EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr A M King	AND	Locked in a Room (Bristol) Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol ON 13 November 2023

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: Mr N Toms (counsel)
For the Respondent: Ms L Veale (counsel)

ORDER

The Claimant's application for interim relief is dismissed.

REASONS

1. In this case the Claimant, Mr King, claims that he has been unfairly dismissed, and that the principal reason was that he had taken part in Trade Union Activities and other matters under s. 152 of the Trade Union & Labour Relations (Consolidation) Act 1992. He also brought related detriment claims and claims for notice and holiday pay. These reasons relate to the Claimant's application for interim relief. The Respondent contends that the reason for the dismissal was misconduct, and that the dismissal was fair. It opposes the interim relief application.

Background

2. The Claimant was dismissed on 2 October 2023. He presented his claim on 8 October 2023 and applied for interim relief. He notified ACAS of the dispute on 5 October 2023 and the certificate was issued on 6 October 2023.

3. When the claim was presented, it was not accompanied by a certificate as required by s. 161(3) TULR(C)A. The Claimant was unable to attach it to the portal and sent it separately on 8 October 2023 to the Tribunal, it was therefore received in time.

4. The application was listed to be heard on 27 October 2023, however due to the Respondent being given insufficient notice of the hearing it was postponed and relisted.

5. I was provided with witness statements from the Claimant and Mr McMullen on his behalf, and from Ms Tinsley and Mr Pfaff on behalf of the Respondent. I was also provided with a bundle of documents of 183 pages, including the witness statements, any reference in these reasons in square brackets is a reference to a page number in the bundle. I also considered the claim form and documents in the bundle as referred to by the parties. I took into account the submissions made by the parties and the authorities provided. I did not make any findings of fact because this is not required by the statutory test.

6. The grounds of claim attached to the claim form consisted of 35 paragraphs. The Claimant commenced employment with the Respondent in November 2021 and did not have 2 years' service at the date of his dismissal. It detailed that the Claimant was a member of the Industrial Workers of the World Trade Union and had been secretary since March 2023 and he also acted as a Trade Union Representative. In essence it was alleged:

    a. The Claimant was dismissed by letter dated 2 October 2023 with immediate effect, in respect of gross misconduct.

    b. The Claimant had been involved in seeking union recognition which had been refused in July 2023.

    c. In August 2023, the Respondent conducted an investigation in relation to TripAdvisor reviews, which it understood had not been uploaded by customers. Staff were interviewed on 17 August 2023 and the Claimant attended those interviews and sought to act as a trade union representative. On 18 August 2023, the Claimant was interviewed as part of the Trip Adviser investigation. He alleges that at the meeting he was given a note which said that if he answered no comment he would be dismissed for gross misconduct with immediate effect.

    d. On 12 September 2023, the Claimant attended a disciplinary meeting, which broke down and was postponed. The Claimant attended a further disciplinary meeting on 26 September 2023.

7. The allegations considered at the disciplinary meeting included:

    a. Alleged disruptive and inappropriate conduct during the Company's initial investigation and the first disciplinary hearing
    b. An alleged invitation of third party to attend his investigation interview
    c. Dishonesty in respect of the allegations raised.

8. The Respondent had not filed its response at the time of the application.

Submissions on behalf of the Claimant

9. It was submitted that union activities were at the heart of the case, which were being conducted at an appropriate time and they were:

    a. Leading a Trade Union recognition campaign;
    b. Attending the Slug and Lettuce on 17 August as a union representative in order to represent or safeguard the interests of TU members being interviewed there;
    c. Accessing and relying on support his union at his disciplinary hearing on 12 September 2023.

10. The background was relevant, in that a voluntary union recognition application had been refused in robust terms.

11. On 17 August he had said he was there in a union capacity. The disciplinary policy was relied upon which said that the procedure comprised of 2 phases, investigation and discipline. And "At all stages, you will have the right to be accompanied by … a trade union representative." He had gone in his Hi-Viz jacket to represent members. He denied aiming to disrupt confidential interviews. No details were given to him about hostile or unnecessarily aggressive behaviour. He was asked if he had asked his colleagues to raise concerns about lack of trade union representation. It was not confidential because it was in a pub, albeit cornered off. The handwritten note [p36] showed why representation might be wanted by employees.

12. He was asked about bringing a soft toy to his meeting on 18 August, with IWW on it. It was said that Tinsley's reasoning did not come from the evidence. The conclusions about dishonesty stemmed from bizarre reasons. He was asked about the presence of a third party on 18 August and had not communicated with him and the Respondent suspected he was involved with the trade union.

13. He was asked, at the disciplinary hearing, about questions asked by his representative on 12 September, it was suggested that his representative was asking questions and it was not the Claimant who was being disruptive.

14. The essence is that these matters showed that union activity was at the heart of the allegations and was therefore the reason for dismissal and he therefore had a pretty good chance of success.

Submissions on behalf of the Respondent

15. The meetings were at the pub because of the sound recording system at the Respondent premises meant conversations would not be confidential. They were held in a cordoned off area of the pub so they were private. Ms Crawford had to re-schedule 2 staff meetings on 17 August, because of the Claimant's presence and behaviour. He was not attending as a representative but to disrupt the confidential meetings and prevent them taking place, which was not union activity. In any event his actions were wholly unreasonable and took them outside of union activities.

16. On 12 September, the Claimant was obstructing the disciplinary process and he and his representative were shouting over the hearing manager. The Claimant was trying to change the nature of the meeting to one about a collective grievance. This was not about what his representative was doing but the Claimant's conduct at the meeting.

17. It was found that the Claimant's account had been untruthful in respect of his arrival at the Slug and lettuce and that no other employees were about. The Respondent says one of the employees greeted him on arrival. Further the Claimant had not gone around the corner, but occupied the booth next to where the interviews were taking place. Further he had not been truthful when he said that Ms Crawford had been amused by the soft toy and it was been found she was concerned it contained a recording device. The Claimant maintained that he did not know the 'third person' at the meeting on 18 August, but when he read out the handwritten note that person busily wrote down what was being said.

18. The main reason was dishonesty and not union activities, which was the main factor in Ms Tinsley's mind. I was reminded that the reason for dismissal is the set of facts known to the dismissing manager (Abernethy v Mott Hay and Anderson [1974] IRLR 213).

The law

19. Section 152 of the Trade Union & Labour Relations (Consolidation) Act 1992 ("TULRCA") provides:

"(1)For purposes of [Part X of the Employment Rights Act 1996] (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—
(a)was, or proposed to become, a member of an independent trade union, . . .
(b)had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, . . .
(ba)had made use, or proposed to make use, of trade union services at an appropriate time,
…

(2)In subsection [(1)]"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 [or (as the case may be) make use of trade union services];
and for this purpose "working hours", in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work.

[(2A)In this section—
(a)"trade union services" means services made available to the employee by an independent trade union by virtue of his membership of the union, and
(b)references to an employee's "making use" of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

(2B)Where the reason or one of the reasons for the dismissal was that an independent trade union (with or without the employee's consent) raised a matter on behalf of the employee as one of its members, the reason shall be treated as falling within subsection (1)(ba).]

20. Section 161 of TULRCA provides:

161 Application for interim relief

(1) An employee who presents a complaint of unfair dismissal alleging that the dismissal is unfair by virtue of section 152 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) In a case where the employee relies on [section 152(1)(a), (b) or (ba), or on section 152(1)(bb) otherwise than in relation to an offer made in contravention of section 145A(1)(d),] the tribunal shall not entertain an application for interim relief unless before the end of that period there is also so presented a certificate in writing signed by an authorised official of the independent trade union of which the employee was or proposed to become a member stating—
(a) that on the date of the dismissal the employee was or proposed to become a member of the union, and
(b) that there appear to be reasonable grounds for supposing that the reason for his dismissal (or, if more than one, the principal reason) was one alleged in the complaint.

(4) An "authorised official" means an official of the trade union authorised by it to act for the purposes of this section.

(5) A document purporting to be an authorisation of an official by a trade union to act for the purposes of this section and to be signed on behalf of the union shall be taken to be such an authorisation unless the contrary is proved; and a document purporting to be a certificate signed by such an official shall be taken to be signed by him unless the contrary is proved.

(6) For the purposes of subsection (3) the date of dismissal shall be taken to be—
(a) where the employee's contract of employment was terminated by notice (whether given by his employer or by him), the date on which the employer's notice was given, and
(b) in any other case, the effective date of termination.

21. The role of the Employment Tribunal, in considering an application for interim relief, requires the Tribunal to carry out an "expeditious summary assessment" as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party. This necessarily involves a far less detailed scrutiny of the parties' cases than will ultimately be undertaken at the full hearing (London City Airport Ltd v Chacko [2013] IRLR 610). The statutory test does not require the tribunal to make any findings of fact (Ryb v Nomura International plc ET 3202174/09). It must make a decision as to the likelihood of the Claimant's success at a full hearing of the unfair dismissal complaint based on the material before it, which will usually consist of the parties' pleadings, the witness statements and any other relevant documentary evidence. Rule 95 states that the Tribunal shall not hear evidence unless it directs otherwise and therefore the default position is that there will be no oral evidence.

22. The basic task and function is to make "a broad assessment on the material available to try to give the tribunal a feel and to make a prediction about what is likely to happen at the eventual hearing before a full tribunal." When considering the "likelihood" of the Claimant succeeding at tribunal, the correct test to be applied is whether he or she has a "pretty good chance of success" at the full hearing (Taplin v C Shippam Ltd [1978] ICR 1068). The EAT, in Taplin, confirmed that the burden of proof in an interim relief application was intended to be greater than that at the full hearing (where the tribunal need only be satisfied on the "balance of probabilities" that the Claimant has made out his or her case being the "51% or better" test. The EAT ruled out alternative tests such as a "real possibility" or "reasonable prospect" of success, or a 51% or better chance of success. This approach has been endorsed by the EAT in Dandpat v University of Bath and anor UKEAT 0408/09 and in Chacko. In Ministry of Justice v Sarfraz [2011] IRLR 562, the EAT held that "likely" was nearer to certainty than mere probability.

23. The Claimant had less than 2 years' service and therefore for the purposes of his automatically unfair dismissal claim, the burden is on him to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was one of the matters in s. 152(1) TULR(C)A.

24. The EAT in both, Dixon and anor v West Ella Developments Ltd *1978 ICR 856, EAT*, and Chant v Aquaboats Ltd *1978 ICR 643, EAT*, said that while the term 'union activity' must not be narrowly interpreted, the activity must still have a connection with the union. As the EAT observed in the *Dixon* case, 'it is important to note that the words are "the activities of an independent trade union," not "trade union activities." In other words, the words "trade union" are not being used in an adjectival sense; what is being looked for are the activities of a trade union.'

25. I was referred to various cases as to when conduct stepped outside of trade union activities. The most recent exposition of the law, was by the Court of Appeal in Morris v Metrolink Ratp Dev Ltd [2018] IRLR 853 at paragraphs 13 to 20. Underhill LJ referred to Lyon v St James Press Ltd [1976] ICR 413 in which Phillips J said at p418 "*The marks within which the decision must be made are clear: the special protection afforded by paragraph 6(4) to trade union activities must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally, the right to take part in the affairs of a trade union must not be obstructed by too easily finding acts done for that purpose to be a justification for dismissal. The marks are easy to describe, but the channel between them is difficult to navigate."* Phillips J also said at p419, *"We do not say that every such act is protected. For example, wholly unreasonable, extraneous or malicious*

acts done in support of trade union activities might be a ground for dismissal which would not be unfair."

26. Underhill LJ also reviewed Mihaj v Sodexho Ltd [2014] ICR D25, UKEAT/0139/14, in which Slade J said at paragraph 17 that the Bass Taverns case established that: "*the way in which trade union activities are carried out is immaterial to the decision as to whether they are in fact trade union activities unless the way in which they are carried out is such as to be dishonest, in bad faith, or carried out for some other organisation or cause so as to remove them from the scope of what can properly be called trade union activities.*

27. At paragraphs 19 and 20 in Morris Underhill LJ said:

"19. In my view the principle underlying these cases is—as so often—most clearly stated by Phillips J. If Slade J in Mihaj v Sodexho Ltd intended to suggest that there was some difference between his approach in Lyon and that taken by this court in Bass Taverns, I would respectfully disagree. At the risk of simply repeating less succinctly what Phillips J says in the passages which I have quoted, there will be cases where it is right to treat a dismissal for things done or said by an employee in the course of trade union activities as falling outside the terms of section 152(1) , because the things in question can fairly be regarded as a distinct reason for the dismissal notwithstanding the context in which they occurred; and his reference to acts which are "wholly unreasonable, extraneous or malicious" seems to me to capture the flavour of the distinction. That precise phraseology should not be treated as definitive (any more than Slade J's formulation in Mihaj); but the point which it encapsulates is that in such a case it can fairly be said that it is not the trade union activities themselves which are the (principal) reason for the dismissal but some feature of them which is genuinely separable. Azam v Ofqual is a good illustration of such a case: the employee's deliberate breach of confidence could fairly and sensibly be treated as a reason for dismissal distinct from the fact that it occurred in the context of trade union activities.

20. However, as Phillips J points out, this distinction should not be allowed to undermine the important protection which the statute is intended to confer. An employee should not lose that protection simply because something which he or she does in the course of trade union activities could be said to be ill-judged or unreasonable (NB that Phillips J, I am sure deliberately, says "wholly unreasonable"). Bass Taverns Ltd v Burgess [1995] IRLR 596 is a good illustration of this: the employee was held to fall within the scope of the section even though he had gone "over the top"."

Conclusions

28. I took into account the fact that none of the evidence had been tested.

29. The burden of proof will be on the Claimant to prove that that the principal reason for his dismissal was one of the matters in s. 152(1)(a), (b), or (ba). That is a relevant factor to take into account in assessing whether he has a pretty good chance of success.

30. A significant part of the decision to dismiss was that it had been found that the Claimant had been dishonest. There are disputes of fact in relation to whether the Claimant was or was not dishonest and it will be a matter for the Tribunal at the final hearing whether it was the belief of Ms Tinsley that the Claimant had been dishonest and whether the s. 152 matters had been the motivating factor for them. It is relevant that Ms Tinsley was not an employee of the Respondent and it is asserted that she was impartial and there was no direct evidence before me to the contrary. She will say that she found that none of the allegations related to union activities and when investigating she found no evidence that his union membership or role was relevant to the disciplinary outcome. I was not satisfied that the Claimant had a pretty good chance of establishing that it was his union membership or activities that was the principal reason for Ms Tinsley's conclusion, rather than the dishonesty she found had occurred.

31. There is a significant issue as to whether or not the Claimant was undertaking union activities at an appropriate time on 17 August 2023. There is not statutory right to be accompanied by a Trade Union Representative at an investigatory meeting. The interviews being undertaken appear to be to find out what had been happening and were not investigating any specific individual at that time. Although the Claimant has a reasonable argument that this was part of the disciplinary procedure, evidence will need to be heard as to what the nature of the interviews was and whether they fell within the scope of the Respondent's disciplinary procedure. Given the factual issues I was not satisfied that the Claimant established that he had a pretty good chance that he was undertaking union activity at that time.

32. Further there is also the significant question of whether the Claimant's actions and behaviour on 17 August 2023 were such that they fell outside of the scope of the legislation. There is a dispute of fact as to what occurred and the level and nature as to what happened. It was appreciated that protection should not be lost simply because the employee, in the course of union activities, did something ill-judged or unreasonable, however it also cannot be used a cloak or excuse for conduct which would normally justify dismissal. There are a large number of variables which are present in this case. Although the Claimant has some prospects of success, on the basis of the dispute of fact, as to the nature and extent as to what occurred, it is not possible to say that he has pretty good chances of success.

33. Similarly there is factual dispute as to the nature of the interview on 12 September 2023 and this comes to down to interpretation of documentation and the hearing of oral evidence. At this stage such an interpretation is evenly balanced.

34. In relation to other aspects relied upon under s. 152, findings of fact will need to be made as to whether the reason for dismissal was his membership of the union and/or that he was using Mr McMullen's services. This is against a context of the nature of behaviour and allegations of dishonesty. The burden of proof is on the Claimant to prove the reason for dismissal. In the circumstances given, the factual and legal disputes, I was not satisfied that he has a pretty good chance of success.

35. Accordingly, the application for interim relief failed.

Employment Judge Bax
Date: 13 November 2023

Judgment sent to Parties: 05 December 2023

FOR THE TRIBUNAL OFFICE