**Case Number:** 3303452/2020

# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| Mr J Murphy | v | Royal Mail Limited |

**Heard at**: Watford, by telephone **On**: 13 May 2020

**Before**: Employment Judge Hyams

**Appearances:**

**For the claimant:** Did not attend and was not represented
**For the respondent:** Ms K Hall, solicitor

## JUDGMENT

1. The claim is dismissed on its withdrawal by the claimant.

2. The claimant must pay the respondent £1,500.00 as a contribution to the respondent's costs.

## REASONS

**The claim**

1 By an ET1 claim form presented on 24 March 2020, the claimant claimed unfair dismissal by ticking the box for that in section 8.1. He also ticked the box in the same section opposite the words "I am making another type of claim which the Employment Tribunal can deal with" and put in the box below that "Trade Union Detrimental Treatment". In addition, he ticked the final box in section 2.3 of the claim form. The text next to that box is in these terms:

> "My claim consists only of a complaint of unfair dismissal which contains an application for interim relief."

2 The claim form was accompanied by a 2-page document entitled simply "Statement". Its first 2 paragraphs (they were all un-numbered) were in these terms:

> "The Claimant is a Trade Union Official of the Communication Workers Union and holds the office of Branch Chair at the Harrow and District Branch.
>
> The Claimant has been removed from the payroll and regards this as a dismissal by the Respondent because the Claimant is a Trade Union Representative of the CWU. The Claimant is applying for Interim Relief."

3 The paragraph at the top of the second page of the statement was in these terms:

> "The Respondent's Manager Adrian Owen wrote to the Claimant on the 23rd of March 2020 via email. The Respondent's Manager Adrian Owen informed the Claimant of the further actions being taken against him which the Claimant states are detrimental because He is a Trade Union Representative. The letter informed the Claimant He is removed from pay as of the date of this letter (23rd of March 2020) and that the Claimant's case was being passed to the Respondent's Manager Steve Conquest for the consideration of the Claimant's Dismissal. The Claimant states that this is detrimental treatment because He is a Trade Union Official."

4 In addition, in section 5.1 of the claim form, the claimant had ticked the box for "yes" in answer to the question: "Is your employment continuing?".

**The procedural history**

5 The claim form was acknowledged by the tribunal staff on 23 April 2020, and at the same time notice of a hearing to determine the application for interim relief was given to the parties. That hearing was to take place on 13 May 2020.

6 On 30 April 2020, the respondent's solicitors, via Ms Hall, wrote to the tribunal, seeking the vacation of the hearing on the basis that the claimant remained employed by the respondent at that time. The claimant responded on 1 May 2020 by sending an email at 19:37 enclosing a letter dated 3 May 2020 in the following terms:

> "The Claimant opposes the application from the Respondent to both vacate and reject the application for the interim relief hearing in the interests of justice on the revised Statement made by the Claimant, the bundle of evidence already submitted to the Employment Tribunal.

> The Claimant has not been in receipt of any pay since the week commencing the 23rd of March 2020. In addition the Claimant has not been in receipt of a pay statement. The Claimant has also made enquiries with Her Majesty's Revenue and Customs which have confirmed on the 1st of May 2020 the Respondent is not listed as an Employer of the Claimant. The Claimant has amended his revised statement dated the 3rd of May 2020 statement at point 29 to reflect this.
>
> This evidence further confirms that the Claimant has been dismissed by the Respondent."

7 The letter enclosed an 8-page statement (which, like the letter, was dated 3 May 2020), with 31 numbered paragraphs. It was headed "Statement for Interim Relief Application".

8 On 8 May 2020 Ms Hall on behalf of the respondent wrote to the tribunal, again seeking the vacation of the interim relief hearing, referring to the relevant statutory provisions (principally section 161 of the Trade Union and Labour Relations (Consolidation) Act 1992 and section 128 of the Employment Rights Act 1996, to which I refer further below) and making a number of submissions in support of the application. The claimant responded on 10 May 2020 with a further letter and an amended statement in response. On 11 May 2020, Ms Hall wrote to the tribunal, asking that the application for the vacation of the hearing was put before a judge. That was done on the following day, when, at 10:07 am, the application was put before Employment Judge Clarke QC. At 15:19, Judge Clarke QC's response was sent to the parties by email. The response was admirably informative and concise. Judge Clarke QC declined to order the vacation of the hearing on this basis:

> "The Claimant has been informed that the Respondent asserts that he has not been dismissed, but appears to assert that he has been. I do not think that this is an issue which should be dealt with looking only at the written exchanges between the parties. However, I do note that the Respondent has provided a detailed account of why it asserts that the Claimant remains its employee and the Claimant does not appear to me to have engaged with that account. He will be expected to do so at the forthcoming hearing."

9 The judge then set out a number of considerations in relation to which the claimant would need to provide information to the tribunal at the hearing of the next day, and concluded:

> "It is noted that the purpose of interim relief is to continue the life of a Claimant's contract of employment and here the Respondent asserts that the contract is continuing. The Claimant should carefully consider whether there is any meaningful Order that the Tribunal could make. The Claimant will need to explain to the Tribunal what Order he seeks."

10 At 16:36 on 12 May 2020, Ms Hall sent to the tribunal and the claimant some detailed written submissions for use at the interim relief hearing. They included, at their end, an application for the respondent's costs on the basis that both the claim and the application for interim relief had been made unreasonably since the claimant had not been dismissed and "the evidence is clear that he was aware that he had not been dismissed."

11 At 16:51, the claimant wrote to the tribunal by email, copying it to Ms Hall, simply this:

> "Dear Sirs,
>
> For your perusal. Formal withdrawal.
>
> Regards
>
> Mr J.Murphy
> Claimant."

12 Ms Hall responded at 16:58, asking that the hearing of the following day nevertheless occurred "to consider an application for costs".

13 The claimant responded to the application for costs in a detailed email sent to the tribunal and the respondent at 21:18 on 12 May 2020. His response was in these terms (all textual errors being in the original document):

> "The Claimant represents himself and would respectfully request no costs are awarded.
>
> The Claimant received the directions from Watford Employment Tribunal at 4:45pm. The Claimant reviewed the directions issued by the Employment Tribunal and noted that the directions required an EDT [i.e. an "effective date of termination", as to which, see paragraph 18 below] either in writing or verbally for the following Morning. The Claimant would not have an EDT in time for the following Morning as directed by the Employment Tribunal.
>
> Point 5 of the directions states 'The Claimant should carefully consider whether there is any meaningful order that the Tribunal can make.' The Claimant considered this direction and concluded there is not at this stage a meaningful order the Tribunal can make.
>
> The Claimant made the interim relief application during the early stages of the lockdown phase not knowing the staffing levels servicing the courts in lockdown The Claimant was anticipating dismissal interview by the Respondent during this period. In preparation the Claimant thought it wise to apply for interim relief. The Respondent removed the Claimant from the pay roll in the early phase of the Lockdown. The Respondent notified the Claimant of the dismissal interview scheduled for the 24th of April 2020.

> The Respondent then cancelled without notification and has rescheduled the dismissal hearing for Thursday 14th of May 2020.
>
> The Claimant received no pay statement on the 24th of April 2020. The Claimant made on going enquiries to date with HMRC who do not have the Respondent listed as his employer. The Claimant could not reach the Respondent's Dismissing Manager, Stephen Conquest as He informed the Claimant via the telephone on the 20th & 21st of April 2020 that He was on annual leave for one week commencing the 26th of April 2020.
>
> With these reasons the Claimant concluded He had been dismissed by the Responden and was anticipating an EDT letter.
>
> The Claimant acknowledges the withdrawal of the claim maybe late, however the Claimant says in the circumstances it is not unreasonable and made the withdrawal of the application in the interests of Justice and not take up any unnecessary time. The Claimant did consider an application for a postponement, but thought against it as there is a chance the Respondent may postpone the Dismissal Hearing again.
>
> The Claimant respectfully asks that no order for costs are made against him and that the withdrawal of the application is not unreasonable in the circumstances."

**The hearing of 13 May 2020**

14 The claimant did not attend the hearing. I called him on his mobile telephone number twice, so that he could attend the hearing. He did not respond to my calls and therefore was not present during the hearing.

**The essential conditions that must be met before a claim for interim relief can be made**

15 A claim for interim relief can be made only under section 161 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA 1992") or section 128 of the Employment Relations Act 1996 ("ERA 1996"). The first of those provides:

> "(1) An employee who presents a complaint of unfair dismissal alleging that the dismissal is unfair by virtue of section 152 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) In a case where the employee relies on section 152(1)(a), (b) or (ba), or on section 152(1)(bb) otherwise than in relation to an offer made in

contravention of section 145A(1)(d), the tribunal shall not entertain an application for interim relief unless before the end of that period there is also so presented a certificate in writing signed by an authorised official of the independent trade union of which the employee was or proposed to become a member stating–

(a) that on the date of the dismissal the employee was or proposed to become a member of the union, and

(b) that there appear to be reasonable grounds for supposing that the reason for his dismissal (or, if more than one, the principal reason) was one alleged in the complaint.

...

(6) For the purposes of subsection (3) the date of dismissal shall be taken to be–

(a) where the employee's contract of employment was terminated by notice (whether given by his employer or by him), the date on which the employer's notice was given, and

(b) in any other case, the effective date of termination."

16 Section 298 of TULCRA 1992 provides:

"In this Act, unless the context otherwise requires–

...

'dismiss', 'dismissal' and 'effective date of termination', in relation to an employee, shall be construed in accordance with Part X of the Employment Rights Act 1996".

17 Section 95 of the ERA 1996 provides:

"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)–

(a) the contract under which he is employed 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) An employee shall be taken to be dismissed by his employer for the purposes of this Part if–

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given."

18 Section 97(1) of the ERA 1996 provides:

"(1) Subject to the following provisions of this section, in this Part 'the effective date of termination'–

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect."

19 The "following provisions of this section", i.e. section 97(2)-(5), do not apply to section 128 of the ERA 1996.

20 Section 128 of the ERA 1996 provides:

"(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 104F(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)."

21 Therefore, where (as here) the employee has not resigned, a claim for interim relief is within the jurisdiction of an employment tribunal only where

21.1 the claimant's contract of employment has been terminated by the employer, or

21.2 notice of the claimant's contract of employment has been given by the employer.

**The respondent's costs application**

22 I heard oral submissions from Ms Hall in support of the application for costs. She referred me to *E T Marler Ltd v Robertson* [1974] ICR 72. There, the National Industrial Relations Court said this (at page 76):

> " If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such cases the tribunal may and doubtless usually will award costs against the employee."

23 The power to award costs is in rule 76 of the Employment Tribunals Rules of Procedure 2013, which starts:

> "A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that–
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;
> (b) any claim or response had no reasonable prospect of success".

## A discussion

24 I myself had already, before Ms Hall addressed me, come to the provisional conclusion that the claim had had no reasonable prospect of success, and also that it might well have been made vexatiously. That was for a number of reasons, but mainly because a claim of unfair dismissal can be made only if the employee has been dismissed or given notice of dismissal, and the claimant had plainly not been dismissed before he made the claim. Nor had he been given notice: he had merely been required to attend a meeting at which the possibility of his dismissal was to be considered. The same limitations apply to a claim for interim relief under section 161 of TULCRA 1992 or section 128 of the ERA 1996. Thus, in my view it was plainly unreasonable to think that a claim of those sorts could be made in the circumstances which existed on 24 March 2020, and given the above statutory provisions, the claim had no reasonable prospect of success.

25 I emphasise that by ticking the box in section 2.3 next to the words "My claim consists only of a complaint of unfair dismissal which contains an application for interim relief", as I note in paragraph 1 above the claimant did here, I understood the claimant to be limiting his claim so that he was not also claiming detrimental treatment of him as a trade union official. Certainly, I read his withdrawal as being of the whole of the claim (especially bearing in mind the words "The Claimant acknowledges the withdrawal of the claim maybe late" in the email set out in paragraph 13 above, even though the claimant also referred several times in that email to the withdrawal of his "application"). I have therefore dismissed the claim on its withdrawal, pursuant to rule 52 of the Employment Tribunals Rules of Procedure 2013. If the claimant did not mean by his email of 12 May 2020 set out in paragraph 11 above to withdraw the whole of the claim, then he will have to ask for a reconsideration of that dismissal judgment. However, since he had not approached ACAS and obtained an early conciliation certificate before making the claim, I cannot at present see how the putative claim of detrimental treatment of him as a trade union official (as such, i.e. not including also a claim of unfair dismissal for trade union activities) could be within the jurisdiction of the tribunal.

26 It is possible that the claimant has here acted misguidedly as a result of what I would characterise as a misplaced sense of injustice, so without hearing from the claimant, I declined to decide that the claim (or at least the claim for interim relief) had been made vexatiously. However, after hearing from Ms Hall, I was of the clear and firm view that the claim (or at least the claim for interim relief) was made unreasonably and that it had had no reasonable prospects of success.

27 The claimant's submission (at the end of his response to the application for costs) that "the withdrawal of the application is not unreasonable in the circumstances" was not to the point. The withdrawal was wholly reasonable; but that was because the claim (or at least the application for interim relief) should not have been made in the first place.

**The claimant's means**

28 I asked Ms Hall what, if anything, she knew about the claimant's means. She said that she did not know anything about the claimant's means except as a result of the following circumstances. The claimant had made 7 claims during 2018 and 2019 about the circumstances which had led eventually to his pay being stopped as at 23 March 2020. Those claims were the subject of evidence given and submissions made to an employment tribunal sitting at Watford on 16-19 March 2020 inclusive. Judgment on those claims was reserved. The reserved judgment (dismissing all of the claims) was sent to the parties by the tribunal by post on 7 May 2020, but neither Ms Hall nor the respondent saw it until it was emailed to Ms Hall in scanned form by the tribunal at 10:21 on 13 May 2020. I had read that judgment before starting the hearing of 13 May 2020. I had seen from it that the claimant had, at the end of February 2020, been paid the full amount claimed by him at that time by way of unpaid wages. That was recorded in paragraph 9 of the reserved judgment in this way:

> "We were told that in late February 2020, the respondent paid the claimant a sum which the claimant agreed represented the totality of all net sums which he considered to be due and owing to him as arrears of pay, and which were the subject of all the unlawful deductions claims. The list of issues and the witness evidence had not been amended in light of this payment."

29 Ms Hall referred to that factor and said that it showed that the claimant must have some money which could be used to pay the respondent's costs here. I said that the fact that the claimant had been paid that money did not necessarily mean that he had money available to him to pay the respondent's costs. I asked Ms Hall how much the lump sum was. She said that it was in the region of £24,000.

**My conclusions on the costs application**

30 In those circumstances, I came to the conclusion that not only were the conditions for the award to the respondent of some or all of its costs satisfied, and amply so, but also that I should indeed (i.e. as a matter of the discretion that is applicable once the conditions for the award of costs are satisfied) award the respondent at least some of its costs.

31 The amount sought by the respondent was in total £3432.00. I thought that in the circumstances, and assuming that the time was necessarily spent on the matter, that sum (the justification for which was set out in an itemised table) was not disproportionate. However, I concluded that the respondent could have spent rather less time in relation to the application for interim relief than it in fact did. That is because the application was on its face plainly misconceived for the reasons asserted by Ms Hall in her correspondence to the tribunal. While I understood that Ms Hall was forced to spend time responding to the application as a result of the persistent refusal of the claimant to see the common sense of the situation and accept that his application was mistaken (which should have

been obvious to him if only because, as I record in paragraph 4 above, he had ticked the box in section 5.1 of the claim form showing that his employment was continuing, and he had obviously not been given notice of dismissal), in my view it was right to reflect the fact that the relative simplicity of the matter meant that the respondent should receive only a proportion of its costs. In my view the right amount was £1,500.00 (that figure including, for the avoidance of doubt, VAT).

Employment Judge Hyams

Date: 14 May 2020

Judgment sent to the parties on 20/07/2020

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Jon Marlowe

For the Tribunal Office