EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Mapembe	**v**	**Slough Borough Council**

Heard at: Reading **On**: 24 June 2022

Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: Ms B Venkata, counsel
For the Respondent: Mr S Bishop, counsel

*[**REASONS FOR JUDGMENT** sent to the parties on the 24 June 2022]*

1. This application is made pursuant to s.131 of the Employment Rights Act 1996 and is requiring me to consider whether there has been a change in circumstances justifying a variation or revocation of the interim relief order made.

2. The respondent's application is made upon three grounds.

3. The first ground is essentially relying on the overriding objective saying that, because the respondent was not in a position to respond to the claim as it did not have the pleadings, now that it has responded that is a change in circumstances and therefore, I should revisit the question whether or not the order for interim relief should be made.

4. Secondly, when one goes on to consider the question of whether not this is an appropriate case in which to make an interim relief order, I ought to conclude that this is not a case where an order for interim relief is appropriate because the claimant cannot show that he has a pretty good chance of succeeding in relation to the relevant claim at the final hearing.

5. The third ground is that on the basis of the claimant's own evidence where he states that, "Due to my poor mental health I have not been able to look for work. In this respect my situation is the same as it was at the hearing in June 2021". That he is unable to work. If that were the case he would now be on zero pay and therefore the interim relief order ought to be varied in that way.

6. I am satisfied that when one considers the statutory scheme the mere presentation of a response in a case where a response had not previously been presented is not in itself a change of circumstances justifying revisiting the question of whether an interim relief order ought to be made or necessarily varying the order on the basis of s.131.

7. The statutory scheme requires interim relief applications to be made within seven days of dismissal and that application has to be listed as soon as possible. It is sometimes the case, although not always the case, that interim relief hearings are listed before the date on which a respondent is required to provide a response and also before a respondent has presented a response. Although adjournments of interim applications is permitted they are not common. It is possible on a proper application of the rules, in an appropriate case, to grant an adjournment. A respondent employer could apply for a postponement of an application for interim relief application if the respondent felt that it was in the interests of justice to do so. However, none of that applied in this case because the respondent did not act and respond to the claim which had been sent of the respondent by the tribunal.

8. The failure of engagement of the respondent was the subject of an earlier consideration by the tribunal this followed correspondence between the respondent's representatives and the tribunal. I made a decision on the application for a reconsideration which concerned me looking into the circumstances as to why the respondent failed to engage in proceedings and failed to present a response in time. The explanation that was put forward by the respondent was that it was on 1 July 2021 that the respondent became aware not only of the proceedings but also of the interim relief application. The application in relation to these proceedings was made on the dates that I specified in my earlier judgment which, if my memory serves me right, was initially in September 2021 and the draft response to the claim and further grounds provided in October.

9. What I have considered today is whether the circumstances in this case are such as to amount to a change of circumstances for the purposes of s.131. My conclusion is that the mere filing of a response is not a change of circumstances justifying variation or revocation of within s.131, however the grounds on which the claim is resisted may justify a conclusion that there is a change of circumstances.

10. There is, in my view, a limitation in respect to which the grounds are capable of constituting a change of circumstances. That limitation I think is this, the grounds must be in relation to the matter which either was not put forward at the time of the interim relief hearing as a basis of defending the claim and therefore was not considered by the tribunal making the order, or some other reason justifying revisiting an issue that was already considered such as discovery of unknown facts. I also consider that the matter set out in the grounds of response to justify variation must be a matter which the respondent could not reasonably have been expected to put forward at that time. In my view, it is not enough simply for the respondent to say, "well we have now properly analysed the circumstances of this case and set out our response and can show that we have a good chance of succeeding in

defending the claims" is sufficient for the tribunal to set aside the order for interim relief. It seems to me that it cannot be enough that had it been put forward at the correct time, it might not have been made or even not likely to have been made.

11. So, what are the circumstances in this case which could be put forward at the time of the hearing had the respondent attended? The respondent seeks to rely on the contents of its response to the claim and says that there is unlikely to be a finding that the claimant made a protected disclosure. It seems to me that whilst the respondent may not necessarily have got all its evidence lined up in the way that it has today at the interim relief hearing, it would have been in a position to present all the arguments that it put forward today at the interim relief hearing. I do not see anything put forward which they could not have put forward at the time of the interim relief hearing.

12. I concluded that cannot operate so as to defeat the interim relief order that has already been made because this is a case where the respondent had the opportunity of resisting the original interim relief application on the basis that is put forward today and have said it should not be made. That is something that they could have done, and in the application for a reconsideration they did do that. It seems to me that if I were to go back to the start, simply on the basis that they did not have chance to put in this argument at the time the original application was, I would effectively be revisiting the reconsideration application and allowing the respondent to get further a reconsideration decision by the back door.

13. I agree with the claimant's submission that it is necessary for there to be finality in process of the legal proceedings, and it also seems to me that compliance with rules and orders is important for certainty and order in the legal process. When one considers the circumstances in this case, I am of the view that the I cannot simply ignore the fact that the claimant's position today is that he is currently unable to work due to the state of his health.

14. The wording of s.131 in my view is sufficiently wide and makes it clear that I have to have regard to the circumstances of the claimant and the respondent which may change. An order an under s. 128 is an order that under which the respondent could require the claimant to attend work.

15. Where the tribunal makes such an order it shall specify in the order the amount which is to be paid by the employer to the employee by way of pay in respect of each normal pay period, or part of any such period, falling between the date of dismissal and the determination or settlement of the complaint. The amount so specified shall be that which the employee could reasonably have been expected to earn during that period, or part, and shall be paid in the case of a payment for any such period falling wholly or partly after the making of the order, on the normal pay day for that period, and in the case of a payment for any past period, within such time as may be specified in the order.

16. The respondent could require the claimant to attend work and the order for continuation of the contract of employment should state that the amount

which the employee could reasonably have been expected to earn in his normal pay period under normal pay for each day of such period as if he had not been dismissed. I understand that to be the claimant to be paid as though he was subject to the original contract on which he was employed.

17. I have been provided with a copy of the contract which shows the claimant's entitlement to pay in circumstances where he is unable to work. It seems to me that the claimant's position is that he would now not be in receipt of any pay under the terms of his contract if, as he states, he has been in such a poor state of health that he has been unable to work since June 2021. So, the respondent's application should succeed in reflecting that in the order but that should be a variation of the order and not a revocation.

18. S.131 provides that at any time between the making of an order and the determination of the claim the employee or the employer may apply for a revocation or variation order.

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Employment Judge Gumbiti-Zimuto

Date: 23 August 2022

Sent to the parties on: 8/9/2022

N Gotecha

For the Tribunal Office