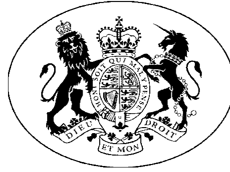

EMPLOYMENT TRIBUNALS

Claimant: Mr R Mapembe

Respondent: Slough Borough Council

UPON a reconsideration of the judgment dated 19 September 2023 on the Tribunal's own initiative under rule 73 of the Employment Tribunals Rules of Procedure 2013, and without a hearing,

JUDGMENT

1. The claimant's application for variation of an interim relief order under s131 Employment Rights Act 1996 is rejected.

REASONS

Summary

1. The claimant made an application to vary an order made for interim relief pending determination of his claim of automatic unfair dismissal, pursuant to s131 of the Employment Rights Act 1996 ("ERA").

2. Mr Meiring (counsel) represented the claimant, and Mr Bishop (counsel) represented the respondent. I am grateful to both counsel for the manner in which they conducted themselves during the hearing, and for their helpful skeleton arguments provided in advance of the hearing.

3. I had in front of me two bundles: one from the claimant of 102 pages (references herein "C/X"), and one from the respondent of 811 pages (references herein "R/X"). The difference in bundle size and the lack of one agreed bundle is due to the difference in opinion between the parties as to the relevant test for the Tribunal under s131 ERA. I address this below.

4. I also had the benefit of the claimant's witness statement that had been produced for a preliminary hearing that took place on 24 June 2022: I had no updated statement for the index hearing. Furthermore, I was provided with a statement from Mr Savio DeCruz, Associate Director of the respondent, that had also been prepared for the 24 June 2022 hearing.

5. Prior to dealing with the substantive application, a preliminary issue arose as to the precise test to be applied by the Tribunal when considering an application to vary under s131 ERA:

   5.1. The claimant's position was that the test is limited to whether there had been a relevant change in circumstances since the original order was made, as under s131(1) ERA;

   5.2. The respondent's position was that a relevant change of circumstances is the first limb of the test. If it is found that there has been a relevant change of circumstances, the Tribunal need then follow s131(2), which requires the Tribunal to go back to the test under s129(1) and consider whether it is likely that the claimant's claim will succeed (in other words, the Tribunal is required to review the merits).

6. On this point, at the hearing, I determined that the claimant's interpretation was correct. I went on to consider the application for variation, and rejected it on the basis that there had been no relevant change of circumstances, and so the test under s131(1) was not met.

7. The respondent asked for written reasons for my decision on the preliminary issue. In approaching that exercise, and on revisiting the legislation, I have formed the view that my decision on that preliminary issue was wrong.

8. I have therefore reconsidered that decision, with full reasons for both my decision on the preliminary issue, and the substantive application, set out below. Evidently, given my findings of fact in this case, my reconsideration of the preliminary issue does not alter my decision on the substantive application. The ultimate judgment therefore remains unchanged.

9. At the hearing, I heard full submissions from both parties on the preliminary issue and have (in short) changed my mind. I consider that, having made full submissions, both parties have had a fair opportunity to address me on the issue of the relevant test under s131 ERA. Therefore, I did not consider it necessary to ask for further representations or to list a hearing to deal with the reconsideration on my own initiative. This is particularly so given, as mentioned above, the issue I have reconsidered does not alter the overall judgment on the application for variation of the interim relief order.

Preliminary issue – oral evidence

10. A matter arose as to whether it was intended that the claimant give evidence at today's hearing. As above, no new statement had been produced.

11. It was Mr Bishop's position that, if the claimant wished to adduce evidence, it needed to be done by way of a witness statement.

12. Mt Meiring submitted that either the claimant should be allowed to give oral evidence and be cross-examined, or the matter should proceed on submissions only.

13. I determined that the most appropriate and fair way to proceed was to hear submissions only, for the following reasons:

    13.1. Although the claimant could have given oral evidence today, and although Mr Bishop is more than capable of cross-examining without the benefit of a witness statement, there was still the risk of some prejudice to the respondent. It may be the case, for example, that the claimant gave evidence to which the respondent could have provided rebuttal evidence with advance warning but is not in a position to produce today, or that Mr Bishop is unable to gain instructions on in time to deal with the issue today;

    13.2. Furthermore, the claimant produced the statement for the hearing on 24 June 2022 without an order from the Tribunal. He was therefore capable of producing an updated statement if he wished to rely on any new witness evidence today.

14. We therefore proceeded by way of submissions alone.

Law

15. The law regarding interim relief applications is set out at ss128-131:

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(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.

…

129 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(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

…

131 Application for variation or revocation of order

(1) At any time between –
a. The making of an order under section 129, and
b. The determination or settlement of the complaint,
The employer or the employee may apply to an employment tribunal for the revocation or variation of the order on the ground of a relevant change of circumstances since the making of the order.
(2) Sections 128 and 129 apply in relation to such an application as in relation to an original application for interim relief except that, in the case of an application by the employer, section 128(4) has effect with the substitution of a reference to the employee for the reference to the employer.

16. Although there is case law regarding the initial application for interim relief under ss128 and 129 ERA, there is no authority on the test for variation or revocation of such orders under s131 ERA that either counsel or I could find. I am essentially therefore asked to interpret the meaning of the primary legislation set out in s131 ERA.

Submissions on relevant test under s131 ERA

17. It was argued for the claimant that the respondent's interpretation of s131(2) ERA would make a non-sense of s131(1) ERA, as it would mean that any disgruntled respondent would be able to seek a variation by arguing the same point on the likelihood of the substantive claim succeeding over and over again. Mr Meiring stated that this would not be in line with the overriding objective, and would also go against the need for there to be finality in litigation, as no interim relief order would ever be capable of being final.

18. Mr Meiring further submitted that the respondent's interpretation would be to ignore s131(1) and the requirement for a change in circumstances, as all that would be needed was a change in opinion of the Tribunal as to the merits of the substantive claim.

19. Moreover, it was averred on behalf of the claimant that the respondent's interpretation was overly literal, and that s129 ERA only applied to the "hearing of an employee's application for interim relief" not an application to vary an interim relief order.

20. Mr Bishop, for the respondent, argued that the inclusion of s131(2) ERA must be taken on face value, and must mean that the test under s129(1) should be read into s131 ERA. Otherwise, there is no purpose to s131(2) ERA.

21. The respondent submitted that this was not an interpretation that would mean an unhappy respondent could apply for variation constantly. Mr Bishop's point was that, in this case, the respondent's case on the substantive claim had never been considered; the claimant's interpretation of s131 is too narrow and asks the Tribunal to ignore the evidence that is now available in the run up to the final hearing.

Conclusion on relevant test under s131 ERA

22. At the hearing, I agreed with the claimant's interpretation of s131 ERA. However, on further thought, I consider the respondent's interpretation to be correct.

23. Reading through s129 ERA, the test set out in that section for the making of an interim relief order is whether it is likely that the underlying claim will succeed.

24. Taking an objective, plain English interpretation of the wording of s131(2) combined with s129, s129 must then be read as meaning:

> "This section applies where, on hearing *an employee's or employer's application for variation of an order 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...that the reason (or if more than one the principal reason) for the dismissal is one of those specified in section ... 103A". - *emphasis added*

25. The natural reading of s131 and s129 together provides for a two-stage test for variation of an interim relief order:

    25.1. That there be a change in circumstances; and, if so

    25.2. That the merits of the underlying claim be reviewed to consider whether, in light of that change in circumstances, that claim is still likely to succeed.

26. To find that the only test the Tribunal need consider is one of a change of circumstances is to ignore s131(2), and to make it redundant. The legislature must have intended s131(2) to add something to the test for a variation of an interim relief order. It is not clear what other meaning s131(2) could have, other than the meaning set out above.

27. This interpretation does not open the floodgates for an upset party to apply for variation again and again, as there is still the pre-requisite of there being a relevant change in circumstances.

28. Moreover, the fact that there is *any* ability to apply to vary an interim relief order indicates to me that the legislature did not envisage parties being stuck with a decision and an order made at the very beginning of litigation, if there was such a change that needed to be reflected by variation of the order. Therefore, the claimant's argument for finality of litigation fails even on his own interpretation of the legislation.

29. Litigation in the Tribunal can take months, and years. It cannot be the case that the Tribunal is barred from reviewing the merits (provided that there has initially been shown to be a change in circumstances). Merits of a claim evolve over time: it must be that the Tribunal (in limited circumstances) is permitted to review the merits and an interim relief order, over the period of lengthy legislation.

30. What amounts to a change of circumstances is evidently a matter of fact for an individual Tribunal. I was not required to deal with the issue of whether (for example) the production of an ET3 is a sufficient change of circumstances to open the door for the Tribunal to review the merits of the

substantive claim. I make no comment as to whether production of a Response would be enough to meet the threshold for a change in circumstances under s131(1) ERA.

31. However, on pure interpretation of the legislation, I now consider that the interpretation placed on ss129 and 131 combined, must be as set out by the respondent.

Findings of fact

Background

32. The claimant worked for the respondent from 6 November 2017 to 26 May 2021 as a Senior Engineer.

33. The claimant presented his claim form on 19 May 2021. Within that claim form, the claimant brought a claim that he was automatically unfairly dismissed pursuant to s103A ERA. On 23 May 2021, the claimant made an application for interim relief under s128(1)(a)(i) ERA.

34. The application for interim relief was heard by Employment Judge Gumbiti-Zimuto on 24 June 2021. At that point, the respondent was not in attendance at the hearing. The Judge granted the application, ordering a continuation of the claimant's contract of employment from the date of termination of employment (26 May 2021) until the determination or settlement of the complaint - [C/1].

35. On 16 September 2021, the respondent applied to the Tribunal for the following - [C/5]:

    35.1. An extension of time for presenting its ET3;
    35.2. Revocation of the interim relief order due to a change in circumstances, that being that the respondent now had sight of the claim form and other Tribunal documents; and,
    35.3. Reconsideration of the judgment awarding interim relief.

36. It was the respondent's position that the first it had heard of the claim against it was on 1 July 2021, when it had received a Notice of Hearing for the hearing that had already taken place on 24 June 2021.

37. The respondent's draft response was sent to the Tribunal on 1 October 2021, with an application to extend time.

38. By judgment dated 5 November 2021, and sent to the parties on 18 November 2021, the respondent was granted permission to present its response out of time. The applications for revocation and reconsideration were rejected. The respondent was told that, if it wished to make an application for revocation on any other basis, it was to do so within 14 days – [C/6].

39. By application dated 29 November 2021, and following the above-

mentioned Judgment, the respondent sought the revocation of the order granting interim relief, as there had been a change of circumstances - [C/12]. This change in circumstances can be summarised as being that the respondent was now in a position to provide its defence, which had not been considered at the original application hearing.

40. A preliminary hearing was listed for 24 June 2022 to determine the respondent's application for revocation. By that date, the respondent had added a further ground to its application. Namely that there had been a further change in circumstances, as the claimant was by that stage unfit to work, and so would only have been in receipt of statutory sick pay, if he were still employed by the respondent. The matter was again heard by Employment Judge Gumbiti-Zimuto.

41. In his Judgment and Reasons, the Judge set out the three grounds relied upon by the respondent – [C/19] paragraphs 3-5:

    41.1. "[The respondent was] 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 of circumstances" (Ground 1);

    41.2. "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" (Ground 2);

    41.3. "That [the claimant] 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" (Ground 3).

42. Employment Judge Gumbiti-Zimuto rejected the respondent's arguments on Grounds 1 and 2. He did however find that the claimant was not fit to work between 24 June 2021 and 24 June 2022. The consequence of this finding was that the Judge considered that the claimant should have been paid in accordance with the respondent's sick pay policy, as opposed to being on full pay, from 24 June 2021. The interim relief order was varied accordingly – [C/15].

Situation at the hearing today

43. The change of circumstances that the claimant seeks to demonstrate to the Tribunal today is that he is now capable of working, and so should be entitled to full pay under the interim relief order.

44. As mentioned above, I had no new statement from the claimant, simply the one that was prepared for the 24 June 2022 hearing. There was no order for a witness statement in advance of that hearing, and yet the claimant produced one. The claimant is therefore capable of providing a witness statement, without an order, when he considers it necessary. Had the claimant felt the need to give evidence, I find that he would have produced a new statement.

45. In terms of medical evidence, I had sight of a letter from the claimant's GP dated 8 November 2022 at [C/93] which tells me that the claimant

consulted with his GP on 20 September 2021 regarding stress and panic attacks, and was referred to talking therapies. He completed that treatment on 16 December 2021, with the therapist reporting that the claimant had overcome his difficulties. There is no evidence of any further consultations, and so no medical evidence to suggest that the claimant has been unfit to work.

46. Turning to the GP records following the effective date of termination:

    46.1. On 19 June 2021, the claimant's blood pressure was monitored - [C/95];
    46.2. On 20 September 2021, the claimant reported some health issues and was signposted to IAPT – [C/96];
    46.3. On 16 December 2021 – the claimant was seen by the psychological wellbeing practitioner. I have not had sight of any correspondence from that person - [C/97];
    46.4. On 16 June 2022, just before the hearing on 24 June 2022, there is an entry, but with no further information other than the claimant's medication details for his high blood pressure - [C/99];
    46.5. On 3 November 2022, the claimant wanted a fit note, stating that he was fit to work, as the respondent was suggesting that he was unfit - [C/100]. This appointment gave rise to the letter at [C/93].

47. Within the bundle there is also documentary evidence of job applications made by the claimant:

    47.1. At [C/29] there is a list of "applied jobs", presumably produced by the claimant (although there is no witness statement to explain this document);
    47.2. At [C/30] I have a print-out of a list of jobs for which the claimant is said to have applied. There is no reference to the claimant by name in this document, and no information about the dates on which either this document was produced or the job applications were made. I note that entries state, for example, "applied 6 days ago", but with no specific date;
    47.3. At [C/31], this again is a list that has presumably been produced by the claimant.

48. I find that the documents at [C/29-31] are of limited evidential value, as they are not supported by the applications themselves, and in any event do not shed light on whether the claimant was/is fit enough to work;

49. I accept Mr Bishop's point that these documents are self-serving; all they show is that the claimant made job applications in 2022 and 2023. They do not tell me whether or when the claimant was fit to work. I accept that at [C/29] there appears to be a gap from 25 April 2021 to 2 October 2022. However, given that this is just a list, without any supporting or corroborating evidence of the applications themselves, I place limited weight on this. All that this gap in dates shows me is that no job applications were made in this period.

50. At [C/77-92], I have seen documents showing engagement with the Department of Work and Pensions ("DWP") from 8 July 2022 to 20 May

2023. This evidence is of limited assistance as, once again, it does not go to the issue as to whether the claimant was fit to attend work, it simply shows that he was engaging with DWP.

51. I have considered the claimant's evidence within his witness statement from the 24 June 2022 hearing. Relevant to his fitness to work, he states the following:

> "the entire ordeal [at work] left me suffering from depression, anxiety and insomnia...
>
> ...after I was dismissed I started to have dark thoughts or suicidal ideation. My GP referred me to IAPT. I have been getting counselling and support. This is still ongoing. I believe I am making steady progress...Due to my poor mental health, I have to been unable to look for work. In this respect, my situation is the same as it was at the hearing in June 2021"

52. The claimant did not give oral evidence at the 24 June 2022 hearing, but was available at that hearing. Given that the above evidence was in his witness statement, produced voluntarily, I take it at face value as being the claimant's account of the year between June 2021 and June 2022.

Claimant's credibility

53. This is an appropriate juncture to mention the claimant's credibility. Mr Bishop asked me to find that the claimant's evidence to the Tribunal on 24 June 2022 was incredible, in light of what appeared to be a change in his (the claimant's) position for the purpose of the index application, in terms of his ability to work since June 2021.

54. I note that Mr Meiring was very careful in his submissions to me. Mr Bishop interpreted the claimant's case as being that he (the claimant) had been fit from June 2021 throughout the relevant chronology, other than 20 September 2021 to 16 December 2021. If this were the claimant's case, this would mean that his evidence on 24 June 2022 was incorrect, and Employment Judge Gumbiti-Zimuto's decision was based on incorrect evidence. However, Mr Meiring made it clear that this was not his position. His position, and the basis of his application today, was simply that the claimant was now fit to work.

55. I have heard no evidence from the claimant today, and therefore find that it would not be right or appropriate for me to make a finding that the claimant's evidence to the Tribunal on 24 June 2022 (or any part of his case) was incredible. I make no comment on the claimant's credibility.

Conclusions on the substantive application

56. I start from the finding of Employment Judge Gumbiti-Zimuto (by which I consider I am bound) that the claimant was unfit to work between 24 June 2021 and 24 June 2022.

57. I am not satisfied on the evidence before me that there has been a change of circumstances from that position.

58. The medical evidence shows no clear change. The only matter that the medical evidence proves is that the claimant had some intervention from IAPT in autumn/winter 2021; it really goes no further than that.

59. The job application evidence does nothing to support the submission that the claimant was fit to work; it simply shows, at its highest, that the claimant was able to fill in some application forms, and engage with DWP.

60. I have not heard evidence from the claimant on any change to his health since he presented his witness statement at the 24 June 2022 hearing. In that statement, the claimant's evidence is that, between June 2021 and June 2022, he had not been able to look for work and his mental health was poor throughout that period. On the back of that evidence, Employment Judge Gumbiti-Zimuto made the finding of fact that the claimant was unfit to work from June 2021 to the date of that judgment.

61. This is the claimant's application, he bears the burden of proof. As I have set out, the status quo is the finding of fact made by Employment Judge Gumbiti-Zimuto that the claimant was not fit to work from 24 June 2021. There is nothing in the evidence that satisfies me that this position has changed.

62. I therefore reject the claimant's application. The interim relief order will remain as it was varied on 24 June 2022. In practice, this means that the claimant will get zero contractual pay until final determination or settlement of the claim, but he will continue to receive pension payments as a result of the order of 24 June 2021.

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Employment Judge **Shastri-Hurst**

Date: 13 October 2023

JUDGMENT SENT TO THE PARTIES ON
19 October 2023

FOR THE TRIBUNAL OFFICE