EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102597/2017

Held in Glasgow on 10 October 2017

Employment Judge: F Jane Garvie

Mr Seymour Lopez	**Claimant** **Represented by:** **Mr C McMillan - Non-Executive Director**
Response (Building Rewarding Relationships) Ltd	**Respondent** **Represented by:** **Mr D Hughes - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

(1) the application for interim relief brought in terms of Section 128(1) of the Employment Rights Act 1996 is refused;

(2) the case will now proceed to a Final Hearing and

(3) if required, a Preliminary Hearing on case management issues can be held on 17 November 2017 as indicated in the directions set out below.

REASONS

Background

1. In this case the claimant presented a claim on 22 August 2017 in which he did not provide an ACAS Early Conciliation Certificate number, giving as his explanation at Section 2.3 of the claim form, (the ET1) that his claim contained an application for interim relief.

2. The claimant specifies in his claim that his employment with the respondent ended on 21 August 2017 and accordingly the claim for interim relief was brought within the requisite 7 day period set out at Section 128(2) of the Employment Rights Act 1996, (the 1996 Act). The claim was referred to Employment Judge Laura Doherty who directed that the claim should be accepted. Her handwritten note indicates that the dismissal appeared to allege that it was in connection with the statutory right to be accompanied and also appeared to be part of the claim set out. She referred specifically to Section 12(5) of the Employment Relations Act 1999, (the 1999 Act). Notices were then issued on 24 August 2017 addressed to Mr McMillan and the respondent. Thereafter, in letters of the same date, the parties were informed that the interim relief application would be heard on 3 October 2017 and that a full day had been set aside.

3. Ms Cooney advised on 29 August 2017 that her firm was directed to represent the respondent and she sought a date by which the response form was to be filed. By letter dated 30 August 2017 it was confirmed that the deadline was 19 September 2017.

4. Then, by letter dated 15 September 2017 Mr Hughes referred to the response, (the ET3) having been filed on the same date.

5. There was also an application separately on the same date for the interim relief Hearing to be postponed and this was intimated to Mr McMillan. The response was accepted under cover of acknowledgement letters dated 19 September 2017.

6. Thereafter, Judge Doherty directed that, if the claimant had any objection to the Interim Relief Hearing being postponed, he should do so by 28 September. Further it was explained that the Employment Judge was not satisfied that it was consistent with the overriding objective to consider the respondent's separate application for strike out of the claim on the same date and the parties' attention was drawn to Section 12(5) of the 1999 Act. This was set out in correspondence dated 21 September 201 7.

7. There were then further enquiries as to when the Hearing was to take place in terms of e-mail correspondence of 2 October 2017.

8. The application for the postponement was granted by letters dated 3 October 2017, informing the parties that the interim relief Hearing would now be held on 10 October 2017. There was an e-mail request that the Hearing on 10 October be re-scheduled as one of the witnesses would be out of the country and a proposal that the Hearing take place on 16, 18, 19 or 20 October 201 7.

9. By e-mail dated 5 October 2017 the parties were informed Judge Doherty had directed that, given the respondent had indicated they would be available any day in the week commencing 9 October, there was no clear indication as to the relevance of the witness who could not attend. This resulted in a reply, explaining that the witness was the Dismissing Manager who would be out of the country on a pre-booked holiday. This was set out in an e-mail of 5 October 2017. On the same date, Mr McMillan advised that he and the claimant were available on 10 October 2017 and alternative dates would be 17 November and 18 December 2017 as being the only alternative dates. By e-mail of the same date the respondent indicated that 17 November 2017 would be available but not 18 December 2017.

10. There was then a further e-mail of 6 October 2017 requesting clarification of when the Hearing was to take place and further confirmation from Mr McMillan that 10 October was suitable for the claimant and himself.

11. A further of e-mail of 6 October 2017 informed the parties that, taking into account the need to deal with the application promptly and that the respondent would be in a position to make representation as to the reasons for dismissal, notwithstanding the Dismissing Officer would not be present, Judge Doherty was not satisfied that

the Hearing should be postponed. Accordingly, the Hearing was to proceed on 10 October 2017.

The Interim Relief Hearing on 10 October 2017

12. At the start of the Interim Relief Hearing on 10 October 2017 it was confirmed with the parties that the Judge was aware of the background correspondence but had not seen the bundle provided by the respondent which was produced that morning nor the authorities to which they refer. Mr McMillan had also prepared a bundle although he had not provided a copy of this to Mr Hughes but he had himself received the respondent's bundle of documents ahead of the Hearing. Mr McMillan then provided a copy of his bundle to Mr Hughes and a further copy for the Judge.

13. There was discussion as to whether Ms Knox who was present at the start of the Interim Relief Hearing should be allowed to continue to attend and give instructions to Mr Hughes. Mr McMillan objected to this as he considers that she is a relevant witness for the Final Hearing which will take place in any event regardless of the outcome of the Interim Relief Hearing.

14. After discussion, Mr Hughes accepted that he could take instructions from Ms Knox, if required, and he agreed that he was prepared to accept that she should return to the respondent's waiting room. She duly left the Tribunal room.

15. It was confirmed that the Dismissing Officer Ms Linda Johnston who is referred to as being an Operations Manager and Disciplinary Manager at a disciplinary hearing held with the claimant on 21 August 2017 was not available as she is the person referred to as being abroad on a pre-booked holiday as at 10 October 2017.

16. In relation to the authorities, Mr Hughes had provided these to Mr McMillan at some earlier date. No evidence was given for either party and it was accepted the case would proceed on the basis of submissions from the parties.

17. In relation to submissions, Mr McMillan had prepared a document which is entitled, "Determination and Reasons". On page 4 there is reference to various decisions one of which is ***Burchell and Another Miller v William Hill Organisation Ltd*** neither of which had any relevance for the Interim Relief Hearing.

18. There was also reference to ***Toal and Another v GB Oils*** although no citation apart from the year of that decision being 2013 was provided. There was also reference to two further decisions ***Ramphal v Department of Transport [2015]*** and West ***London Mental Health NHS Trust v Chhabra in 2013.*** Mr McMillan did not have copies of these Judgments available. After discussion, he confirmed that he did need to provide copies of these authorities to the Tribunal.

19. It was also confirmed that there were no witness statements available and it was further confirmed that it is not the remit of this Tribunal in hearing the Interim Relief application to make findings of fact in relation to what allegedly occurred in relation to the various meetings in August 2107.

20. It was accepted by both representatives that the relevant sections are section 10 and 12 of the 1999 Act.

21. Section 10 states:-

"10 Right to be accompanied

(1) This section applies where a worker -

(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b) reasonably requests to be accompanied at the hearing.

(2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who -

(a) is chosen by the worker;

(b) is within sub section (3).

(2B) The employer must permit the worker's companion to -

(a) address the hearing in order to do all or any of the following:-

(i). put the worker's case;

(ii). sum up that case;

(iii). respond on the worker's behalf to any view expressed at the hearing;

(b) confer with the worker during the hearing.

(2C) Sub section (2B) does not require the employer to permit the worker's companion to:-

(a) answer questions on behalf of the worker;

(b) address the hearing if the worker indicates at it that he does not wish his companion to do so;

(c) use the powers conferred by that sub section in a way that prevents the employer from explaining his case or prevents any other person at the hearing from making his contribution to it.

(3) A person is within the sub section if he is:-

(a) ....

(b) ....

(c) another of the employer's workers

(4) If-

(a) a worker has a right under this section to be accompanied at a hearing;

(b) his chosen companion will not be available at the time proposed for the hearing by the employer;

(c) the worker proposes an alternative time which satisfies sub section (5);

(d) the employer must postpone the hearing to the time proposed by the worker.

(5) An alternative time must -

(a) be reasonable;

(b) fall before the end of the period of five working days beginning with the first working day after the day proposed by the employer.

22. Section 12 states:-

"12. Detriment and dismissal

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he -

(a) exercise or sought to exercise the right under Section 10 (2A), (2B) or (4) or

(b) accompanied or sought to accompany another worker (whether of the same employer or not) pursuant to a request under that section.

(2) ....

(3) A worker who is dismissed shall be regarded for the purposes of Part X of the Employment Rights Act 1996 as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that he -

(a) exercised or sought to exercise the right under Section 10 (2A), 2(B) or 4(B)"

While the respondent's submission sets out some relevant facts, as indicated above, it is not the remit of this Tribunal to make findings of fact. The Tribunal understood the position is that the claimant commenced employment with the respondent on 8 May 2017, working as a Customer Call Assistant dealing with calls in a Call Centre environment. It is not in dispute between the parties that an investigation meeting was held with the claimant on 15 August 2017. No issue was taken as the Tribunal understood it in relation to the claimant attending that

meeting. The claimant was thereafter advised that he was being invited to attend a disciplinary hearing, originally to be held on 17 August but changed, at the claimant's request, to 18 August and a letter was issued to the claimant to that effect. When the date of the hearing was then changed again a further letter was issued on 18 August 2017, (pages 49/50 of the claimant's bundle) which sets out the claimant's right to representation. There is also reference to the respondent's disciplinary procedure which is found in the respondent's bundle at pages 34, 35 and 36.

23. The point made by Mr Hughes was that the claimant, at this stage, had not had any reason to invoke his statutory right to be accompanied at the disciplinary hearing and it is therefore the respondent's position that their actions could only be motivated by the alleged misconduct of the claimant.

24. The Tribunal was then referred to the notes of the disciplinary hearing on 18 August set out at pages 45/47 of the claimant's bundle where there is discussion as to the issue of a representative for the claimant. It was explained that the claimant contacted his line manager who, in turn, indicated that another employee, (referred to here as Mr A) could perhaps be available to act as the claimant's companion or colleague. The Tribunal understood that the claimant spoke to his line manager at 5pm on 18 August. It also understood that this individual would be at work on a shift on 21 August 2017 but would not start that shift until 11.30am. The claimant's disciplinary hearing was being reconvened with a start time of 9am on 21 August.

25. The minutes of the disciplinary hearing on 21 August 2017 as set out at the claimant's bundle at pages 51/58 make reference to a discussion between the claimant and Ms Johnston, (the Disciplining Manager) about representation for the claimant. It appears that the disciplinary hearing then proceeded on 21 August 2017 without the claimant having a representative present on his behalf.

26. By letter dated 31 August 2017, (pages 91/92 of the claimant's bundle) it was confirmed to the claimant that he had been informed by Mrs Johnston that his employment had been terminated on 21 August 2017 on the grounds of gross misconduct. The letter also deals with the outcome in relation to a grievance raised by him.

Claimants Submission

27. As indicated above, Mr McMillan provided a written submission which is entitled "Determination and Reasons". This is a four page document and it sets out his position as to why the claimant is bringing a complaint of automatic unfair dismissal in relation to Section 10 of the Employment Relations Act 1999, (see above).

28. In reaching its decision, (see below) the Tribunal took into account all the points that are set out by Mr McMillan in his written submission.

Respondent's Submission

29. As indicated, Mr Hughes provided a written submission. The Tribunal adjourned to consider both sets of written submissions before returning to clarify some final points with the parties.

30. In relation to the respondent's written submission this refers to what are stated to be relevant facts. As has already been explained, it is not the role of this Tribunal to make findings of fact. However, the Tribunal did not understand any of the background facts to be in dispute between the parties but that does not mean that what is set out in the respondent's submission can be taken as findings made by this Tribunal.

31. In relation to the statutory position the requirement in terms of Section 129(1) of the Employment Rights Act 1996 is as follows:-

> "1. This section applies 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 ..."

It was agreed that reference to section 12 of the 1999 Act has to be "read across" from the 1996 Act.

Mr Hughes submits that the test is whether the claimant is **likely'** (this Tribunal's emphasis) to establish the reason for his dismissal as being that his dismissal was for his having asserted his right to representation under section 10 of the 1999 as well as alleged detriment and dismissal in terms of section 12 of the 1999 Act.

32. Reference was made to the judicial interpretation which has been placed on the word, 'likely'.

33. The test to be applied is whether the claimant will be able to establish that the reason for his dismissal was his attempted exercise of his section 10 right to representation.

34. The test, it was pointed out, is not on the balance of probabilities, or a 51% chance of success. The claimant will require to satisfy this Tribunal that he has "a pretty good chance" of establishing that the reason for his dismissal was because he sought to exercise his Section 10 right and that, it was submitted, is a higher test.

35. Reference was made to the following authorities:-

TapHn v Shippam Ltd [1978] ICR 1068 at page 1074 C - F

Approved by -

Dandpat v University of Bath UKEAT/0408/09 @ para 20

Blitz v Vectone Group Holding Ltd UKEAT/0306/09/DM @ paras 17 -20

Raja v Secretary of State for Justice UKEAT/0364/09/CEA @ para 25 - 28

Ministry of Justice v Sarfraz [2011] IRLR 562 @ -

Para 16 'Likely does not mean simply more likely than not - that is at least 51% - but connotes a significantly higher degree of likelihood"

Para 19 - "likely connotes something nearer to certainty that mere probability"

London City Airport Limited v Chacko [201 3] IRLR 610 EAT @ paras 10 & 11

Mihaj v Sodexho Ltd [2014] ICR D25 (EAT) @ para 1

36. It was indicated that the onus of establishing this rests with the claimant, (see ***Bombardier Aerospace/Short Brothers PLC v McConnell [2008] IRLR 51*** at page 59 paragraph 15.

37. Mr Hughes also referred the Tribunal to ***Harvey on Industrial Relations and Employment Law at Division*** N1 para 614 - 615.05 which suggests that the test of likely as set out in ***Taplin*** and subsequent cases is too high, and the correct test is the balance of probability. However, it was pointed out that the Employment Appeal Tribunal has set a different test.

38. It was further submitted that a tribunal should be slow to grant an order for interim relief, (particularly in a case not involving trade union activities and where accordingly there is no union certificate to support a ***prima facie*** case in favour of the claimant).

39. The test should be set "comparatively high" so as to avoid irretrievable prejudice to the employer in cases not likely to succeed - see the Honourable Mr Justice Underhill in the Employment Appeal Tribunal in ***Dandpat v University of Bath UKEAT/0408/09*** at para 20.

40. Mr Hughes indicated that it is not relevant in determining this application, for this Tribunal to look at the reasonableness of the decision taken to dismiss the claimant nor is it relevant to consider whether the claimant was actually permitted to exercise his right of representation at the disciplinary hearing.

41. The only question for this Tribunal is whether the claimant will be likely to succeed in establishing that the reason for dismissal was, as he asserted, or seeks to assert his statutory right to representation.

42. Mr Hughes' position was that there was a wealth of evidence that the claimant's dismissal was in relation to conduct and was nothing to do with the assertion by him of his section 10 rights under the 1999 Act.

43. Again, this Tribunal was reminded that the test is not the reasonableness of the decision to dismiss since this is not "at large" before this Tribunal.

Deliberation and Determination

44. The Tribunal was grateful to the representatives for providing such helpful submissions. As indicated, these were taken into consideration in reaching its determination.

45. The Tribunal was clear that the only issue before it is whether the claimant is likely to succeed in his allegation that the reason for his dismissal was on the basis of his seeking to have representation at the disciplinary hearing rather than the respondent's assertion that his dismissal was by reason of gross misconduct.

46. Having given careful consideration to all that was said as well as the various authorities the Tribunal noted the clear direction from ***Taplin*** that 'likely' does specify the need to more than proving, on a balance of probabilities, the assertion made in relation to the application for interim relief. The reference at paragraph (f) in ***Taplin*** is as follows:*

> "We think that the right approach is expressed in a colloquial phrase suggested by Mr White. The Industrial Tribunal should ask themselves whether the applicant has established that he has a "pretty good" chance of succeeding in the final application to the Tribunal."

47. There is also the reference in ***Ministry of Justice v Sarfraz,*** (see above) at paragraph 16 that 'likely' does not mean simply more than likely not - that is at least 51% - but connotes a significantly higher degree of likelihood. Also, at paragraph 19 'likely' connotes something nearer to certainty than mere probability.

48. Accordingly, the Tribunal asked itself whether the claimant has a "pretty good" chance of succeeding at the Final Hearing in establishing that his dismissal was for asserting a statutory right.

49. The Tribunal concluded that Mr Hughes' submission is correct as there is insufficient information before this Tribunal to support the assertion that the reason for the claimant's dismissal was something other than the reason given by the employer, namely gross misconduct. The Tribunal was not satisfied that the claimant is likely to succeed in his assertion that his dismissal was for his having

asserted his statutory right to be accompanied at the disciplinary hearing on 21 August 2017.

50. The Tribunal therefore concluded, in relation to the application for interim relief that it was not satisfied that the claimant will meet the test set out by Section 129 of the Employment Rights Act 1996. It did so having given careful consideration to the guidance given by the higher courts and tribunals as to the interpretation to be placed on the word, 'likely' from the authorities referred to above.

51. Since this Tribunal cannot conclude that it is likely that the Tribunal in determining the complaint to which the application relates at the Final Hearing will find that the reason for the claimant's dismissal was his asserting his right to representation, it therefore follows that this Tribunal cannot grant the application for interim relief which is therefore refused.

Further Procedure

52. It was discussed with the representatives that the Tribunal would issue its Judgment in writing and that, in the event this Tribunal's conclusion was that the claimant was entitled to interim relief then the date already discussed with the parties of 17 November 2017 could be used for the further issue that would have arisen had the Tribunal found that the application for interim relief succeeded. However, since it has not so concluded it therefore follows that the claim should now proceed direct to a Final Hearing.

53. However, should the parties think it would be helpful to have a further Preliminary Hearing by way of case management directions for that Final Hearing then this can be arranged and, if necessary, this could take place by way of a Telephone Conference Call. The parties should confirm in writing to the Tribunal by no later than 24 October 2017 whether they do wish to have a Preliminary Hearing for such case management in which case 17 November 2017 will be allocated for that Preliminary Hearing. In that event, it would be helpful if the parties could provide an Agenda of Issues for consideration at that Preliminary Hearing.

54. If they do not consider it necessary to have such a Preliminary Hearing, then date listing letters will be issued separately from this Judgment. They will be issued on

25 October 2017 so as to allow the parties' time to decide whether or not they wish to have that further Preliminary Hearing. If they do then the dates to be fixed for that Final Hearing can be fixed on 17 November 2017.

Employment Judge: Jane Garvie
Date of Judgment: 12 October 2017
Entered in register: 12 October 2017
and copied to parties