hearing

5. Prior to the hearing the respondent's agents lodged a Joint Bundle of documents (JB1-11) and written submissions. I delayed the hearing for a short period to allow the claimant an opportunity of reading the written submissions. I explained the process that would be adopted to the claimant and invited him as a party litigant to ask me questions about the process as we proceeded or indeed if he had some difficulty in understanding any aspect of the submissions being made.
6. It was agreed at the outset that many of the facts were not in dispute. As Ms Neukirch expanded on her submissions the claimant at various points confirmed his agreement of the dates of significant events and the content of the correspondence. This allowed the Tribunal to make findings in fact.

Submissions

7. Ms Neukirch indicated that in the ET1 the claimant was seeking compensation for loss of earnings from 9 July 2019 until 1 October 2019 a period of 12 weeks. She took the Tribunal through the correspondence and to the e-mail of 4 December seeking strike-out. She referred the Tribunal to section 95 of the Employment Rights Act (“ERA”) and to section 95(1)(c) in particular which deals with constructive dismissal. There were she argued no grounds for constructive dismissal on the facts here. She then made reference to section 135, section 147 and section 148 of the Act.
8. The circumstances here were, she suggested, that the claimant was laid off. The respondent made it clear that employees in that position such as the claimant could apply for a redundancy payment, as was their statutory right, in terms of section sections 150/151.
9. The claimant had indicated that he had heard from a colleague that his redundancy application had been accepted. He decided to apply. Section 150 provides that an employee is not entitled to a redundancy payment by reason of being laid off: “*unless he terminates his contract of employment by giving such period of notice as is required for the purposes of this section before the end of the relevant period*”. In terms of section 151: “*an employee is not entitled to a redundancy payment by reason of being laid off or kept in short-time working if he is dismissed by his employer.*” The claimant admitted that he was laid off although he disputes the basis on which the respondent claimed to be able to do this. He applied for a redundancy payment (JB7), the application was accepted (JB8), the claimant resigned (JB9), he received 12 weeks’ pay in lieu of notice and a redundancy payment of £9526.14.
10. The claimant’s position was she submitted contradictory. In terms of section 151 of the Employment Rights Act he was entitled get a have statutory redundancy payment if he was dismissed by the employer. He applied for redundancy and received the payment. To do so he had to resign which he did. Finally, Ms Neukirch made reference to the case of **TA Balls v.**

Downham Market High School & College UKEAT/0343/10/DM, the guidance contained therein in relation to strike out. It was accepted that the strike-out was a draconian measure and could only be granted if there was no reasonable prospects of success. That was in her submission the position here.

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11. The claimant's position was relatively straight forward. In his view the employers were not entitled to lay him off. He had declined to sign a new contract of employment which would have allowed them to do so. If they did lay him off then he was entitled to a statutory guaranteed payment. He wasn't paid for the first two weeks and effectively raised a grievance about this. He was then told on or about the 13 May by letter that he would be paid £28 per day whilst on lay off. He heard from a colleague that he could apply for a redundancy payment because of the length of the lay off period. He felt forced to do so because he had bills to pay and was being paid no money by the respondent although by the time he applied on 25 June he was being paid statutory guaranteed payments.

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Facts

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12. The claimant was employed by the respondent as a Demolition Site Supervisor from 3 April 2006 until 9 July 2019.
13. The claimant was laid off by the respondent from 10 May 2019 although he did not receive the letter intimating this to him until 13 May 2019.
14. The respondent initially made no provision for payment to the claimant during the period of layoff.
15. The claimant queried the position with the respondent and was told on or about 24 May that his employers would pay him £28 per day during the lay off period.

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16. The claimant had attended work on 13 May but had not been paid for it. He had initially raised Employment Tribunal proceedings for unlawful deduction of wages but has since withdrawn those proceedings.
- 5 17. The claimant was concerned that there was no work for him and no sign that the lay off period would end soon. He found it difficult financially whilst he was laid off.
- 10 18. On 7 June 2019 the claimant had a meeting with a Manager Mr.G. MacInnes and two other employees. Mr MacInnes advised that there was still no work but that employees had the right to apply for redundancy. The claimant was initially sceptical about the matter but on the 25 June he heard from a fellow employee that his redundancy claim had been accepted. Accordingly, he sent an e-mail to Mr MacInnes (JB7):
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- “Since no work appears to be forthcoming I now wish to claim my right to redundancy pay.”*
19. Mr MacInnes responded (JB8):
- 20 *“David, confirmation we agree to your claim for redundancy and will be in touch shortly to confirm what you are entitled to.”*
20. The claimant gave notice to his employer (JB9):
- 25 *“Since my claim for redundancy has been accepted I hereby give notice of my resignation from Lawrie (Demolition) Ltd. My last day of employment will be Tuesday 9 July 2019.”*
21. The respondent e-mailed the claimant on 2 July (JB10) confirming that they had received his resignation and would calculate what he was due.
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22. The claimant was paid 12 weeks’ in lieu of notice from 9 July, a redundancy payment of £9526.14.

Discussion

23. The Respondents sought, under Regulation 37 of the Employment Tribunals Rules of Procedure 2013, a strike out of the claim on the basis that it had no reasonable prospects of success. The powers of the Tribunal are set out in that Rule which is in the following terms:

Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b).....

24. It has been observed that the power of strike out is a draconian one and should only be exercised in rare circumstances. The effect of a successful strike out application would be to prevent a party proceeding to a hearing and leading evidence in relation to the merits of their claim. (**Balls v Downham Market High School & College [2011] IRLR 217 EAT**)

25. In the present case the Tribunal is not without sympathy to the situation that the claimant found himself in or indeed for the respondent company which for the first time in many years found itself in a severe downturn. While the Tribunal did not hear the full circumstances leading up to the lay off of the claimant and others it seems that the statutory scheme ultimately relied on was not fully explained to the claimant and no provision seems to have been made for payment of Guaranteed pay as required.

26. Nevertheless, the claimant had two legal options available to him. If he believed that the employers were in material breach of their obligations he could either resign and claim “constructive” unfair dismissal or raise a claim for the payments he was due. I was told that he did at some point take the latter option but dropped those proceedings.

27. There is no doubt that the claimant found himself in a difficult financial position but there was no indication that there was any pressure put on him by the employer to resign to take advantage of the statutory right to a redundancy payment. Indeed, the claimant was initially sceptical that he would be accepted and delayed applying. The facts show he resigned to take advantage of his right to a redundancy payment.
28. Although I accept that his employers could have handled the matter better it seems as though there was a genuine redundancy situation caused by the current economic circumstances that underlay these events. The claimant might have been put under financial pressure more quickly than he otherwise might have been but as he explained he would not have been able to live on the Guarantee Payments anyway and redundancy would almost certainly have been his only option to meet his financial commitments.
29. By resigning in order to participate in that scheme he can no longer argue that he resigned because of his employer's breach of contract: he cannot ride both horses at the same time. His resignation, properly viewed, was not in response to his employer's earlier actions but for the purpose of accessing a redundancy payment. The claim for unfair dismissal has accordingly no reasonable prospects of success and is struck out.

Employment Judge	James Hendry
Date of Judgement	24 November 2020
Date sent to parties	24 November 2020