



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Montes Morales

**Respondent:** Premier Fruits (Covent Garden) Limited

**Heard at:** LONDON SOUTH      **On:** 12 August 2020

**Before:** E J Siddall

## Representation

Claimant: Mr C Devlin

Respondent: Mr A Macphail

## ORDER ON APPLICATION FOR INTERIM RELIEF

1. The application for an order for interim relief under section 161 of the Trade Union and Labour Relations (Consolidation) Act 1992 is granted.
2. The application for an order for interim relief under section 128 of the Employment Rights Act 1996 is refused.
3. It is ordered that the Claimant shall be reinstated by the Respondent with immediate effect in accordance with section 163(4).

## REASONS

1. The Claimant asserts that he was automatically unfairly dismissed because of his trade union membership and/or activities, or in the alternative because he made protected disclosures, and he seeks interim relief either under section 161 of TULCRA 1992 or under section 128 ERA 1996.
2. Under rule 95 of the Employment Tribunal Rules of Procedure, oral evidence is not usually heard at an interim relief hearing. However both parties had submitted bundles of evidence including witness statements. I noted (with reference to the case law cited below) that it was not for me to make findings of fact at this stage but rather to carry out a broad assessment of the evidence in order to reach a view as to whether the Claimant was likely to succeed in his claims at a full hearing. I took into account that the Respondent had not yet had the opportunity to lodge a Response, and it seemed appropriate to read the key background papers that related to the factual matters set out in the claim form, in order to make that assessment. I emphasised to both sides that I would read the witness statements but would place little weight upon them as no cross-examination would take place. There are a number of areas where the witness evidence will be in dispute and those issues will need to be determined by the

- tribunal.
3. The claim form quoted extensively from recordings of meetings that had taken place on 12 May 2020. The Claimant had produced a transcript which was in the bundle but the Respondent did not agree that it was entirely accurate. As what was said at the meeting appeared to be highly relevant to the claim for relief under section 161 I agreed to listen to the recordings, having first allowed an adjournment to give Mr Macphail the chance to listen to them. Mr Devlin then played the two recordings to the tribunal in the presence of the parties.
  4. A brief summary of the background is as follows.
  5. The Claimant started work for the Respondent in August 2018.
  6. In March 2020 the business of the respondent which is based at the fruit and vegetable market in New Covent Garden was badly affected by the coronavirus pandemic.
  7. In March 2020 the Respondent proposed that all staff take a 25% pay cut and take one week's unpaid leave per month. The Respondent was under the impression that all staff including the Claimant agreed to this.
  8. On 9 May 2020 a union called United Voices of the World lodged a grievance on behalf of the Claimant stating that the wage reductions had caused him detriment and that the health and safety of staff was being endangered by a lack of PPE.
  9. A meeting took place between the Claimant and Mr Tanner on 11 May 2020. What happened is not clear and will be a matter of evidence. The next day Mr Tanner held a staff meeting. The Claimant says he was excluded from the meeting; in a signed witness statement Mr Tanner says that 'I did not invite him to attend the meeting' because he had discussed the issues with him the day before. The Claimant asked a colleague, DL, to record the meeting on his phone.
  10. I have listened to the recording of that meeting which was played in court. Mr Tanner is heard making the following comments:
  11. 'One particular person in the firm has decided to go to a union'.
  12. That person 'is not obviously backing the company'
  13. 'I am extremely upset and disappointed over this one person who decided to go to the union'
  14. 'you can probably all guess who the person is as he is not stood in the office at this moment in time'
  15. 'I will not be dictated to by a union. What they did to the firm 12 years ago was disgusting'.
  16. 'If they are not careful they will ruin this country'.
  17. At a meeting on 14 May the Claimant was questioned about whether he had asked DL to make the recording. He was asked to sign a document stating formally that he would agree to accept a pay reduction but he refused. On 15 May 2020 DL was dismissed.
  18. A grievance meeting took place on 20 May 2020. I have noted from the grievance minutes that at this meeting the Claimant complained about what he called 'victimisation'. He alleged that he had been threatened with dismissal for bringing a grievance on 11 May.
  19. On 25 May 2020 Mr Hudson from United Voices of the World telephoned Mr Tanner. The Respondent subsequently complained to Mr Hudson about the telephone call being made on a bank holiday. It was also alleged that Mr Hudson had been aggressive although the Union denied this. What happened during that phone call may be a matter of fact that the tribunal has to deal with.
  20. The grievance outcome letter dated 18 June deals with the matters of pay and health and safety raised in the grievance but does not deal with the Claimant's allegations of victimisation.
  21. On 22 June 2020 the Claimant appealed against the grievance outcome. He also complained about having been subjected to detriments on the basis of trade union membership or activity (section 146 TULRCA 92) and under the Equality Act amongst other things, specifically in relation to the exclusion from the meeting on 12 May 2020.

22. The letter confirming the outcome of the appeal was sent to the Claimant on 7 July 2020. Two days later on 9 July the Claimant was called to a meeting which took place later that same day to discuss the possible termination of his employment. He was dismissed immediately following the meeting with the reason given that the company was 'unable to sustain your full salary'.

### **Union Membership or Activities**

23. Section 152 TULRCA 92: *'the dismissal of an employee shall be regarded as unfair if the reason for it (or if more than one, the principal reason) was that the employee*  
a) *was or proposed to become a member of an independent trade union; or ...*  
ba) *had made use, or proposed to make use of trade union services at an appropriate time.'*
24. An interim relief order can be made under section 161 of TULRCA 1992 if *'it appears to the tribunal that it is likely that in determining the complaint to which the application relates that it will find that ...the complainant has been unfairly dismissed.'*
25. Mr Macphail refers me to the case of **Ministry of Justice v Sarfraz [2011] IRLR 562** which states that the word 'likely' does not mean 'more likely than not' (ie the civil test of the balance of probabilities) and 'but connotes a significantly higher degree of likelihood'. The principles to be applied are set out clearly by the EAT in the later case of **Mihaj v Sodexo Limited UKEAT/0139/14/LA** at paragraph 16 where Mrs Justice Slade states: *'The principles of law to be applied in this appeal are clear and they were agreed by the parties. The task of an Employment Tribunal on an application for interim relief is to make a summary assessment of whether it is likely that at final hearing the Claimant will establish that the reason for his dismissal was his taking part in trade union activities. The cases of **Raja v SSJ UKEAT/0364/09** and **London City Airport Ltd v Chacko [2013] IRLR 610** were cited. Second, in considering whether the complaint is likely to succeed, the Employment Tribunal should ask themselves whether the final determination of the application for automatic unfair dismissal has more than a 51% probability of success or whether the Claimant has established that he has a "pretty good" chance of success. Those propositions were explained by Slynn J, as he then was, in **Taplin v Shippam [1978] ICR 1068 at 1074D and 1074F**.'*
23. The case of **London City Airport Ltd v Chacko** cited by the EAT above also gives guidance as to the way in which the tribunal should approach the evidence where it states at paragraph 23: *'The application falls to be considered on a summary basis. The employment judge must do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The employment judge is then required to make as good an assessment as he is promptly able of whether the claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant is ultimately likely to succeed in his or her complaint to the Employment Tribunal but whether "it appears to the tribunal" in this case the employment judge "that it is likely". To put it in my own words, what this requires is an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim.'*
26. Having noted this guidance I address the question of whether it appears likely that the Claimant will be able to show that he was dismissed because he was a trade union member, or had availed himself of the assistance of United Voices of the World.

27. The evidence of what happened at the staff meeting on 12 May is compelling as is the fact that Mr Tanner did not want the Claimant to attend. He makes very clear his irritation that the Claimant had gone to the Union without speaking to him and expressed views that are strongly critical of trade unions.
28. I give weight to the fact that LD who had recorded the meeting was dismissed three days later.
29. I note that the Claimant was not dismissed immediately. Mr Macphail argues that if all the available evidence is considered including what happened at the meeting on 14 May this tends to show that the true cause of dismissal was that the Claimant would not sign a document formally agreeing to a wage cut. I have noted the reason for dismissal set out in the letter of 9 July.
30. I also note that Mr Tanner stated at the meeting on 12 May that he had no objection to staff being trade union members of such. The objection that he expressed was that the Claimant had gone the union rather than coming directly to him.
31. I take into account the fact that dismissal did not take place until 9 July. The Respondent waited until very shortly after the grievance process had concluded. The reason given for the dismissal was that the Claimant would not sign his consent to the pay reduction. It will be for full tribunal to make findings of fact on this point and decide what the true reason for dismissal was.
32. However making the broad assessment of the evidence which I am obliged to do, I find it is likely that the Claimant will be able to show that he was dismissed because he had sought the assistance of the union to bring a grievance. Mr Tanner acted extremely adversely to the Claimant bringing a grievance via the Union. The remarks recorded at the meeting on 12 May indicate strong hostility to trade union involvement. The member of staff who recorded the meeting was dismissed three days later. I reach the view that these factors mean that the Claimant has a 'pretty good chance of success' of establishing his claim under section 152 at full hearing.

### **Protected Disclosure**

33. The claim for interim relief on the basis that the Claimant had made a protected disclosure is less persuasive at this stage. Mr Tanner made it clear that he would far rather that the Claimant had gone to him directly with his concerns and that his 'door was always open'. The tribunal will need to decide at the full hearing whether the Claimant would have been dismissed if he had raised the matter of health and safety with Mr Tanner himself without involving the union. I am not able to conclude at this stage that the claim for automatic unfair dismissal for making a protected disclosure is likely to succeed. The application for interim relief on this ground fails.

### **Interim Relief**

34. However I grant the application on the basis of section 152(ba): it is likely that the Claimant would be able to show that he was dismissed for making use of the services of a trade union to bring his grievance. Having communicated this decision to the parties, Mr Macphail indicated that the Respondent would consent to reinstatement. I have made an order accordingly.

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**Employment Judge Siddall**

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Date 12 August 2020.