



# EMPLOYMENT TRIBUNALS

**Claimant:** Michael Bysouth

**Respondent:** Bourne Group Limited

**Heard at:** Bristol Employment Tribunal      **On:** Wednesday, 1 July 2020

**Before:** Employment Judge Mr. M. Salter

**Representation:**

Claimant: Mr. N. Toms, counsel.

Respondent: Mr. D. Dyal, counsel.

## JUDGMENT

The Claimant's application for interim relief fails and is dismissed.

## REASONS

### INTRODUCTION

1. This is an application for interim relief made by Mr. Michael Bysouth, the claimant, arising from his dismissal by Bourne Group Limited.

### THE DISMISSAL

2. It is agreed the Claimant was dismissed by the Respondent. The Respondent contends this was for gross misconduct, the Claimant says that this was because he engaged in health and safety activities on 6<sup>th</sup> April 2020 [22].

### THE LITIGATION

3. The Claimant presented his claim form on 11<sup>th</sup> June 2020 [10]. A notice of claim was sent on 16<sup>th</sup> June 2020 [1]

4. On 19<sup>th</sup> June 2020 an updated notice of hearing was sent to the parties [6] listing the matter for a hearing via Cloud Video Platform (“CVP”).

#### PAPERS BEFORE ME

5. I had before me papers considering of:
- (a) Agreed bundle of documents (166 pages)
  - (b) Authorities bundle (80 pages)
  - (c) Witness statements on behalf of :
    - (i) the Claimant
      - 1. The Claimant (10 pages)
      - 2. Mr. Raymond Lawson (2 pages)
      - 3. Mr. Peter Garlinge (2 Pages)
    - (ii) the Respondent
      - 1. Mr. Nick Hatton (16 pages)
      - 2. Mr. John Flynn (7 pages)
  - (d) Skeleton argument from both parties: the Claimant (16 pages), the Respondent (13 pages)
6. I had the opportunity to read most of these papers the evening before the hearing, and completed my pre-reading prior to the hearing commencing on 1<sup>st</sup> July 2020.

#### THE HEARING

7. Neither Notice of Hearing permitted the giving of oral evidence and there was no application on the morning for me to direct, under R95 of Sch 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, that such evidence should be heard.
8. Therefore, the hearing today took the form of submissions by both counsel: Mr. Toms on behalf of the Claimant and Mr. Dyal on behalf of the Respondent. These submissions were foreshadowed by detailed and helpful written submissions, which I do not repeat here.

#### THE LAW

##### Statute

9. By s.128 of the Employment Rights Act 1996 (“the ERA”) an employee may apply for interim relief if, among other things, he has presented a complaint to the tribunal that he has been unfairly dismissed and that the reason or principal reason for his dismissal is one proscribed by s.100 ERA.
10. If on the hearing of that application “... it appears to the tribunal that it is likely that on determining the complaint ...” the Tribunal will find in favour of

the Claimant, that his dismissal was for a reason contained within s100 ERA, then the Tribunal must make an Order for interim relief (section 129 ERA).

11. So far as is relevant s 100 ERA states:

**100 Health and Safety cases**

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that –

- (a) Having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities;
- (b) Being a representative of workers on matters of health and safety at work or member of a safety committee –
  - (i) in accordance with arrangements established under or by virtue of any enactment, or
  - (ii) By reason of being acknowledged as such by the employer

The employee performed (or proposed to perform) any functions as such a representative or a member of such a committee.

**Interim Relief**

12. The test for me to decide is whether at the final hearing on the merits “it is likely that” that Tribunal will find that the reason or reasons for the dismissal is one or more of those listed in section 129(1). What is clear is that I must not attempt to decide the issue as if it were a final issue: Parkins v Sodexho Ltd [2002] IRLR 109 in the words of HHJ Altman at paragraph 29:

“Accordingly, it seems to us, that we must find that the Employment Tribunal erred in the question they asked themselves in reality, as to the reason for dismissal, by asking themselves what was the reason for dismissal and forming a judgment about it rather than asking whether it was likely that the reason would be a qualifying reason at the final hearing.”

13. Or rather, the relevant statutory test is not whether the claimant is ultimately likely to succeed in his complaint to the employment tribunal but whether it ‘appears to the tribunal’ . . . ‘that it is likely’ he will establish the qualifying reason is the reason for dismissal, issues of s98 unfairness are for the tribunal tasked with the final hearing.

What is “likely”

14. I have been referred in the helpful written submissions to various expositions on the threshold required. In Taplin v C Shippam Ltd [1978] IRLR 450 the Employment Appeal Tribunal, says this means more than probable,
15. More recently the Employment Appeal Tribunal revisited this issue in Ministry of Justice v Sarfraz [2011] IRLR 562 where at paragraph 16, Underhill J stated it “connotes a significantly higher degree of likelihood” than more likely than not, i.e. something more than 51%.
16. I accept Mr. Toms’ submissions however, that I should not overstate the test, and that “likely” does not mean “certain”

#### CONCLUSION

##### Application in Time?

17. Respondent accepts application for interim relief was presented within the 7 days.

##### “Likely” to succeed?

18. It appears to me that on the material I have before me, that unsurprisingly, there are fundamental disputes of fact at the heart of this claim as to what the reason for the dismissal was, and whether it falls within s100.
19. Was the Claimant within s100(1)(a) or (b)? I accept Mr. Mr. Toms point that there is no gloss of reasonableness on the carrying out of his duties, contained within s100(1)(a) or (b) (unlike later parts of that section). Mr. Dyal’s point is that, as I understand it, this need not concern me as the Claimant was not, in this case, acting within those duties designated to him by the employer when he, in the Respondent’s position, arranged a meeting of employees and orchestrated a shutdown of the factory, both of which were outside the tasks designated to him as a health and safety representative. The Claimant’s claim for interim relief should stop there.
20. This will be the first element of the s100 protection I should, therefore, consider.
21. The question for who actually organised or arranged this meeting will be for others to determine as question of fact. However, for my purposes in assessing whether the Claimant is *likely* to succeed in showing this was the

reason for his dismissal, this aspect of s100 presents me a fundamental hurdle in granting the Claimant's application.

22. Mr. Dyal highlighted numerous instances of accounts being given that contradict the Claimant's pleaded case, including accounts given by the Claimant himself during his meetings with the Respondent where he accepted that it was him who organised this meeting, this admission is corroborated by numerous accounts from other members of staff who identify the claimant who as being the person who organised this meeting.
23. Turning then to what the Respondent terms the 'shutdown' of the factory they contend that this was wholly unreasonable and malicious act that would take the Claimant outside the s100 protection. This does not appear to me to be an allegation that is simply advanced by the Respondent without any foundation, I say now that whether that foundation supports what's put on it is another thing, however for my purposes today there is material from which a tribunal may be persuaded as to its force. With this issue, there is therefore another factor which, appears to me, to reduce the Claimant's prospects of success below the "likely" threshold required.
24. With these issues and supporting evidence on both sides fact I arrive at the conclusion that, doing as best I can on the material before me today, I cannot say that appears to me that the Claimant is likely to succeed in showing the reason, or if more than one reason, the principal reason for that dismissal was for a reason prohibited b s100(1)(a) or (b), namely he was performing the functions designated to him (s100(1)(a)) or those of the H&S Representative (100(1)(b)).
25. Whilst the Claimant may well succeed at Final Hearing, and there is certainly enough material from what I have read and that which was highlighted by Mr. Toms, to require the question to be answered by the Respondent, it does not appear to me that his prospects of success reach the high threshold required by the term "likely", the Claimant may well have a good arguable case that calls for an answer, but it does not appear to me to surpass the requirement for my purposes of being likely he will succeed.

Employment Judge Salter

Date 16 July 2020

Judgment and Reasons sent to parties 21 July 2020

FOR THE TRIBUNAL OFFICE

Notes

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.