



EMPLOYMENT TRIBUNALS

Claimant: Mr Eric Bonsu
Respondent: Royal Mail Group Ltd (International Distribution Services)
Heard at: East London Hearing Centre
On: 3 May 2023
Before: Employment Judge Palmer

Representation

Claimant: Not present or represented
Respondent: Mr C Milsom (Counsel)

JUDGMENT ON APPLICATION FOR INTERIM RELIEF

1. The Claimant's application for interim relief is not upheld.
2. No order is made for reinstatement, re-engagement or continuation of the contract of employment.

REASONS

Introduction

1. This hearing was listed to determine the Claimant's application for interim relief and, if appropriate, to order the Claimant's reinstatement or re-engagement or to grant a continuation of contract order pending the hearing of the complaint of unfair dismissal.
2. The Claimant was a delivery driver for Royal Mail Group Limited from January 2010 until his dismissal on 20 March 2023. He worked at the Respondent's Parcelforce Worldwide London East centre, which operates as part of the Respondent's International Distribution Services. The Claimant was also a local representative of the Communication Workers' Union.

Claims and Issues

3. The Claimant has brought a claim against the Respondent alleging that his dismissal was unfair. This includes claims that:
 - The dismissal was an “ordinary” unfair dismissal for the purposes of Section 98 of the Employment Rights Act 1996 (“ERA”);
 - The dismissal was an automatically unfair dismissal for the purposes of Part X ERA, because the sole or principal reason for the dismissal was on grounds related to union membership or activities, under Section 152 of the Trade Union & Labour Relations (Consolidation) Act 1992 (“TULCRA”).
4. The Claimant notified ACAS of his prospective claim against the Respondent on 22 March 2023 and the Early Conciliation Certificate was issued on the same date.
5. On the same date, 22 March 2023, the Claimant presented his claim to the Tribunal. He alleges not merely “ordinary” unfair dismissal, but also, to quote from the claim form, the Claimant says, “*I feel that being a Union representative contributed to my unfair dismissal*”.
6. The Claimant’s unfair dismissal claim was accepted by the Tribunal on 20 April and the Respondent was notified that any response to the claim needed to be provided to the Tribunal by 18 May 2023. A copy of the Respondent’s response was provided to me during the hearing although it is not clear whether this has yet been formally received or processed by the Tribunal.
7. At part 2 of his claim form, the Claimant provided his Early Conciliation certificate number. However, he also ticked the box saying, “*My claim consists only of a complaint of unfair dismissal which contains an application for interim relief*”. As a consequence of this, the Tribunal accepted a claim for interim relief and this hearing was listed, by notice of hearing dated 20 April 2023, to consider the application for interim relief.
8. No other information was provided by the Claimant in support of his application for interim relief.
9. Where an allegation is made that a dismissal falls within the protection of Section 152 TULRCA, the relevant provisions in respect of an application for interim relief are set out at Sections 161 to 166 TULCRA.
10. Section 163 TULCRA governs the procedure for hearing an application and making an order. At subsection 1 it says that:

“(1) If on hearing an application for interim relief it appears to the tribunal that it is likely that on determining the complaint to which the application relates that it will find that, by virtue of section 152, the complainant has been unfairly dismissed, the following provisions apply”.
11. Subsections (2) to (6) then go on to set out the procedure by which, if the first hurdle is passed, the tribunal will go on to consider whether to exercise its powers to make an order for reinstatement, re-engagement or the

continuation of the contract of employment until the claim has been determined or settled.

12. The issues for me to determine at this hearing were therefore:
 - 12.1 Is it likely that on determining the Claimant's complaint, the tribunal will find that the Claimant was unfairly dismissed for the purposes of Section 152?;
 - 12.2 If so, what if any order should be made pending the Final Hearing (reinstatement, re-engagement, continuation of contract, or no order)?.

Documents and application by Claimant to postpone the hearing

13. The Respondent is represented at this hearing by Mr Milsom of Counsel, attended by his instructing solicitors.
14. At around 9 am on 2 May (the day before this hearing), the Respondent's representatives emailed the Tribunal providing documents to be considered at the hearing, which include the Response (I am not certain whether this has been submitted to the Tribunal yet as it is not due until 18 May 2023) and a bundle of documents running to 209 pages.
15. That documentation was also provided to the Claimant who was copied in when it was sent to the Tribunal.
16. The Claimant did not attend the hearing today. In response to being sent the documentation by the Respondent yesterday, he emailed the Respondent and the Tribunal saying:

"Thank you for you [sic] correspondence ... concerning the hearing scheduled for May 03, 2023 at 10 am. Due to the CWU and Royal mail group processes which have not been exhausted and are still ongoing, I would like the ... hearing date of the case number referenced above to be rescheduled to a future date".
17. I considered that the Claimant's email could be regarded as amounting to an application to postpone the hearing of the application for interim relief. I therefore decided to treat it as such an application to postpone.
18. Under Section 162 TULRCA, any application for interim relief is to be promptly determined, and Section 162(4) specifies that "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".
19. I do not consider that the reasons put forward in the Claimant's email amount to special circumstances. In effect, he is asking for the application to be deferred while he seeks to persuade the Respondent to allow his internal appeal and reverse its decision to dismiss him. Interim relief is an emergency remedy which could have exactly the same effect (or at least result in full pay

being restored), albeit on a holding basis pending the determination of the unfair dismissal claim in this tribunal.

20. Deferring consideration because the Respondent is in the process of hearing an appeal which would (if upheld) achieve the same outcome as the Claimant has applied for at this hearing does not, in my view, constitute a special reason for not proceeding today.
21. If the Claimant's internal appeal is successful, the interim relief application would no longer be necessary, but that is not a reason not to hear it promptly. If the Claimant's internal appeal is unsuccessful, the test which the tribunal has to apply when considering this application would be exactly the same as it is today and the fact that there had been an unsuccessful appeal would make no material difference that I can see to the Claimant's prospects of success on this application.
22. I see nothing to suggest that proceeding to hear this application is likely to make any material difference to the outcome of the internal appeal process so as to cause the Claimant any prejudice in that process.
23. Having decided that the application should proceed today, I considered that it was appropriate to proceed in the absence of the Claimant without making any further attempts to contact him. I noted that he was sent notice of this hearing on 20 April 2023, and is clearly aware that the hearing is happening, because he was corresponding with both the Respondent and the tribunal in relation to this hearing only yesterday. He could have attended in person to make an application to postpone but chose not to do so.
24. The Respondent has attended through Counsel (accompanied by his instructing solicitor) and is ready to proceed. I consider that it is not fair to the Respondent, or an appropriate or proportionate use of the Tribunal's resources, to delay the start of the hearing to wait to see whether the Claimant wishes to attend in circumstances where he has chosen not to do so.
25. I am also mindful that this is a hearing in which I do not consider oral evidence, and the issue which I must decide is to be resolved on the basis of my impression of the prospects of success of the Claimant's claim of automatically unfair dismissal, based on the material before me. In those circumstances I do not consider that the Claimant will be significantly prejudiced by the hearing proceeding in his absence.
26. I therefore decided that it was appropriate to proceed to deal with the application, taking the Claimant's case at its highest as it appears from the face of the documentation before me, having particular regard to what the Claimant says in the claim form.
27. I then proceeded to consider the application itself. I had regard to all the material placed before me, consisting of:
 - 27.1 The claim form (ET1) and response (ET3);
 - 27.2 The bundle of documents submitted on behalf of the Respondent;
 - 27.3 The written submissions of Mr Milsom, supplemented by oral submissions at the hearing.

The Law

28. Section 152 TULRCA makes it clear that dismissal on grounds related to union membership or activities will be regarded as automatically unfair. This arises in circumstances which include where the reason or, if there is more than one reason, the principal reason for the dismissal is that the employee
- 28.1 Was... a member of an independent trade union;
 - 28.2 Had taken part... in the activities of an independent trade union at an appropriate time.
29. Section 161 TULRCA goes on to say that an employee who presents a complaint of unfair dismissal alleging that the dismissal is unfair by virtue of section 152 may apply for interim relief.
30. Section 163(1) says that “If on hearing an application for interim relief it appears to the tribunal that it is likely that on determining the complaint to which the application relates that it will find that, by virtue of section 152, the complainant has been unfairly dismissed”, interim relief is available under the process set out in section 163(2) to (6).
31. I am mindful that the case law in relation to these provisions and the equivalent provisions under Section 129 ERA, which has been helpfully summarised by Mr Milsom in his written submissions, makes it clear that, for reasons of public policy, the bar is set comparatively high in the case of applications for interim relief.
32. The test is whether the automatically unfair dismissal claim has “a pretty good chance of success” at the eventual hearing (*Taplin v C Shippan Ltd* [1978] ICR 1068). This is significantly higher than a “more likely than not” test. It means “something nearer to certainty than mere probability” (*Ministry of Justice v Sarfaz* [2011] IRLR 562).
33. The burden is on the applicant to establish that relatively high degree of likelihood. That test of “pretty good chance of success” applies to each matter or element which the Claimant would be required to establish in order to succeed with his claim of automatically unfair dismissal at the eventual hearing.
34. I am also required to bear in mind that this is an emergency jurisdiction and I am not making findings of fact. I am expected to be careful to avoid making findings which might tie the hands of the tribunal ultimately charged with the final determination of the merits of this claim. My task is one of forming an overall impression of the Claimant’s likelihood of success in his claim of automatically unfair dismissal, based on the material which is before me at this stage.

Conclusion

35. It does not appear to be in dispute in this case that the claim arises in the context of industrial action which was taking place in Autumn 2022 at the site where the Claimant worked. The Claimant was a local union representative and participated in that industrial action.

36. The Claimant's position in relation to the dismissal is set out in his claim form. In brief terms, he says that on 13 October 2022 he approached a colleague Mr Sangha, who was a member of the CWU, to "*ask him to support his colleagues on the picket line*". As the Claimant says in his claim form, such a request is one which he would be entitled to make. He says that Mr Sangha agreed to his request to join the picket line and went in to the office to collect his belongings. He says that Mr Sangha was then approached by a manager asking why he was going home, and decided to stay at work. The Claimant says that he continued to work normally until 17 October 2022 when he was suspended pending investigation of an allegation of gross misconduct in relation to his conversation with Mr Sangha. He was eventually dismissed for gross misconduct with effect from 20 March 2023, following a disciplinary hearing on 19 March 2023. The Claimant says that he believes that the fact that he was a union representative contributed to his dismissal. He points in particular to the fact that "*to this date there has been no complaint in writing or verbal from Mr Sangha to identify the alleged breach of the 2016 picket guidelines*".
37. The Respondent provides a detailed response to the allegation in the ET3. It explains that on 13 October 2022 the Claimant's colleague Mr Sangha informed a manager that the Claimant had just had a conversation with him in which the Claimant accused him of being a "traitor" for not joining the picket line. The Respondent says that another colleague also reported to the same manager that the Claimant had recently called him a traitor on a previous day of industrial action at the site. The Respondent's case is that it considered that this language could be regarded as abusive behaviour towards a colleague. It says that it suspended the Claimant as a precautionary measure pending investigation. It held an informal meeting and a fact-finding meeting with the Claimant, and interviewed various other individuals (including Mr Sangha and the manager who spoke to both Mr Sangha and the other colleague). The Respondent then convened a disciplinary hearing which the Claimant attended with a representative.
38. The Respondent says that at the disciplinary hearing the Claimant denied having called either of his colleagues a "traitor". He denied any conversation with the other colleague along those lines. In respect of Mr Sangha, he accepted that he had had a conversation asking Mr Sangha to participate in industrial action. However he denied using the alleged word "traitor", which he accepted would have been abusive if used. He said that his conversation must have been misconstrued by Mr Sangha. Having considered the matter, the manager holding the disciplinary hearing decided that the alleged abusive language had occurred on two separate occasions, that this was intimidating and inappropriate, and that this amounted to abusive behaviour towards colleagues, which was considered to fall within the examples of potential gross misconduct set out in the Respondent's conduct policy. The decision was therefore taken by the Respondent to dismiss the Claimant on grounds of gross misconduct. The Respondent asserts that this was a fair dismissal by reason of misconduct, and denies that the dismissal was because of the Claimant's union membership or activity.
39. As I said earlier in relation to my discussion of the law, any final determination of the reason, or principal reason, for the dismissal will lie with the tribunal at the Final Hearing and is not for me to resolve. The tribunal which hears the

claim will have the benefit of hearing cross-examination of the dismissing officer and considering all the evidence before considering whether or not it accepts the Respondent's assertion that the dismissal was on grounds of misconduct.

40. I have to look at the material before me and form an impression of whether it appears to me that the Claimant has, or does not have, a "pretty good chance of success" in establishing that the (principal) reason for the dismissal was in fact his union membership or activity, so as to bring himself within the sphere of protection of Section 152 of TULCR.
41. I see considerable force in Mr Milsom's argument that, taken at its highest, the Claimant's assertion that the dismissal was automatically unfair is based on a feeling, or belief, on his part that the dismissal was "contributed to" by his union membership. That, in my view, falls some way short of an assertion that the union membership or activity was the sole or principal reason for the dismissal. It does not provide me with any assistance in relation to what if any evidence in this case might point to a conclusion that the real reason was something different.
42. The material which has been put before me today does, on the face of it, support the Respondent's assertion that the reason had to do with the language used by the Claimant towards his colleagues, rather than the fact of him asking those colleagues to support the industrial action. I have seen documentation issued by the Respondent to managers in August and September 2022, in which amongst other things it is set out that "*No-one should use foul or abusive language or act in a threatening manner. This applies at all times including during strikes and on picket lines... If anyone does, remind them of the standards and behaviours expected of us all. If a rep ignores the standards, consult your line manager... If appropriate, the conduct code should be used in the normal way. Don't go looking to catch anyone out, but don't turn a blind eye. We have said we are going to protect colleagues from intimidation and harassment and that is what we must do*".
43. Similarly, in a document apparently circulated on 7 September 2022, reminding employees of the expected standards of behaviour during periods of industrial action, there is a reminder that "*threats of any kind are not acceptable*" and that employees should "*Exercise your right to strike without risking disciplinary action*".
44. At this stage, I do not have information about the extent to which, if at all, these documents were disseminated to the workforce at the site where the Claimant worked. However the material does appear on the face of it to provide some information about the approach management were being encouraged to take during the industrial action, namely that abusive and threatening behaviour would be addressed, where appropriate, with disciplinary action under the normal disciplinary rules and procedures and in the normal way.
45. I have also seen documentation in relation to the Respondent's normal disciplinary rules and procedures, which makes it clear that abusive and threatening behaviour towards colleagues may result in disciplinary action, potentially for gross misconduct.

46. I have also seen documentation in relation to the disciplinary investigation and disciplinary hearing which were conducted in the Claimant's case. There is documentation, which will need to be evaluated by the tribunal considering this case at the Final Hearing, showing that evidence was gathered in relation to allegations of the Claimant having called colleagues "traitors" on two occasions during the industrial action. This was the allegation which was levelled at the Claimant during the disciplinary proceedings and which was cited as the reason for dismissing him. I see nothing on the face of the documents to undermine that reason.
47. I also note two further points made by Mr Milsom which appear to me to have considerable force, namely:
- 47.1 That the internal rights of appeal afforded to the Claimant as a union representative are in fact more favourable than those afforded to other employees. His appeal is to be heard under a separate appeal procedure, by a specially convened panel which includes a union representative. This appears to be a procedural safeguard implemented by the Respondent which is intended to ensure that inappropriate considerations related to union activity do not form part of the reason for dismissal.
- 47.2 That the Claimant had been a union representative for a considerable period of time prior to the alleged incidents. I have not seen any evidence suggesting, for example, that any prior issues of concern had arisen on either side. Neither, on the face of the documents, does there appear to be any basis for considering or alleging that the Claimant's union activities were regarded as troublesome by local management, or as a basis on which management were looking for an opportunity to dismiss him.
48. I note that in his claim form, the Claimant has asserted that "*to this date there has been no complaint in writing or verbal from Mr Sangha to identify the alleged breach of the 2016 picket guidelines*". I do note that, when interviewed during the disciplinary investigation, Mr Sangha said that the comment about being a traitor had been made to him "in passing" and in a jovial manner and that he was not upset by it. There is also, however, a statement from the manager who spoke to him at the time saying that Mr Sangha was upset at the time he reported the matter verbally. Similarly, the other colleague alleged to be a victim of the alleged abuse said that he was not unduly concerned at the comment made.
49. These are all matters which will no doubt be explored and considered in cross-examination of the dismissing manager at the Final Hearing, and the tribunal will be able to form a definitive view about whether they undermine the purported reason for dismissal advanced by the Respondent. That task does not form part of my function today.
50. However, even if at this stage these matters could be regarded as undermining the Respondent's purported reason for dismissal to a degree, they do not in my view reach the relatively high bar of showing that the Claimant has a "pretty good chance" of succeeding in establishing at the Final Hearing that the actual, or principal, reason for his dismissal was his

membership of a union or participation in union activities, rather than the reason put forward by the Respondent.

51. I consider that there does appear to be cogent evidence, at this preliminary stage and for today's purposes, to support the purported reason for the dismissal advanced by the Respondent, namely misconduct.
52. I further consider that there is no cogent evidence on the face of the documents to support the Claimant's belief that the real reason was (or was principally) his union membership or activities. One falls back, then on the coincidence of timing or context, namely that the alleged behaviour took place in the context of union activities (industrial action) for which the Claimant was seeking to elicit the support of his colleagues.
53. However, the test which the Claimant would need to establish at the Final Hearing is not a "but for" test, in other words whether "but for" his union activities he would not have been dismissed. For today's purposes, I need to be satisfied that there is a pretty good chance that the Claimant would be able to establish at the Final Hearing that the main or principal reason in the mind of those dismissing him was his union membership or activity.
54. In my view, on the basis of the material currently before me and the limited exercise of impressionistic assessment which I am carrying out today, such a "pretty good chance" does not exist in this case. That is not to say that the Claimant may not ultimately succeed in establishing his case on the balance of probabilities before the tribunal at the Final Hearing in due course. However, in my judgment he does not get over the higher threshold which applies when considering an application for interim relief.
55. For the purposes of Section 163, it therefore does not appear to me to be likely that on determining this claim, the tribunal will find at the Final Hearing that the Claimant has been unfairly dismissed by virtue of Section 152 TULRCA.
56. It follows from that decision that it is not appropriate for me to proceed to consider the question of what if any interim relief should be ordered in this case. Accordingly, I dismiss the Claimant's application and make no order for interim relief.

Employment Judge Palmer
Date: 3 May 2023