# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr W. Davey**

**Respondents:** **Harrods Ltd.**

**Heard at:** **London Central** **On: 5 November 2020**
**by remote technology (CVP)**

**Before:** **Employment Judge Goodman**

**Representation**
**Claimant:** **in person**
**Respondent:** **Ms A. Greenley, counsel**

**PRTELIMINARY HEARING**

# JUDGMENT

No order on the application for interim relief

# REASONS

1. This hearing was to decide the claimant's application for interim relief following his dismissal on 4 October 2020.

2. The claimant says the dismissal was unfair, because he was dismissed for making protected public interest disclosures (whistleblowing), or because he had carried out health and safety activities when designated for those duties. He gives other grounds for holding the dismissal unfair, but these are those for which interim relief is an available remedy. The respondent by contrast says he was dismissed by reason of redundancy.

**Conduct of the Hearing**

3. There had been a preliminary hearing for case management on 29 October, which would have been the interim relief hearing but that the respondent had only just seen the ET1, due to not staffing their office. Directions were then given for this hearing, and both sides have complied with some tight deadlines. The claimant did apply for a postponement on 1 November as he needed more time to prepare his witness statement, but he did manage to submit one on time, though in an abbreviated form, and the postponement was refused because the legislation is

clear that interim relief applications must be heard as soon as practicable - section 128(3) Employment Rights Act 1996 - and it was practicable to hear it today.

4. The claimant mentioned in his claim form he had a long-term health condition, and later emails identified that this was a mental health condition, probably anxiety. He asked to have a remote hearing, or to be able to make written submissions. At the start of the hearing I discussed what measures were necessary, and I did what I could to explain the legal background, and to ask questions on what seemed to me to be the core issues. The claimant articulated his case well in the hearing, and I had been able to read his claim form, his application for interim relief, and the witness statement.

5. I had available a hearing bundle of 803 pages, with a seven page index. I have not read the whole of this, but I have considered the documents about the respondent's redundancy process, and the claimant's grievances, formal and informal, before the redundancy process began.

6. I have also read the claimant's witness statement, and witness statements from Martin Illingworth, the respondent's Director of Store Development, who managed the team the team of duty managers of which the claimant was one, and the statement of Alice Hoque, a member of the respondent's human resources department, who attended all redundancy meetings relevant to the claimant, whether individual or for consultation with employee representatives.

7. I read the respondent's skeleton argument, which the claimant had also seen, and I outlined the thrust of their submissions for the claimant.

**Interim Relief and the Grounds it Protects – Relevant Law**

8. By section 129(1) of the Employment Rights Act:

> "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..section 103A",

the tribunal is to order reinstatement, or if the employer is unwilling, make an order for continuation of the employee's contract until the final hearing. (There is also an option of reengagement in another role if the employee consents to take what is offered). There is no provision for refund if in the event the employee does not succeed in his claim.

9. What is meant by "likely" to succeed is clarified in **Taplin v C. Shippam Ltd (1978) ICR 1068**. It means: "a greater likelihood of success in his main complaint than either proving a reasonable prospect or a 51 per cent. probability of success and that an industrial tribunal should ask themselves whether the employee had established that he had a "pretty good" chance of succeeding in his complaint of unfair dismissal". This formulation was affirmed in **Dandpat v University of Bath (2009) UKEAT/0408/09/LA,** where it was said: "there were good reasons of policy for setting the test comparatively high… if relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the claimant, until the conclusion of proceedings: that is not (a) consequence that should be imposed lightly". In **Ministry of Justice v Sarfraz (2011) IRLR 562** "likely" meant a "significantly higher degree of likelihood" than "more likely than not". In **Parsons v. Airplus International Ltd UKEAT/0023/16/JOJ,** it was said that the claim should be "clear cut".

10. The task of the tribunal hearing an interim relief application: is "to make an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he or she has… doing the best he or she can with the untested evidence advanced by each party" – **London City Airport v Chacko (2013) IRLR 610**. The tribunal is not required to make findings or reach a final judgment on any point - **Parkins v Sodexho Ltd (2002) IRLR 109.** As stated in **Parsons: "**The Judge is not required (and would be wrong to attempt) to make a summary determination of the claim itself. In giving reasons for her decision, it is sufficient for the Judge to indicate the "essential gist of her reasoning": this is because the Judge is not making a final judgment and her decision will inevitably be based to an extent on impression and therefore not susceptible to detailed reasoning; and because, as far as possible, it is better not say anything which might pre-judge the final determination on the merits".

11. To succeed in the claim of unfair dismissal for making a protected disclosure the claimant must establish that he made one or more disclosures of information, which in his reasonable belief tended to show one of the forms of wrongdoing set out in section 43B (1)(a) to (f) of the Employment Rights Act, that he made the disclosure in the public interest and, importantly, he must establish that making a protected disclosure was the reason, or if more than one, the principal reason for the dismissal – section 103A.

12. The respondent argues that at this stage the claimant has not identified what information he had disclosed within his very lengthy informal and formal grievances in December 2019 and March 2020, but in any case, denies that this, rather than redundancy, was the reason for dismissal.

13. To succeed in claim of dismissal for health and safety activity under section 100(1) (a) (the claimant does not rely on (b) which is about safety representatives, which he was not), the claimant must show he had 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".

The respondent argues that the claimant had not been "designated" to carry out such activities, (while the claimant says they formed part of his job description) and even if he was "designated", argues that redundancy, not safety activity, was the reason for dismissal.

14. Section 105 of the Employment Rights Act is about where there is a redundancy situation, where the reason for selecting on employee rather than another, was a protected reason. It provides:

> "an employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant (b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held a position similar to that held by the employee and who have not been dismissed by the employer, and (c) it is shown that any of the subsections (2A) to (27N) applies".

The subsections include (3) health and safety activity, and (6A) making public interest disclosures, as well as a dismissal because of section 104, were asserting a statutory right was the principal reason.

15. The claimant relies on this too. However, section 105 is not one of the grounds for awarding interim relief. He may succeed at the final hearing in showing that

the selection of him rather than a colleague was for a protected reason, such as whistleblowing, but not get interim relief now. This was made clear in **Bombardier Aerospace v McConnell and others (2008) IRLR 51.** Unless the claimant can show the whole redundancy process was a sham, devised to dress up the real reason for dismissing him, he will not get interim relief, even if at the final hearing he could show that selecting him to go within a genuine redundancy consultation was for a protected reason and so automatically unfair.

a. "Redundancy" is defined in section 139 as where "the dismissal is wholly or mainly attributable to – (b) the fact that the requirements of that business – (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."

16. Employers can use redundancy (or another fair reason) as a way to disguise a dismissal for another reason, as recognised in **ASLEF v Brady**, ("even a potentially fair reason may be the pretext for a dismissal for other reasons") or it can be chance that they are glad to see the back of those who happen to be chosen for some other reason. The cases allow employers some latitude in establishing a redundancy situation within the statutory definition. **Kingwell v Elizabeth Bradley Designs Ltd EAT 0661/02 i**ndicated that there need not be a poor financial situation if a reorganisation is more cost-effective than the existing composition of the workforce, for example. **James Cook (Wivenhoe) Ltd v Tipper (1990) ICR 716 CA** discusses the investigation of whether there was redundancy.

**Outline of Relevant Facts**

17. This outline is prepared on the basis of the unsworn witness statements and the documents, including the claim form and interim relief application.

18. The claimant started work in September 2017 as out of hours duty manager, working 3 or 4 night shifts the week, responsible for supervising construction projects across the Harrods estate, principally at the large shop building in Knightsbridge. His job description is in the bundle and has a comprehensive list of duties which included making sure that areas remained free of building contractors rubbish and materials, highlighting any issues, checking the materials were correctly stored monitoring work and compiling factually accurate reports to various departments. He had to explain Harrods procedures to contractors, check who was coming on site and what was being removed, and so on. There is no specific mention of health and safety, except that emergency works of health and safety nature did not require 48-hour notice from a building contractor, although in general it might be assumed that in this job a working knowledge of health and safety issues on construction sites was important.

19. The claimant describes in his witness statement how he complained about a number of safety issues, and mentions in particular account reported to health and safety executive in respect of access to facilities for workers, and a prohibition notice, and an issue when asbestos was removed. He kept a site diary about his concerns on safety issues from July to December 2019.

20. On 11 December 2019 he lodged an informal grievance. This complaint in general terms states that standards were slipping and that the uncertainty of what was required was affecting his health, with specific complaint about his working time, and not getting enough breaks between shifts for adequate sleep. In a follow-up on 15 December he listed a number of items of health and safety concern, including removal of an asbestos tent without expert confirmation that this was safe, a number of different accidents and injuries, a lack of PPE

(personal protective equipment), and particular concerns about contractors working without proper breaks and any PPE. On 6 January he gave a list of examples of health and safety concern that had arisen over the weekend.

21. After some short spells of absence through ill-health, on 12 March 2020 he lodged a formal grievance about safety shortcomings that were on his mind. This adds concern about lack of risk assessments and extra detail of earlier concerns. These concerns were significantly amplified in a follow-up on 19 June 2020, although perusal of this shows that much of it reproduces regulations which he considered had been broken, but with reference to some specific incidents causing concern about safety procedures.

22. Against the background of this history, the Covid 19 lockdown had started.in March, which lasted from 25 March to 15 June 2020.. The respondent's evidence is that soon after lockdown began they met to consider cuts to their programme of capital spending, and decided that 14 major projects were not to go ahead in 2020 as planned, but would be deferred to future years. More generally, they say that by the end of lockdown it was clear that they were 65% down on target revenue, which had fallen to 2013 levels, and decided that they needed to review operations including their payroll headcounts, worth £185 million, forecast revenue having been reduced to £1.5 billion. Mr Illingworth's witness statement is to the effect that within capital projects, they identified they needed to reduce project managers, CAD operators, and the out of hours duty team. Minor projects (for example, brands setting up shop displays from time to time) were to continue. There would be no changes to the day team, but at night, when the disruptive work on major projects was carried out, the deferment of major projects meant they identified a reduced need for staffing. Their particular response was to decide to cancel 3 vacancies for project managers, to lose a CAD operator (by requiring contractors to do the work rather than doing it in-house), and to cut the out of hours duty managers from 2 to 1. The lead manager and the duty manager would between them work the night shifts. Any additional requirement for holiday and sickness cover would come from the day shift managers.

23. The claimant said that this cut to the out of hours duty team was not necessary, because even with a reduction in major projects, there was a need for a manager on nights, as the two left could not do any sickness or holiday cover, an8nting to 3 months a year just for holidays. He argues that the implication is that his job was not redundant, and this decision was a sham in order to remove him because he had complained at length and repeatedly about health and safety breaches.

24. I hope I have expressed the claimant's case on this adequately. On more than one occasion in the hearing he said that there *was* a genuine redundancy situation, but "it was used to get me out of the business". He also said that the list of major projects he had last seen in March 2020 was by 2 October more or less the same, and he denies that projects have been deferred to the following year. Unfortunately, neither document was in the bundle, and this point is not dealt with by the respondent's witnesses.

25. The respondent carried out a redundancy consultation exercise across the business. There was a pre-agreed matrix of criteria for selection for redundancy within each department. The out of hours team was identified on the HR1 notification of intention to make redundancies. The business case within projects is in the document of 30 June 2020, the same day as the workforce generally was notified of the need to make a 14% reduction in the current workforce of 4,800, and the claimant specifically told that the 2 duty managers would be reduced to one post. They invited employee representatives from each department. In the out of hours duty team; the claimant's colleague nominated himself as representative, and the claimant himself did not, when invited to comment on this. The documents

and witness statements show 3 consultation meetings with the representatives, when feedback was invited, and 2 meetings with the claimant. The respondent says that on neither occasion did he make any suggestions for alternatives to redundancy, and he did not say either that he was being removed because of health and safety complaints, or that it was wrong to remove anyone from the out of hours duty team. His ability was scored by 2 separate managers against that matrix criteria, and the points averaged. He came out 7 points lower than his colleague.

26. The claimant was told on 4 September 2020 that he was to be dismissed by reason of redundancy, which took effect on expiry of notice on 4 October.

27. The claimant's grievance outcome was transmitted to him on 25 September, and immediately he lodged an appeal, which has yet to be decided.

**Discussion and Conclusion**

28. in relation to an interim relief application, the claimant's chief difficulty is in showing that one of the 2 out of hours duty managers post was not redundant, and that announcing that one of these posts was redundant was in fact a sham designed to remove him because of his safety concerns. Even if I assume for the sake of argument that he will be able to establish that he made protected disclosures that meet the criteria of subject matter, disclosure of information, reasonable belief and being made in the public interest, *and* that this was the reason for choosing him to go, rather than his colleague, he still has a lot of uphill work to show the redundancy was a sham. There is a lot of latitude given to employers when making redundancy decisions. If an employer can show he believed redundancy was the reason, it is difficult for the tribunal to intervene just because events or evidence show that the belief was mistaken. The respondent adds that with an objective scoring matrix, apparently carried out by 2 others independently, it could not be predicted that the claimant would be the duty manager to go. This weakens the claimant's argument that making one of 2 duty managers redundant was a sham intended to get rid of him – it could have been his colleague, so he has to show both that it was a sham and that the outcome was fixed. The claimant also faces difficulty that he did not mention in either consultation meeting any criticism of the respondent's assessment of their needs for duty managers. I understand that he was already suffering from stress and depression, and that both lockdown and the prospect of redundancy will have intensified any employee's stress, but it does not assist him in defeating the respondent's case.

29. For this central reason, the difficulty of showing the redundancy was a sham, my assessment is that the claimant is not "likely", to the high degree required for interim relief to be granted, to succeed.

30. In respect of the section 100 argument, there is little evidence that the claimant was "designated" to carry out health and safety activities. This diminishes further the likelihood of success on this ground.

31. Therefore, the application for interim relief does not succeed.

32. The claimant should recognise that although he has not succeeded at this stage, he still has prospects of success in showing unfair dismissal as a final hearing. That is because at the final hearing a tribunal will be able to assess whether the reason for choosing him for redundancy, rather than his colleague, was a protected disclosure, or safety activities, as prohibited in section 105.

**Case No: 2206663/2020**

Employment Judge Goodman

Date : 5th Nov 2020

JUDGMENT SENT TO THE PARTIES ON

06/11/2020

FOR THE TRIBUNAL OFFICE