

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4107596/17**

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**Held in Glasgow on 13 and 14 February 2018**

**Employment Judge: Lucy Wiseman**

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**Mr David Gemmell**

**Claimant  
Represented by:  
Mr G Bathgate -  
Solicitor**

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**Carntyne Transport Co Ltd**

**Respondent  
Represented by:  
Mr R Bradley -  
Advocate**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Tribunal decided to grant the application for interim relief.

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The Tribunal ordered the continuation of the claimant's contract of employment from the date of termination of employment (20 December 2017) until the determination or settlement of the complaint.

The Tribunal further ordered the respondent:-

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(i) to pay to the claimant the (net) sum of £3,627 (being normal pay due to the employee in the period 20 December 2017 to 21 February 2018) on or before the 14 March 2018 and

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(ii) from the 28 February 2018 and each week thereafter to pay to the claimant net wages of £403 until the final determination or settlement of the claim.

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

## REASONS

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1. The claimant presented a claim to the Employment Tribunal on 22 December 2017, alleging the principal reason for his dismissal was trade union activities (section 152 Trade Union and Labour Relations (Consolidation) Act 1992) (TULRCA). The claimant also complained of unfair dismissal in terms of section 98 Employment Rights Act.  
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2. The claimant made an application for interim relief in terms of Section 161 TULRCA.
- 15 3. I heard evidence from the claimant; Mr Michael Symon, employee of the respondent and senior official for Unite within the respondent; Mr Scott McIntyre, Business Unit Head and Mr Corin Gentles, Health and Safety Manager who took the decision to dismiss.
- 20 4. I was also referred to a number of jointly produced documents.
5. I, in determining the application for interim relief, had regard to section 163 TULRCA which provides that if on hearing an application for interim relief it appears to the Tribunal that it is likely that on determining the complaint to which the application relates (that is, the complaint in terms of section 152 TULRCA) that it will find that, by virtue of section 152 TULRCA, the complainant has been unfairly dismissed then the following provisions set out below apply.  
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- 30 6. The test I must apply in determining the application for interim relief is whether it is "*likely*", upon final determination, the claimant will be found to have been unfairly dismissed contrary to section 152 TULRCA.

7. I was referred to three authorities regarding the meaning of “*likely*”, which are helpful to consider. In **Taplin v C Shippam Ltd [1978] IRLR 450** the EAT considered the right approach was that expressed by Counsel for the respondent, when he stated the Tribunal should ask itself whether the applicant had established that he had a “*pretty good chance*” of succeeding in the final application to the Tribunal.
8. In **Ministry of Justice v Sarfraz [2011] IRLR 562** the EAT held that the term “*likely*” does not mean “*more likely than not*” (that is, at least 51% probability), but connotes a significantly higher degree of likelihood.
9. The EAT in the case of **London City Airport Ltd v Chacko [2013] WL 617799** noted the correct approach to be applied to the meaning of “*it is likely*” had been a matter of some controversy. The EAT noted the weight of authority was against a simple balance of probabilities approach and they referred to the **Taplin** decision.
10. I, having had regard to the authorities to which I was referred, was satisfied the test I must apply to determine the application for interim relief is whether it is “*likely*” the claimant will succeed in showing the principal reason for dismissal was trade union activities, and “*likely*” means a significantly higher degree of success than 51%.
11. I decided, having had regard to the evidence before me, the documents to which I was referred and the submissions made by the representatives, to grant the application for interim relief. I was satisfied the claimant is likely – that is, that there is a significantly higher than 51% chance – to be able to show, at the final hearing, that the principal reason for his dismissal was trade union activities.
12. I reached my decision for two reasons: firstly, inconsistency of treatment. The respondent’s policy (document 33) is a blanket prohibition on using a hand held mobile device whilst driving a company vehicle. The respondent’s witnesses accepted it was a blanket prohibition. The claimant was

dismissed in terms of this Policy in circumstances where five other employees, who had also breached the policy, were not dismissed. I did not find the respondent's explanation for the difference in treatment to be credible.

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13. The second reason for my decision related to the fact there was evidence regarding targeting of Unite officials. This evidence, if accepted by the Tribunal hearing the case, would provide the basis for drawing an adverse inference in support of the claimant's claim.

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14. The respondent's representative, Mr Bradley, in his submission to the Tribunal, invited me to accept there was no entrapment of the claimant, or conspiracy to dismiss him. I make no findings of fact regarding these matters. However, I did not accept these matters are fundamental to the success of the claim because the material issue is difference in treatment and not how the claimant came to be in that position. I also considered there may be issues of credibility regarding Mr McIntyre's evidence.

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15. Mr Bradley also invited me to consider the likelihood, in light of the claimant's admission of texting whilst driving, that the dismissal was imposed because of trade union activities. I accepted the respondent would have a reasonable belief the claimant had acted as alleged (based on his admission); however, the material issue in this case is the sanction meted out by the respondent and the reason for the inconsistent treatment.

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16. I, in conclusion, decided to grant the application for interim relief for these reasons.

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17. I explained, in terms of Section 164 TULRCA, the powers the Tribunal may exercise.

18. Mr Bradley confirmed the respondent would not reinstate or re-engage the claimant. Accordingly, I decided to make an order for continuation of the

contract of employment. This means the contract of employment will continue in force for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, from the date of termination of employment (20 December 2017) until the  
5 determination or settlement of the claim.

19. The claimant was summarily dismissed with effect from 20 December 2017. The claimant's wages were agreed as being £516 gross per week, giving a net weekly take home pay of £403. The claimant was paid weekly on a  
10 Wednesday. The claimant was a member of the respondent's pension scheme.

20. I ordered the respondent to pay to the claimant the sum of £3,627 (being 9 weeks from 20 December 2017 until 21 February 2018 x £403 net per  
15 week). The parties agreed this sum would be paid to the claimant on or before 14 March 2018.

21. The respondent will, from the 28 February 2018 (and on each Wednesday thereafter), pay the claimant the sum of £403 net per week (£516 gross per  
20 week) until final determination or settlement of the claim.

**Employment Judge: L Wiseman**  
25 **Date of Judgment: 19 February 2018**  
**Entered in register: 22 February 2018**  
**and copied to parties**