Appeal No. UKEAT/0138/19/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 25 July 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

DR COLIN HANCOCK — APPELLANT

(1) MR M TER-BERG
(2) NHS ENGLAND MIDLANDS AND EAST — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON BUTLER (of Counsel) Direct Public Access
For First Respondent	MR KEVIN McNERNEY (of Counsel) Instructed by: Leathes Prior Solicitors 74 The Close Norwich NR1 4DR
For Second Respondent	

SUMMARY

VICTIMISATION DISCRIMINATION – Protected disclosure

VICTIMISATION DISCRIMINATION – Interim relief

UNFAIR DISMISSAL

The Claimant applied for interim relief pursuant to s.128 of the **Employment Rights Act 1996** following the termination of his contract allegedly because he had made protected disclosures. The Respondent contended that there was no entitlement to make such an application as the Claimant was not an "employee" within the meaning of that section. The Respondent's application for a postponement of the interim relief application pending a determination of the employee issue was refused. At the interim relief hearing, the Tribunal considered that the "likely to succeed" test under s.129 of the **1996 Act** applied not just to the reason for dismissal but also to the contested issue of employee status. It determined that the Claimant had a 'pretty good chance' of success in showing that he was an employee and that he was dismissed for having made protected disclosures. The Respondent appealed on the grounds that the Tribunal erred in entertaining the application for interim relief before first concluding that the Claimant was indeed an employee.

Held (dismissing the appeal): On a proper construction of ss.128 and 129 of the **1996 Act**, all elements of a complaint of unfair dismissal for a proscribed reason (including that it was because of protected disclosures) were to be determined at the interim relief hearing on the likely to succeed test. That included the question of employment status if that were put in issue by the employer. That construction was consistent with the intention of the interim relief regime, that being to provide a speedy remedy to preserve the status quo pending the full hearing. The Respondent's contention that there should be a Preliminary Hearing to determine conclusively

whether the Claimant was an employee before determining the application for interim relief would cause delay and would undermine the interim nature of the remedy under s.129.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. The issue in this appeal is whether the right to make an application for interim relief pursuant to s.128 of the **Employment Rights Act 1996** ("the 1996 Act") applies only to those who have been conclusively determined to be employees or whether employment status can itself be one of the matters for assessment on a summary basis at the interim relief stage.

Background

2. The Respondent to the appeal was the Claimant below, and the Appellant was one of four Respondents below. To avoid confusion, I shall refer to the parties as they were below.

3. The Claimant is a dentist. He had previously owned his own practices.

4. On 1 April 2013, the Claimant entered into an agreement ("the contract") with a dental practice named Simply Smile Manor House Limited, which is the First Respondent. The directors of the First Respondent were Mr Parul Malde and Dr Colin Hancock, the Third and Fourth Respondents respectively. (References in this judgment to the Respondents are to the First, Third and Fourth Respondents unless otherwise stated). This agreement was described as an associate agreement for use in a JDS contract. Pursuant to the contract, the Claimant was granted a licence and authority to carry on the practice of dentistry at the premises of the First Respondent. The contract expressly provided that it was not to constitute a contract of employment.

5. Pursuant to the contract, the Claimant was also provided with equipment, furniture, a dental nurse, staff, materials, drugs, supplies, and the services of a dental laboratory. He was required to arrange his own professional indemnity insurance, to take holidays upon giving notice to the owner of the practice, to carry out a certain number of units of dental activity, be compliant

with the Respondents' policies, and to pay his own tax and National Insurance. He was also entitled to paternity and adoption leave.

6. Clause 36 of the contract made provision for the appointment by the Claimant of a locum in certain circumstances. This was to apply in the event that the Claimant's failure through ill-health or other cause to use the facilities for a continuous period of 20 days or more. The locum had to be acceptable to the practice, and the primary care organisation, in this case NHS England Midlands and East, which was the Second Respondent.

7. Clause 37 of the contract provided that it could be terminated upon three months' notice.

8. In 2016, the First Respondent engaged another dentist, referred to by the Tribunal as AT. The Claimant had concerns about AT's professional practices and treatment of patients. He raised these concerns informally at first, and from about September 2017, on a more formal basis, including by referring the matter to external organisations. These concerns were raised between September 2017 and August 2018. In each case, the Claimant raised concerns about AT's fitness to practice, and gave details of what he had found on examination of AT's patients that he had subsequently treated.

9. By a letter dated 1 August 2018, the Claimant was invited to a meeting by the Third Respondent to discuss his concerns. The meeting date of 7 August 2018 was proposed.

10. The Claimant replied that he was not able, due to his commitments, to attend on that date, and suggested an alternative, 22 August 2018. There was no response to that suggestion from the Respondents. Instead, by letter dated 9 August 2018, the Respondents gave notice of the

termination of the contract. No reason was given for termination, and the Claimant was given three months' pay in lieu of notice.

11. On 5 November 2018, the Claimant issued proceedings in the Employment Tribunal. Claims were brought against the Respondents, and also NHS England Midlands and East. He claimed that he had been unfairly dismissed for making a protected disclosure.

12. The Claimant also applied for interim relief pursuant to s.128 of the **1996 Act**. He sought a continuation of his employment pending final determination of the case under s.129 of the **1996 Act**.

The Tribunal Proceedings

13. The interim relief application was listed to be heard in the Norwich Employment Tribunal on 14 December 2018. On that date, however, the allocated Employment Judge had to recuse himself, and the hearing was re-listed to be heard on 17 January 2019. By a letter dated 14 January 2019, the Respondents' representatives made an application to postpone the hearing listed for the 17 January 2019 in order that there could be a preliminary hearing to determine the issue of the Claimant's employment status. That request was refused and the hearing proceeded on 17 January 2019.

14. At the hearing on the 17 January 2019, the Respondents renewed their application to postpone the hearing. It was argued that it was a prerequisite of an application for interim relief that it be made by an "employee", and that that question should be determined before any consideration of the application for interim relief. That application was opposed by the Claimant. The Tribunal considered the application but decided to refuse it. In doing so it said as follows:

> **"6. The tribunal was not prepared to grant the application to postpone. Interim relief applications are by their very nature a provisional assessment of whether the claimant is likely**

> **to succeed. Section 128 of the Employment Rights Act 1996 (ERA) provides that the application shall be determined as soon as practicable and that the tribunal shall not exercise any power to postpone unless there are exceptional circumstances.**
>
> **7. Whether the claimant is 'likely to succeed' in the circumstances of this case can include the issue of employment status.**
>
> **8. The tribunal also took account of the fact that the ERA provides that there should only be a postponement in exceptional circumstances and it did not find any existed… The hearing therefore proceeded."**

15. The Tribunal considered the evidence and the submissions of the parties. It made clear that it was not making findings of fact at this hearing. It then set out the submissions of both sides in the Judgment, including the Respondents' contention that the application for interim relief failed at the first hurdle of employment status, the relevant law and then its conclusions. As to employee status the Tribunal said as follows:

> **"48. The respondent has asserted that the claimant's claim falls at the first hurdle as he was not an employee. That has been considered as part of this application. This tribunal finds it likely that the claimant will be able to establish, in the light of the current state of the law, that he was an employee in view of the degree of control exercised by the respondent. The label on the relationship is only one factor, as is the tax treatment. The clauses to which reference has been made show that it is likely that despite the labelling, the tribunal will hold that the reality of the relationship was that of employee and employer. It is also likely that the claimant will establish he made protected disclosures.**
>
> **49. With regard to the locum clause the tribunal, at this interim stage, does not find that determinative and finds it likely that a tribunal will accept the submissions made on behalf of the claimant that that is not a classic substitution clause and that the respondent and the Trust retained a veto on who could be appointed. The claimant could not send who he wanted."**

16. It is not necessary for present purposes to set out all the other conclusions reached by the Tribunal in full, suffice it to say that the Tribunal was satisfied that the Claimant was likely to succeed in his claim, and that the reason or principal reason for his termination was that he had made protected disclosures. The Respondents were ordered to pay the Claimant the sum of £17,627.88 for the period from the effective date of termination until 9 February 2019. The Respondents were thereafter ordered to pay to the Claimant the sum of £5,875.96 per month, starting on 9 March 2019, and continuing on the 9th of each month until determination or settlement of the complaint.

17. The Respondents lodged an appeal on 5 February 2019. Five grounds of appeal were originally relied upon. The matter was considered on the sift by Swift J. Permission was granted to proceed only in respect of one ground of appeal in a slightly amended form. The sole ground of appeal now therefore is as follows: whether the Tribunal erred in entertaining the application for interim relief before first concluding that the Claimant was indeed an employee.

Legal framework

18. Section 128 of the **1996 Act** provides:

> **"128. Interim relief pending determination of complaint.**
>
> **(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and-**
>
> > **(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in-**
> >
> > > **(i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or**
> > >
> > > **(ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or**
> >
> > **(b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104(1) and the condition in paragraph (a) or (b) of that subsection was met,**
>
> **may apply to the tribunal for interim relief.**
>
> **(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).**
>
> **(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.**
>
> **(4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.**
>
> **(5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so".**

19. Interim relief is therefore available to an employee claiming to have been dismissed for having made protected disclosures contrary to s.103A of the **1996 Act**. For present purposes it is relevant to emphasise that the application is to be presented by an "employee".

20. The question to be considered upon an application for interim relief is set out in s.129 of the **1996 Act** list of rights:

> **"129. Procedure on hearing of application and making of order.**
>
> **(1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find-**
>
> > **(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in-**
> >
> > > **(i). section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or**
> >
> > > **(ii). paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or**
> >
> > **(b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104(1) and the condition in paragraph (a) or (b) of that subsection was met.**
>
> **(2) The tribunal shall announce its findings and explain to both parties (if present)-**
>
> > **(a) what powers the tribunal may exercise on the application, and**
> >
> > **(b) in what circumstances it will exercise them.**
>
> **(3) The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint-**
>
> > **(a) to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or**
> >
> > **(b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.**
>
> **(4) For the purposes of subsection (3)(b) "terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed" means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.**
>
> **(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.**
>
> **(6) If the employer-**
>
> > **(a) states that he is willing to re-engage the employee in another job, and**
> >
> > **(b) specifies the terms and conditions on which he is willing to do so,**
>
> **the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.**
>
> **(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.**
>
> **(8) If the employee is not willing to accept the job on those terms and conditions-**
>
> > **(a) where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and**
> >
> > **(b) otherwise, the tribunal shall make no order.**
>
> **(9) If on the hearing of an application for interim relief the employer-**
>
> > **(a) fails to attend before the tribunal, or**

(b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3),

the tribunal shall make an order for the continuation of the employee's contract of employment".

21. The meaning of the word "likely" for these purposes has been considered in several cases. The leading case is **Taplin v C Shippam Ltd** [1978] ICR 1068 EAT, which was decided under similar provisions relating to interim relief applications in dismissal for trade union reasons. The **EAT** (Mr Justice Slynn) held that it must be shown that the claimant has a "pretty good chance" of succeeding, and that that meant something more than merely on the balance of probabilities. That approach to the word "likely" has been followed in several subsequent decisions. See for example, **Dandpat v The University of Bath and Anor** UKEAT/0408/09 unreported at paragraph 20, **Ministry of Justice v Sarfraz** [2011] IRLR 562 at paragraphs 16 to 17 and **His Highness Sheikh Khalid Bin Saqr Al Qasimi v Ms T Robinson** UKEAT/0283/17/JOJ, unreported, at paragraphs 8 to 11.

22. The issue in this case is whether the 'likely to succeed' test or ("LTS test") applies only to the question of the reason for dismissal, (i.e. in order to show that it was one of the proscribed reasons) or whether it applies to all aspects of the complaint which the Tribunal will consider and determine at the Full Hearing.

23. Before concluding this section, I should also mention s.230 of the **1996 Act.** So far as relevant, this provides:

"230 Employees, workers etc.

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

…"

Submissions

24. Mr Butler on behalf of the Respondents makes the straightforward submission that s.128 expressly provides that only an employee, who presents a complaint to the Employment Tribunal that he has been unfairly dismissed, and that the reason (or if more than one, the principal reason) for a dismissal is one of the proscribed reasons, may apply to the Tribunal for interim relief. He submits that the provision cannot be construed in any other way so as to permit a non-employee to make an application. That contention is bolstered, he submits, by considering what is to be decided by the Tribunal on an interim relief application. Section 129 specifically requires that it must be shown that it is likely that the "employee's" complaint will be upheld by the Tribunal, and not whether it is likely that the Tribunal will uphold the prior issue of whether the complainant is an employee at all. He submits that if Parliament had intended for persons other than employees to be permitted to obtain interim relief then it would have said so expressly. Mr Butler referred me to the various remedies upon an interim relief application, some of which, e.g. re-instatement, could only apply to an employee.

25. I was also referred to various appellate judgments dealing with the questions which the Tribunal at the interim relief stage must consider. These included **Ministry of Justice v Sarfraz**, **Parsons v Airplus International Limited** [2017] UKEAT/0111/17, and **Wollenberg v Global Gaming Ventures (Leeds) Ltd and Anor** UKEAT/0053/18/DA.

26. The correct approach, according to Mr Butler, would have been for the Tribunal to satisfy itself as a preliminary matter whether or not the Claimant was an employee before entertaining the application for interim relief, and that by merely considering whether or not it was likely that the Claimant established that he was an employee, the Tribunal erred in law.

27. Mr McNerney for the Claimant submits that there was no error, and that it was open to the Tribunal to decide the issue of employee status on the same basis as the application for interim relief as a whole, namely, by applying the LTS test in s.129 of the **1996 Act**. He draws support for that approach from the decision of HHJ Eady QC in **Qasimi v Robinson**, in which the Tribunal below had been faced with an argument that the claimant in that case was not an employee at all, as well as an argument that the contract was tainted by illegality. The Tribunal reached a conclusion that it was able to take a view as to the likelihood of the claimant being able to show he was an employee, and that that would be within the overall assessment as to whether or not the claimant had established he had a "pretty good chance" of succeeding in the claim. On appeal, the respondent was not permitted to appeal against the decision that it was open to the Tribunal to consider the question of employee status by reference to the pretty good chance test, it having failed to include that ground in its original Notice of Appeal. It was, however, permitted to challenge the Tribunal's failure to address the question of illegality. In considering the Respondents' submissions in that case HHJ Eady QC said as follows:

> **"58. On ground 7 and the failure to consider illegality, in his skeleton argument Mr Stephenson, for the Claimant, had argued that the ET was only required to determine the issue of reason on an interim relief application (i.e. whether, on hearing the application, it appeared to the ET that is was likely that, on determining the substantive complaint, the Tribunal would find that the reason, or principal reason, for the dismissal was one of those specified in section 103A). It seemed to me that this argument raised potentially difficult questions as to the approach an ET was to take when faced with a case where, as here, issues such as employment status and the illegality were very much in play. The suggestion seemed to be that these should simply be assumed in the Claimant's favour on the interim relief application although that, it seemed, might give rise to a potential injustice if the application was successful, but it was subsequently found, for example, that the contract had been void for illegality. Putting that difficulty to Mr Stephenson in oral argument, he retreated from the high ground of this argument and allowed that these points – if in issue – would indeed need to be considered by the ET alongside the reason question, with the same test applied to all. That being so, Mr Stephenson acknowledged that it would be an error of law for an ET to fail to deal with a point of this nature raised by the Respondent (as here), albeit that he contended that the Respondent ought properly to have drawn it to the Employment Judge's attention after the oral Judgment had been given. In any event, he contended that the ET's findings that the Claimant's employee status jumped out of the page effectively meant it must also have found that the Respondent was responsible for deducting tax and National Insurance at source and thus the illegality issue did not arise. Even if that were wrong, then this was a matter that was suitable for the Burns/Barke procedure".**

28. In conclusion HHJ Eady QC said as follows:

> **"71. That leaves the last ground of appeal – ground 7 – which relates to the ET's failure to address the issue of illegality. This was an issue expressly raised before the ET and was plainly**

> **keenly in dispute. The ET was obliged to deal with the point but failed to do so. I do not accept, as Mr Stephenson suggested, that by addressing the question of employment status, the ET can be taken to have determined the illegality point in the Claimant's favour. And, as Mr Stephenson acknowledged in argument, by failing to deal with the matter thus raised the ET erred in law.**
>
> **72. Had this been the only point raised it would have been open to question as to whether an appeal was the appropriate way of dealing with the issue. Given the requirement under the overriding objective to assist the Tribunal, when it became apparent (however late in the evening) that the Employment Judge had overlooked this point in his Judgment, there was an obligation upon the legal representatives to say something. The failure to do so is all the more incomprehensible here as the parties knew the Judge was dependent upon them to finalise the Judgment and yet neither side even raised the omission when sending their notes in for this purpose. There was, further, no application for reconsideration or even for a Burns/Barke reference in the Notice of Appeal; steps that could also have been considered in this case. All that said, ultimately I have allowed the appeal on the public interest grounds and also allow it on ground 7 because the ET erred in law in failing to deal with a point that was plainly in issue before it".**

29. Mr McNerney submits that it is plain from that Judgment that *any* contested issue relevant to the claim may be determined by reference to the LTS test set out in s.129. In any event, submits Mr McNerney, if the Respondents' submissions were to be accepted then it would undermine the effectiveness of an interim relief application given that any jurisdictional question would have to be determined in advance of the interim relief hearing itself. That would introduce delay and would subvert the clear Parliamentary intention that such applications be determined as soon as practicable, and that they should only be subject to postponement in exceptional circumstances. That would also be contrary to the purpose of the provision which is to protect employees and Trade Union representatives, who are subject to dismissal for proscribed reasons.

Discussion and conclusions

30. I begin, as is appropriate, with the statutory provisions.

31. Section 128 of the **1996 Act** provides the right to apply for interim relief applies to:

> **"An employee who presents a complaint to the Employment Tribunal that he has been unfairly dismissed and that the reason (or if more than one principal reason) for the dismissal is one of [the proscribed reasons]".**

A

32. A complaint for these purposes is a complaint of unfair dismissal under s.111 of the **1996 Act**. That is the definition given in s.167(2) of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA"). The relevant provisions of which are to be construed as one with Part 10 of the **1996 Act**: see s.167(2) of **TULRCA**.

B

33. Thus, any employee who presents a complaint of unfair dismissal for a proscribed reason may apply for interim relief. Section 111 of the **1996 Act** provides, so far as relevant:

C

> **"(1) A complaint may be presented to an [employment tribunal] against an employer by any person that he was unfairly dismissed by the employer.**
>
> **…"**

D

34. I do not consider that it can realistically be said that the use of the word, "*person*" in s.111 in contradistinction to the specific word, "*employee*" in s.128 means that a broader category of persons who are not employees can bring a complaint of unfair dismissal. As is made clear by s.98 of the **1996 Act**, it is only employees that have the right not to be unfairly dismissed. However, a complaint under s.111 can comprise many elements, any one of which might be disputed. Apart from whether the complainant is actually an employee within the meaning of s.230 of the **1996 Act**, there is the question of dismissal. The employer might dispute that there was a dismissal at all, and contend that there was in fact a voluntary resignation. There may be other issues, such as whether the complaint was presented within the appropriate time limit from the effective date of termination. There may be a dispute as to the effective date of termination itself if, for example, there was an issue as to when the notice of termination took effect.

E

F

G

35. The plain and ordinary meaning of s.128 is that the right to seek interim relief is conferred on an employee. However, if that status is disputed then the issue of employee status becomes yet another issue to be determined on the complaint, just as it would be for a claim of ordinary

H

unfair dismissal. It seems to me that each and every issue that might be relevant to a claim of unfair dismissal is part of the "complaint" to be determined by the Tribunal.

36. Section 129 provides that where, on hearing the employee's application for interim relief, it appears to the Tribunal that it is likely that on "determining the complaint to which the application relates" the Tribunal finds that the reason or if more than one principal reason for dismissal is one of the proscribed reasons.

37. On one reading of that provision, favoured by Mr Butler, the LTS test applies only to the question of the reason for the dismissal. Mr McNerney submits that as a matter of construction the LTS test applies to any matter relevant to the determination of the complaint of unfair dismissal, including, of course, that the reason for dismissal is a proscribed reason.

38. In my judgment, the construction argued for by Mr McNerney is to be preferred. Section 129 requires the Tribunal to be satisfied that it is likely that "*on determining the complaint to which the application relates the Tribunal will find that the reason or principal reason for dismissal"* was one of the proscribed reasons. The Tribunal will clearly need to consider the likely outcome of the eventual determination of the complaint. The provision does not preclude a Tribunal from having regard to the merits of other elements of the claim aside from the reason for dismissal. Indeed, if it were not to have regard to such matters at the interim relief stage, then it would not be considering the likely outcome on determination of the complaint (but only part of it), and those words would be rendered otiose.

39. Section 129(3) of the **1996 Act** only precludes a Tribunal from entertaining an application if it is brought out of time. Section 161 of **TULRCA** provides a further reason for not entertaining an application in Trade Union cases, and that is that in such cases the employee must present a

certificate from an authorised official of a relevant Trade Union, confirming that on the date of dismissal the employee was or proposed to become a member of the Union, and that there appeared to be reasonable grounds for supposing that the reason for dismissal or the principal reason was one alleged in the complaint, i.e. one that related to Trade Union membership or activities. It is notable that those are the only two express exclusions from bringing the claim. In my judgment, there is nothing to preclude the Tribunal from entertaining the application for interim relief where there is a dispute as to employee status.

40. That approach to construction is, in my judgment, supported by the fact that the narrower approach, whereby the LTS test applies only to the reason for dismissal, would lead to real difficulties in its application.

41. First, it would leave uncertain how the Tribunal is to approach other elements of the complaint at this preliminary stage. One approach, which was submitted in **Qasimi v Robinson**, would be to assume all elements of a complaint in the employee's favour, save for the question of the reason for dismissal, which has to cross the high bar of the LTS test. However, as HHJ Eady QC remarked in **Qasimi v Robinson,** that would give rise to all sorts of difficulties and potentially unjust outcomes. For example, if there were a real question as to whether or not the contract was tainted by a illegality, then assuming that issue in the employee's favour at the interim relief stage could give rise to an injustice, if it was later established at the Full Hearing that the contract was indeed illegal. It seems to me that there is no real warrant, either in the terms of the statutory provisions or on any wider basis, for adopting any approach which assumes any issue in favour of either party.

42. If that is so, then the question is what test should be applied to the other elements of the complaint if the LTS test were only to apply to the reason for dismissal? Should it be some lesser

test, such as having reasonable prospects of success, or a test based on the balance of probabilities? It seems to me that such tests would suffer from the same potential for injustice described above in that a person may succeed in obtaining interim relief where there are only reasonable prospects of success in respect of a significant part of a claim. It does not appear to be consistent with the statutory intention that an applicant must show that he or she has a "pretty good chance of success" if key parts of the claim could succeed by crossing a lower threshold.

43. The alternative approach would be to require that elements of the claim apart from the reason for dismissal, be conclusively established on the balance of probabilities before the interim hearing application. That is the approach contended for by Mr Butler. There are significant difficulties with that approach too. If one were to take that approach then a further question would arise as to which issues should sensibly be hived off? Is it just the question of employee status or would it include other questions, such as whether or not there was a dismissal, whether or not the claim was presented in time, and so on. Mr Butler accepted that on his approach, if dismissal itself were contested then that too would have to be determined at a preliminary hearing before the interim relief hearing. In my judgment, it would severely undermine the intended speed of an interim relief application if it were to be delayed or derailed by potentially numerous preliminary hearings to determine conclusively whether or not other elements of the complaint are satisfied.

44. As Mr McNerney submits, a full determination of employee status would require disclosure, witness statements and a substantive hearing at which witnesses would be questioned and cross-examined. To convene such a hearing, even on an expedited basis, would lead to substantial delays in the hearing of an interim relief application. Indeed, the intended interim nature of that hearing would be substantially undermined, particularly if the preliminary issue is

itself the subject of any subsequent appeal. Mr Butler submits that the claimant in such circumstances is not necessarily prejudiced by the delay because of the power to backdate the award made at the interim relief hearing to the date of termination. However, that would be small comfort for a person who has lost his job for having blown the whistle or for having raised trade union matters. It must be borne in mind that s.128 procedure envisages an expedited process whereby an interim relief application is heard as soon as reasonably practicable and which can only be postponed if there are special circumstances justifying such a course. It does not seem to me to be a special circumstance for a Respondent to challenge employee status so as to warrant the postponement of the interim relief hearing; indeed, such challenges are commonplace in employment disputes.

45. By contrast, the Respondent is not, it seems to me, substantially prejudiced by taking the approach which applies the same LTS test to all aspects of the complaint that may be in issue. The safeguard for the Respondent who seeks to maintain that the complainant is not an employee, or was not dismissed at all, will be the full merits hearing at which the outstanding issues will be conclusively determined. Moreover, there is no or little risk of the right to seek interim relief being abused by persons who are not even arguably employees or who clearly did resign voluntarily. The experienced Tribunal hearing the interim relief application would undoubtedly quickly nip such abusive claims in the bud on the basis that the applicant gets nowhere near the LTS threshold in respect of those issues. Even cases where an applicant was able to establish a 51% chance of establishing employee status would not be eligible for interim relief. True it is that if an initial assessment that a claimant has a pretty good chance of establishing employee status is later disproved, he or she would not be required to repay any interim payments that were ordered, and that might be prejudicial to the employer. However, it seems to me that that is a risk

A that applies in respect of any interim relief application, and not just one where employee status might be disputed.

B 46. I do not foresee any particular difficulty in Tribunals adjudicating on issues such as employee status or whether there was actually a dismissal at the interim relief stage. As has been stated many times before, the analysis at this stage would not involve a full assessment of the facts but a summary assessment based on limited evidence, usually in the form of written C statements and documents. An experienced Employment Tribunal is well placed to assess, on a summary basis, the prospects of success in a claim where employee status is disputed, and would be in a position to determine whether or not there is a likelihood of success on that preliminary D issue.

47. Mr Butler's argument that the sections are drafted specifically to confer the entitlement E on employees is correct, as is his argument that the procedures and remedies are directed at employers: see s.128(4) of the **1996 Act**. However, that is not to say that a preliminary assessment of employee status cannot be made at the interim stage, and if it is subsequently determined that a complainant is not an employee then any remedy or remedies ordered at the F interim stage will not continue to apply.

48. The other cases referred to by Mr Butler, including **Ministry of Justice v Sarfraz**, G **Parsons v Airplus International Ltd**, and **Wollenberg v Global Gaming Ventures Ltd,** do not assist for the simple reason that none of them dealt with the question of whether employee status or indeed, whether any other elements of the claim which are not connected with the H reasons for dismissal, were properly considered by the Tribunal below. Whilst Underhill J, as he then was, in **Ministry of Justice v Sarfraz** did say at paragraph 14 of that judgment that in order

to make an order under ss.128 to 129, the Judge had to have decided that it was likely that the Tribunal at the final hearing would find five things, it was not suggested that those five things were the *only* matters that the Judge might have to decide. There was certainly no issue in that case as to employee status.

49. The only authority to which I have been taken where the court came close to having to consider that sort of issue is **Qasimi v Robinson**. Although that case may not deal with the employee status issue itself, for reasons I have already explained, the EAT did deal with another argument raised by the Respondent in that case, which was unconnected with the reason for dismissal, and that was that the contract of employment was tainted by illegality. The clear conclusion there was that the issue of illegality was one that ought to have been dealt with by the Tribunal in its reasons. There is no suggestion from the EAT that in doing so it ought to have applied a different test to that issue or that it was not one that should have been addressed at all at the interim stage. In fact, it would appear from the remarks at paragraph 58, which I accept were obiter, that HHJ Eady QC accepted that the LTS test should apply to all issues at play on such an application. It is, of course, noteworthy that the Tribunal below in **Qasimi v Robinson** addressed the employee status issue on the same basis, although that issue is not one that the EAT in that case had to address directly. That issue does arise directly in the present case.

50. Mr Butler also submitted that the approach contended for by the Claimant and accepted by the Tribunal below has some important consequences. I have dealt with two of these above. These are to do with the construction of ss.128 and 129 and the prejudice or potential prejudice to the employer if subsequent conclusive findings differ from those at the interim relief stage. A third consequence contended for by Mr Butler was that, in this particular case, the Tribunal, having decided (on the basis of the LTS test) the employee status issue in favour of the claimant,

went on nevertheless to direct a preliminary hearing, plus two days of evidence, to determine that very issue.

51. Whilst it may seem unusual that a claim determined to have a pretty good chance of success should require a separate preliminary hearing before the main substantive hearing, I do not see that that undermines in any way the appropriateness or correctness of the Tribunal's approach. The question of whether or not there needs to be a preliminary hearing to determine the employee status is a matter of case management for the Tribunal. In the absence of any error of principle or perversity it does not seem to me that that is a matter which can affect the correctness of the decision on the interim relief application.

Conclusion

52. For the reasons set out above, and notwithstanding Mr Butler's eloquent and forceful submissions, I am satisfied that the LTS test applies to all elements of the complaint of unfair dismissal for one of the proscribed reasons that may properly be the subject of an application for interim relief, and that the Tribunal did not err in applying that test to the question of employee status. Accordingly, this appeal is dismissed.