



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr K Rossiter

Respondent

AND Butterfields Home Services Ltd
t/a Butterfields Community Care

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY VIDEO (CVP)
EMPLOYMENT JUDGE GRAY

ON

26 May 2021

Representation

For the Claimant:

For the Respondent:

Did not attend and was not represented
Mr M Durrant (Operations of Director)

JUDGMENT

The judgment of the tribunal is that the Claimant's application for Interim Relief is refused.

REASONS

1. This judgment deals with the Claimant's application for interim relief.
2. Written reasons are provided with the agreement of the Respondent in view of the non-attendance by the Claimant.
3. In this case the Claimant claims that he has been unfairly dismissed and he asserts the principal reason for this is he had made a protected disclosure. He therefore applies for interim relief.
4. The Respondent opposes the interim relief application.
5. By a claim form submitted on the 4 January 2021 the Claimant submitted a claim for unfair dismissal and other payments and included an application for interim relief.
6. The claim form states at 8.2 ... "Unfair dismissal is the reason I refused to work while on a retained shift was due to travel. I did not seem it safe to travel as I was overtired from the day before when I work from 08:00 until 22:15 without getting a break. I feel that this is unlawful and voiced my concerns to management and they said they would sort it out. I then got removed from the work group chats and was then emailed a termination of employment letter by the operations director/owner of Butterfields Home Services. The letter stating that it has been decided to end my probation

and terminate my employment due to refusing to follow reasonable management instruction.”.

7. The Claim form did not include any details of the Claimant's dates of employment. After two requests for confirmation of the Claimant's employment dates by the Tribunal the Claimant then confirmed the position by email dated 24 March 2021 as being ... "Start date of employment was Tuesday 10th November 2020 and end date was 29th December 2020."
8. An application for interim relief must be made within 7 days of dismissal. In this case the Claimant was dismissed on Tuesday 29 December 2020 and his claim including the application for interim relief was submitted on Monday 4 January 2021. This is within the necessary 7-day period.
9. By notice of hearing dated 18 May 2021 this video hearing was then listed.
10. By email dated 21 May 2021 further copies of Tribunal papers were sent to the Respondent.
11. The Claimant acknowledged the hearing notice providing his mobile phone contact number to the Tribunal by email dated 21 May 2021.
12. By email dated 25 May 2021 the Respondent emailed a set of documents to the Tribunal and the Claimant for consideration at this hearing consisting of 24 pages and a separate index.
13. This hearing was listed to start at 10AM.
14. The Respondent was in attendance in advance of 10AM.
15. By 10AM the Claimant was not in attendance. The Tribunal Clerk called the Claimant's mobile phone number and was informed by the Claimant that he didn't realise the time and it was agreed that he would log in now. After a period of approximately 5 minutes the Claimant had still not joined. The Tribunal Clerk again called the Claimant's mobile number and the Claimant informed the Clerk that he was having difficulty connecting as he was at work, in his work van and only had his mobile phone available. It was suggested he join the hearing by telephone instead and was provided the contact numbers over the phone and then subsequently by email. However, after 30 minutes the Claimant had still not joined the hearing. His mobile phone was tried several times but went straight to message. He had also not responded to the email sent to him.
16. The Employment Judge considered the following:
 - a. The Claimant had been given reasonable opportunity to join the hearing.
 - b. An interim relief application involves the Employment Judge considering the parties pleadings, any proposed witness statements, and other relevant documentary evidence. There is no need to make any findings of fact because this is not required by the statutory test.

- c. Pursuant to section 128(5) of the Employment Rights Act 1996 a postponement of an interim relief hearing is only possible in “special circumstances”.
 - d. Pursuant to rule 47 of the Employment Tribunals Rules of Procedure, if a party fails to attend or be represented at the hearing, the Tribunal may proceed with the hearing in the absence of that party, having considered any information which is available to it, after any enquires that may be practicable, about reasons for the party’s absence.
17. After considering these matters the hearing therefore commenced in the absence of the Claimant at 10:43AM.
18. The position as to the delay and the non-attendance of the Claimant was explained to the Respondent.
19. The documents considered by the Judge, namely the Claim form and the Respondent’s documents, were discussed with the Respondent.
20. It was noted that the documents submitted by the Respondent for this hearing included a copy of an employment contract made out for the Claimant, some WhatsApp messages and email correspondence about the Claimant’s communications with the Respondent at that time. It also included a copy of the termination letter dated 29 December 2020.
21. The Respondent confirmed that its correct legal title (as set out in the documents it had provided to the Tribunal and Claimant) is **Butterfields Home Services Ltd t/a Butterfields Community Care**. The legal title of the Respondent is therefore amended to this.
22. It was confirmed that the Respondent submits that the reason for the dismissal of the Claimant was conduct, so not because of any alleged protected disclosure. The Respondent records in the letter of termination dated 29 December 2020, a copy of which was presented at this hearing, the following ... “As a result of refusing to follow a reasonable management instruction whilst being paid as a retained staff member to support your team if required, and the nature of the vital care and support that is required within this role, it has been decided to end your probation and terminate your employment with Butterfields.” (this is at page 21 of Respondent’s set of documents).
23. Within the documents provided the Respondent had also included a 2-page chronology of matters from its perspective which highlights (and which Mr Durrant confirmed would form the basis of his witness evidence) the following about the alleged disclosure:
- “13. The Claimant eventually spoke to Mr Mike Durrant and advised he was not willing to travel to Glastonbury.
14. At no point did the Claimant say he was unable or unwilling to travel because of health and safety concerns. His refusal was based on the location of the work to be undertaken.

15. The Claimant was dismissed on 29th December 2020, the reason provided to the employee and set out in the confirmation of termination letter was failure of probationary period in particular; refusal of a reasonable management instruction whilst being paid as a retained staff member to support the team if required, and the nature of the vital care and support that is required within the role (see page 21 of the Bundle).”
24. Mr Durrant submitted that the Claimant had never vocalised any health and safety concerns, nor raised any concerns about hours of work. Mr Durrant says the Claimant told him he was not willing to travel to Glastonbury and the first he heard of the concerns referred to in the Claimant’s claim form was when he received details of the Tribunal claim.

25. Considering the relevant law:

26. Under section 128 of the Employment Rights Act 1996: (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(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.
27. From this it is important to note that a dismissal for refusing to return to the workplace or taking of other measures in circumstances of danger under sections 100(1)(d) and (e) of the Employment Rights Act 1996 do not provide for an interim relief application to be made. However, if an associated disclosure to an employer has been made, this may well amount to a protected disclosure which does permit an interim relief application to be made. This appears to be the basis on which the Claimant makes his claim as can be seen from the details he has set out in the claim form.
28. The Employment Tribunal needs to consider whether it appears that it is likely that on determining the complaint to which the application relates a Tribunal will find that the complainant has been unfairly dismissed for the asserted qualifying reason.
29. An approach as to the process to be followed by an Employment Tribunal in hearing an interim relief application has been suggested in **Raja v Secretary of State for Justice UKEAT/0364/09/CEA**.
30. This necessarily involves a far less detailed scrutiny of the parties’ cases than will ultimately be undertaken at the full hearing, see **London City Airport v Chacko [2013] IRLR 610**. The Tribunal must make a decision as to the likelihood of the claimant’s success at a full hearing of the unfair dismissal complaint based on the material before it, which will usually

consist of the parties' pleadings, the witness statements and any other relevant documentary evidence.

31. When considering the "likelihood" of the claimant succeeding at Tribunal, the correct test to be applied is whether he or she has a "pretty good" chance of success at the full hearing – see **Taplin v CC Shippam Ltd [1978] ICR 1068**. The burden of proof in an interim relief application is intended to be greater than that at the full hearing.
32. In this case the Claimant does not have at least two years' continuous employment and the burden is therefore on him to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosure.
33. The Claimant therefore also needs to prove that he made a protected disclosure. That is the Tribunal needs to decide the Claimant made one or more qualifying protected disclosures as defined in the Employment Rights Act 1996.
34. Under section 43A of the Employment Rights Act 1996 a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
35. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
36. Under section 103A of the Employment Rights Act 1996, an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

37. Decision:

38. In this case the Claimant says the following in his claim form about the alleged protected disclosure ... "I did not seem it safe to travel as I was

overtired from the day before when I work from 08:00 until 22:15 without getting a break. I feel that this is unlawful and voiced my concerns to management and they said they would sort it out.”.

39. The Respondent submits this is disputed fact. The Claimant has not presented copies of any contemporaneous documents to support his assertion. However, the Respondent has presented WhatsApp communications that do not appear to support what the Claimant asserts being raised as an issue.
40. The Respondent has presented a copy of the termination letter, where the reason recorded is, “... refusing to follow a reasonable management instruction whilst being paid as a retained staff member to support your team if required...”. This appears to be consistent with the documents the Respondent has presented, namely the WhatsApp messages and the asserted witness evidence that will be given at any final hearing.
41. I therefore do not find that the Claimant has a “pretty good” chance of success at a full hearing.
42. The application for Interim Relief is therefore refused.
43. The Respondent was reminded it needs to submit its ET 3 Response by the 15 June 2021.

Employment Judge Gray
Date: 26 May 2021

Judgment and Reasons sent to the Parties: 16 June 2021

FOR THE TRIBUNAL OFFICE