EMPLOYMENT TRIBUNALS

Claimant: Ms S. Messi

Respondents: (1) Manpower UK Ltd
(2) Teleperformance UK Ltd

Heard at: Watford (by CVP) **On**: 23 November 2021

Before: Employment Judge McNeill QC

Appearances

For the Claimant: No attendance
For the Respondents: (1) Mr Sutherland, Solicitor
(2) Ms Usher, Solicitor

JUDGMENT

(1) The Claimant's application to postpone the hearing of her application for interim relief is refused.

(2) The Claimant's application for interim relief against the First and Second Respondents is dismissed.

REASONS

1. The Claimant has brought claims for automatic unfair dismissal against the First and Second Respondents. Those claims are brought pursuant to section 103A of the Employment Rights Act 1996. She alleges that she was employed by the First and/or Second Respondents between 17 July and 11 August 2021 and that she was dismissed for making protected disclosures. Those protected disclosures have not yet been properly detailed.

2. The First Respondent admits that it employed the Claimant at the relevant times. It contends that it still employs the Claimant and has never

dismissed her. The First Respondent is an employment business that places its employees on assignments with clients.

3. The Second Respondent contends that it never employed the Claimant. It engages the First Respondent for the provision and administration of temporary workers. The Claimant was a temporary worker who was assigned to work for the Second Respondent until her assignment was terminated on 11 August 2021.

4. The Claimant has made an application for interim relief to the Tribunal. That application was made in the Claimant's ET1, presented to the Tribunal on 12 August 2021 and was listed to be heard today.

Application to postpone

5. On 17 November 2021, the Claimant applied to postpone this hearing of her application for interim relief. This was her second application to postpone the interim relief hearing.

6. Applications for interim relief fall under section 128 of the Employment Rights Act 1996 (ERA).

7. Pursuant to section 128(3) of the ERA, the Tribunal *"shall"* determine such applications *"as soon as practicable after receiving the application"*.

8. Pursuant to section 128(5) of the ERA: *"the tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so".*

9. The Tribunal has a general power to postpone a hearing under rule 30A of the Employment Tribunals Rules of Procedure. Where an application to postpone is made less than 7 days before the date on which the hearing begins, the power to postpone is restricted as set out in rule 13(2) of the Rules of Procedure. A postponement may be granted where there are *"exceptional circumstances".*

10. The application to postpone that was before me was made by the Claimant on 17 November 2021, less than 7 days before this hearing. The grounds for the application were stated as follows: *"I am asking for a postponement due to Covid 19 symptoms because I am not well enough to participate physically or mentally".* The Claimant attached an NHS Isolation Note to her application. The isolation period started on 14 November and ended on 24 November 2021. The note stated that the Claimant had been advised to self-isolate by an NHS service or a healthcare professional because she had symptoms or coronavirus or had tested positive. In the heading to her email, the Claimant stated that she had *"coughing, running nose and fever".*

11. Both Respondents objected in writing to the application to postpone by emails dated 18 November 2021, copying in the Claimant.

12. The First Respondent pointed out that this was the second application to postpone, the first application having been granted on 8 September 2021 just two days before the hearing.

13. On further examination of this earlier application to postpone, it transpired that a first hearing of the Claimant's application had been listed for 10 September 2021. In an email to the Tribunal dated 27 August 2021, which was not copied to either Respondent, the Claimant asked for a postponement because she had a wedding to attend on 10 September. The First Respondent only learned of this application on 7 September, when the Claimant mentioned her application to postpone in correspondence concerning the preparation of a bundle for the 10 September hearing. The First Respondent, on 8 September, wrote to the Tribunal objecting to the application to adjourn but it appears that his correspondence may have arrived too late, as an order was made on that day to postpone the hearing. The Second Respondent only learned of that application to postpone after the postponement had already been granted.

14. Returning to the First Respondent's objections to the application to postpone made on 17 November, the First Respondent further contended that interim relief hearings should be dealt with as expeditiously as possible, in accordance with the overriding objective. The First Respondent pointed out that the Claimant had provided no medical evidence confirming her state of health or why she could not attend a hearing, contrary to the Presidential Guidance on seeking postponements. He also referred to rule 30A(2) of the Rules of Procedure.

15. The Second Respondent, in its email of 18 November, adopted and supported the First Respondent's objections. It further relied on the fact that the hearing was to be by CVP (Cloud Video Platform) and there was no medical evidence that supported the Claimant's contention that she could not take part in such a hearing. Rather than acting promptly, the Claimant had delayed after the beginning of her self-isolation period (14 November) before making the application to postpone. A postponement would be contrary to the overriding objective of the Rules, which was to enable Tribunals to deal with cases fairly and justly.

16. On 22 November 2021 (yesterday) by an email at 15.03, Employment Judge Tynan directed that the Claimant's application for a postponement would be considered at the start of this interim relief hearing. The Claimant was asked to confirm whether she had "*subsequently tested positive for Coronavirus and, if so, to supply a copy of [her] test result or other evidence in this regard".*

17. Five minutes later, at 15.08, the Claimant responded: *"Not taking a test as not received one and already requested another one. I mentioned I have symptoms and not well enough due to fever, cough and headache and will*

not be able to participate fully which will put me at a disadvantage". She asked the Tribunal to take this into consideration.

18. In objecting to the postponement in oral submissions, both Respondents relied on their emails of 18 November 2021. They contended that there was no medical evidence that the Claimant had tested positive for Covid-19. They further drew attention to the urgent nature of applications for interim relief; the absence of any medical evidence to support the application for postponement made on grounds of ill-health; and the fact that although the Claimant was able to respond to yesterday's email containing EJ Tynan's direction within five minutes, she did not join the video hearing today, even to make her application to postpone.

19. The Respondents submitted that, although this was not a hearing to determine the merits of the case, no evidence had been produced by the Claimant which contradicted the very clear evidence from documents in the bundle that the Claimant remained employed by the First Respondent and that she was never employed by the Second Respondent.

20. In deciding whether to postpone, I took into account that this was a second application to postpone and that interim relief applications should be dealt with urgently. There was evidence in the form of assertions by the Claimant that she was unwell, with symptoms that might be consistent with a diagnosis of Covid 19 and that she had been advised to self-isolate on 14 November, nearly ten days ago. However, there was no medical evidence that supported her state of health being such that she was unfit to attend a video hearing, even to make an application to postpone. The fact that she was able to respond to an email from the Tribunal within 5 minutes yesterday, suggested she could at least have attended today's hearing by video, even if only to explain that she could not proceed. Even when she was specifically asked to provide evidence of a test or other evidence supporting what she was saying about her health, the Claimant did not do so. She had been advised to self-isolate nearly 10 days ago, which would normally signal that a test should be taken.

21. It was not appropriate to determine any merits issues when considering a postponement, I did, however, take into account that there was nothing in the bundle of documents produced to me that indicated that the Claimant was either dismissed by the First Respondent (some of the Claimant's own evidence indicated to the contrary) or that she was in an employer/employee relationship with the Second Respondent.

22. Taking into account all these matters, I did not consider that there were either *"special circumstances"* within section 128(5) of the ERA or *"exceptional circumstances"* within rule 30A of the ET Rules of Procedure for granting a postponement.

23. I therefore refused the application to postpone and went on to consider whether the application for interim relief should be granted.

Application for interim relief

24. Pursuant to section 129(1) of the ERA, an application for interim relief should be granted only where one of the types of claims referred to in section 129 is *"likely"* to succeed at a full hearing. *"Likely"* means *"a good chance"* and *"a good chance"* means a higher degree of probability than just more likely than not: **Ministry of Justice v Sarfraz** [2011] IRLR 562, EAT. The relevant claim here is a claim under section 103A of the ERA, namely that the Claimant was dismissed and that the reason or principal reason for her dismissal was that she had made one or more protected disclosures.

25. The test of likelihood applies to all aspects of the Claimant's claim. For example, she must not only show that it is likely that she will prove at a full hearing that she was dismissed but also that it is likely that she will show that she made protected disclosures and that she was dismissed because she made those protected disclosures.

26. I first considered the issue of dismissal. Unless there was a good chance that the Claimant could show that she was dismissed, within the meaning of section 95 of the ERA, by the First or Second Respondent, her application for interim relief could not succeed.

27. I considered first whether there was any evidence in the documents before me that the Claimant was dismissed by the First Respondent, which admitted that it was her employer.

28. There was a document headed Terms and Conditions of Employment for Temporary Employees, which described the First Respondent as the employer and the Claimant as the Temporary Employee. In that document, it was made clear that the First Respondent was an employment business providing the Claimant with temporary work. Her job title and duties were explained, including the offering of assignments to work with the First Respondent's clients. It was made clear at paragraph 1.6 of the Terms and Conditions that the First Respondent or the client could terminate an assignment at any time, without prior notice or liability and that termination of an assignment was not termination of the Claimant's employment.

29. The First Respondent's handbook for Temporary Employees explained at paragraph 2.2 the difference between an assignment being ended and the employee's employment with the First Respondent being terminated. This was explained again at section 9 of the Handbook.

30. Other documentation in the bundle indicated that the Claimant herself knew that her contract of employment with the First Respondent was continuing after 11 August 2021. For example, in an email dated 12 August 2021, she said that she should be paid in full until the expiry of her fit note, which was 30 October 2021. On 16 August 2021, she asked about what she should do with her timesheets moving forward. On

October 20 2021, she complained to the pensions regulator that she had not be been automatically enrolled in the pension scheme after 12 weeks. On the Claimant's own case, 12 weeks from the start of her employment was 9 October 2021.

31. There was no evidence before me that the Claimant was dismissed by the First Respondent. On the contrary, all the evidence from both the First Respondent and the Claimant herself indicated that she remained in employment.

32. On the basis of all these matters, and taking into account what is before me at this interim relief application, I did not consider that it was likely that the Claimant would establish that she was dismissed by the First Respondent. In the circumstances, I did not consider whether other aspects of her claim were likely to be determined in her favour. If it did not appear likely that the First Respondent dismissed the Claimant, her application for interim relief against the First Respondent could not succeed.

33. In relation to the Second Respondent, I could find no evidence that the Second Respondent was the Claimant's employer. Unless the Second Respondent was the Claimant's employer, an unfair dismissal claim against it could not succeed. Again, I was not determining the matter on any final basis. However, in considering whether there is a good chance that the Claimant would establish that essential aspect of her claim, namely that she was employed by the Second Respondent, I have concluded that there is not. The Claimant was assigned to work for the Second Respondent but the applicable contractual documentation made It clear that she remained employed by the First Respondent. Again, I do not go on to consider the other aspects of the claim.

34. The interim relief application against both Respondents therefore fails.

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Employment Judge McNeill QC

Date: 23 November 2021

Sent to the parties on: 13 January 2021

.....GDJ.....
For the Tribunal

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