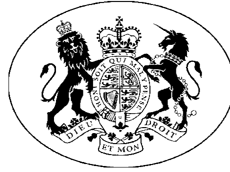
Case No: 1309402/2022



EMPLOYMENT TRIBUNALS

Claimant: Mr L Breen

Respondent: Royal Mail Group Limited

Heard at: **Midlands West (by CVP)** **On:** **6 January 2023**

Before: **Employment Judge Woffenden**

Representation
Claimant: Mr J Lynch ,trade union representative
Respondent: Mr C Milsom of Counsel

JUDGMENT

The claimant's application for interim relief under section 128 Employment Rights Act 1996 is refused.

ORDER

1 By 13 January 2023 the claimant shall send to the tribunal and the respondent written representations about whether this claim should be: a) transferred to another region and, if so, which, including a description of the role (if any) it is anticipated Paul Kennedy will play in the final hearing of the claim; and
b) stayed pending the outcome of the claimant's appeal against dismissal and if so, for how long.
2 By 27 January 2023 the respondent shall send to the tribunal and the claimant written representations about whether this claim should be:
a) transferred to another region and, if so, which; and
b) stayed pending the outcome of the claimant's appeal against dismissal and if so, for how long.

REASONS

Background

1 The claimant (a driver, member of Communication Workers Union ('CWU') and vice chairman of CWU branch at the respondent's Coventry depot) was employed from 29 November 2004 to 23 November 2022 when he was summarily dismissed.

2 The claimant presented his claim form to the tribunal on 29 November 2022 accompanied by an interim relief application. In his claim form he complained (among other complaints) that he had been automatically unfairly dismissed contrary to section 152 (1) (a) and/or (b) Trade Union and Labour Relations (Consolidation) Act 1992 ('TULR (C) A. This hearing has been listed to determine that application.

3 A response had been served in which the respondent says the reason or principal reason for the claimant's dismissal related to his conduct.

4 From my pre-reading of the agreed bundle of documents for the interim relief application hearing, it appeared the claimant had been represented at the disciplinary hearing on 11 November 2022 by a Mr Paul Kennedy as CWU divisional representative. There is a non-legal member of that name appointed to the Midlands West Region with whom I have sat on a number of occasions. I therefore asked the parties at the commencement of the hearing to confirm if the Paul Kennedy who had represented the claimant was also a non-legal member in the Midlands West region. Mr Lynch confirmed that he was. I sought the parties' views about whether the hearing should be postponed in those circumstances to enable the claim to be referred to the Regional Employment Judge to decide if the claim should be transferred to another region. Having done so, I decided that the hearing should proceed for reasons I gave at the time. Before so proceeding, I sought and obtained the parties' confirmation that they had no objection to my conducting today's hearing. Having provided oral reasons, Mr Milsom at the hearing requested that I provide written reasons.

Issues

5 Section 129 of the Employment Rights Act 1996 provides: - "Procedure on hearing of application and making of order. (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— (i)section 100(1)(a) and (b), 101A(1)(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.
6The Claimant makes an application for interim relief under Section 128(1)(A)(i) ERA 1996: "128 Interim relief pending determination of complaint. (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(1)(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. (2)The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date). (3)The tribunal shall determine the application for interim relief as soon as practicable after receiving the application. (4)The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing. (5)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."

7 In essence, the issues to be determined are whether it appears that it is likely that on determination of the complaint to which the application relates the Tribunal will find the reason for the dismissal, (or if more than one, the principal reason for the dismissal) was that the claimant

'(a)was, or proposed to become, a member of an independent trade union, or

(b)had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time' .

Under section 152 (2) an 'appropriate time' means—

'(a)a time outside the employee's working hours, or

(b)a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union '.

Legal Principles

8 In determining an application or interim relief, I must carry out a predictive exercise as to the likely outcome of the final hearing. In undertaking that exercise, I have avoided making determinations of factual issues. The application stands on the pleadings, documentary evidence and the submissions and arguments of the parties. Rule 95 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 states that in considering an Interim Relief application "the Tribunal shall not hear oral evidence unless it directs otherwise". I decided this is not a case in which I considered it appropriate to hear oral evidence.

9 The leading cases on the test to be applied by an Employment Tribunal hearing an application for interim relief are those of **Taplin -v- C. Shippam Limited [1978] ICR1068** and the **Ministry of Justice -v- Sarfraz [2011] IRLR 562.** What must be established is a "pretty good chance of success" (**Taplin**). 'Likely' does not simply mean more likely than not but a significantly higher degree of likelihood i.e. "something nearer to certainty than mere probability" (Underhill P in **Ministry of Justice v Sarfaz**. The burden in this regard falls on the claimant.

10 In **London City Airport Limited -v Chacko [2013] IRLR610** Mr Recorder Luba QC provided further guidance upon the approach to be taken and in particular the correct approach to be applied to the meaning of "it is likely". At paragraph 23 he explains: "23. In my judgment the correct starting point for this appeal is to fully appreciate the task which faces an employment judge on an application for interim relief. The application falls to be considered on a summary basis. The employment judge must do the best he can with such material as the

parties are able to deploy by way of documents and argument in support of their respective cases. The Employment Judge is then required to make as good an assessment as he is promptly able of whether the claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant is ultimately likely to succeed in his or her complaint to the Employment Tribunal but whether "it appears to the tribunal" in this case the employment judge "that it is likely". To put it in my own words, what this requires is an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim.'

Material

11 The respondent had prepared an agreed indexed and paginated Interim Relief Hearing bundle of 270 pages. There was also a witness statement for the claimant and for Mr James Parker (the respondent's Area Distribution Manager and dismissing officer). I thank the parties for their written submissions and also the oral submissions they made today.

12 The respondent and CWU are currently in dispute over pay and there is ongoing strike action.

13 The claimant stated in his claim form setting out his grounds of complaint that he has appealed against his dismissal but that appeal has not yet been heard and sets out the grounds of the appeal. He asserted the reason for his dismissal was either his membership of CWU or because he had taken part in trade union activities as a picket supervisor and was therefore automatically unfair.

14 Mr Parker (who is based at the respondent's national distribution centre) dismissed the claimant on 23 November 2022.In his witness statement he says that the claimant was dismissed for breaching the respondent's Code of Business Standards by demonstrating aggressive and intimidating behaviour towards 2 colleagues on 8 September 2022 and a security guard on 12 September 2022. On 8 September 2022 (a strike day) the claimant was not at work but at home on holiday when the 2 colleagues in question were delivering a Covid test to his home and on 12 September 2022 the claimant returned to work.

15 Mr Parker says in his witness statement that the claimant had learned on 8 September 2022 that it was alleged the security guard had taken down a CWU flag and thrown it in the direction of the picket line and he would have summarily dismissed the claimant for the incident on 12 September 2022 alone, as he believed the claimant made a predetermined decision to confront the security guard and believed the 'vitriolic nature of the way he spoke' to the security guard was unacceptable. He had a note of an interview with the security guard who described being sworn at and belittled by the claimant who said he had picked sides, described him as being a £3.50 an hour security guard, that it was not nice and did not make him feel good about himself; he thought the claimant meant he was a nothing, he meant nothing and he was insulting him as a security guard as though it was nothing and he was nothing. Although Mr Parker was aware that the claimant was a trade union representative, that had nothing to do with his decision to dismiss him which was in relation to his behaviour towards the 2 managers and the security guard.

16 In his witness statement for this hearing the claimant accepted that he had sworn at the security guard and told him he should stick to his role as a £3.50 an hour security guard. He had admitted this in his fact finding meeting with the respondent on 22 September 2022 and also that his remark had probably upset him.

17 During the course of the hearing it became apparent that Mr Lynch was submitting that the claimant was taking part in trade union activities on 8 and 12 September 2022. In his claim form the claimant had said that the activities in question had been on 26 and 31 August 2022 when he had been acting as picket supervisor and that he was likely to act as such a supervisor on future dates. The respondent accepted in its response that the claimant took part in trade union activities as a picket supervisor. If however the claimant's position is as set out Lynch's submissions there is a factual dispute between the parties about whether and if so when the claimant was taking part in trade union activities.

18 In his witness statement the claimant said that the respondent's handling of the disciplinary process and the evidence was so perverse that it was reasonable to conclude that 'other motives were at play... specifically that I was a representative and they wanted to be rid of me '.Mr Lynch submitted that a tribunal at a final hearing would find that the respondent's handling of the evidence and the procedure was so flawed and perverse that it was inconceivable a tribunal would find the dismissal fair and, if that was so, the question arose as to whether the genuine reason for the dismissal was the claimant's misconduct. He submitted the way the process was conducted 'was so far outside the norm for handling genuine conduct matters that no other rational explanation is credible other than that the principal reason for dismissing the C - - was his participation in rtrade (sic) union activities at an appropriate time'. He invited me to draw inferences that the reason or principal reason for the dismissal was trade union membership /participation in trade union activities from the incidences of alleged unfairness (in relation to evidence and procedure and the shortcomings of Mr Parker) and the (bitter) industrial dispute as well as what the CWU contended was a policy of targeting members and representatives unfairly with conduct allegations, first suspending then dismissing. When I pressed him about this he pointed to the material in the bundle about how CWU members and /or trade union representatives were currently being disciplined or dismissed which he said demonstrated there was such a policy on the part of the respondent.

19 The material to which Mr Lynch referred me was a letter from the Acting Deputy General Secretary (Postal) to CWU branches dated 22 December 2022 in which it was alleged there was such a policy, referring to 120 suspended employees, a letter from him to the respondent about this dated 20 December 2022 asking such cases to be jointly reviewed and a schedule of such employees from various CWU branches in the Midlands, which included the claimant.

Conclusions

20 Interim relief is an emergency interlocutory remedy available not to claimants who say they have been unfairly dismissed but only to those who say the reason (or principle reason) for their dismissal is within one of a number of proscribed reasons which include trade union membership or having taken part or proposing to take part in trade union activities at an appropriate time.

21 I conclude that the claimant has failed to discharge the burden on him. On the material before me I cannot say that it is likely that at the final hearing a tribunal will resolve the factual dispute identified at paragraph 17 above in the claimant's favour.

22 As far as the reason for dismissal is concerned, what has been put before me by Mr Lynch sets out the grounds that the claimant will rely on at his appeal against dismissal. He told me in his poral submissions that no explanation is possible for the alleged incidents of unfairness other than the reason or principal reason being trade union membership or participation in trade union activities. I do not agree. On the material before me it seems perfectly possible that a tribunal could find that Mr Parker dealt with the evidence and the process as alleged by the claimant and that the respondent shows that his reason for dismissal (as decision maker) was related to the claimant's conduct. The material about the respondent's policy appeared to me to be self serving and ,without more , of little evidential assistance to a tribunal at the final hearing. The strike (bitter as it might be) appears to me simply part of the factual matrix against which the allegations of misconduct will fall to be considered by the tribunal.

23 On the material before me I cannot say that it is likely that at the final hearing a tribunal will conclude the reason or principal reason is either that the claiamnt was, or proposed to become, a member of an independent trade union, or that he had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time.

Employment Judge Woffenden

Date 13th January 2023