



EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant
MR R OTHER**

AND

**Respondent
LIDL GREAT BRITAIN LTD**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT: BRISTOL ON: 14TH AUGUST 2024
(VIA VHS VIDEO)**

**EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)**

APPEARANCES:-

FOR THE CLAIMANT:- NO ATTENDANCE

FOR THE RESPONDENT:- MR T PERRY (COUNSEL)

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's application for interim relief pursuant s128 Employment Rights Act 1996 is dismissed.

Reasons

1. By a claim form submitted on 26th June 2024, arising from the claimant's dismissal on 22nd June 2024, the claimant brings claims of unfair dismissal and/or automatic

- unfair dismissal (S100 / 103A ERA 1996) asserting that the reason (or principal reason) for his dismissal was that he had raised health and safety concerns with his employer within the meaning of s100 ERA 1996 and/or made public interest disclosures within the meaning of s103A.
2. Claimant- The claimant did not attend the hearing. The Notice of Hearing was sent to the email address he supplied on the ET1. He was clearly aware of the hearing as the respondent's solicitor confirmed when sending the bundle yesterday that the claimant had no further documents he wished to add. The tribunal emailed the claimant (he has not supplied a telephone number) shortly after 10.00 o'clock but he had not replied by 10.30, and not contacted the tribunal to indicate that he had any difficulty joining. In the circumstances, and given that this was an application for interim relief which must be decided promptly, and is to be assessed on the basis of the documentary material before the tribunal, I decided we should proceed with the hearing.
 3. The application before me is for an order for interim relief in the making of a continuation of a contract of employment order (s129 ERA 1996). The respondent resists the application on the basis that it is not "likely" (within the meaning of s129) that the tribunal which determines the complaint will make a finding that the claimant was automatically unfairly dismissed pursuant to s100 and/or 103A ERA 1996.
 4. I have read the bundle of documents for the hearing, and the Respondent's Draft Grounds of Resistance.
 5. Rule 95 (ET Rules 2013) provides that the tribunal shall not hear oral evidence unless it directs otherwise, and the directions for the hearing provided that no evidence would be heard. This reflects the fact that the tribunal is not at the preliminary stage making findings of fact, but making a summary determination of the likelihood of success on the basis of the information before it. The tribunal's task is to make a summary assessment of the written material, and determine whether it is "likely" (see below) that the claimant will succeed in his claim for automatic unfair dismissal, and if so whether it is appropriate to grant interim relief in the form of a continuation of contract order. Accordingly the "facts" as set out below are not findings of fact but a recitation of the events as described by the parties in the pleadings and documents which I have taken into account in coming to my conclusions . I have not heard any evidence and am not making or purporting to make any finding of fact binding on any future tribunal.
 6. The claimant was employed as a warehouse operative from 28th September 2016 until 22nd June 2024 within the warehouse of the Respondent's Southampton Distribution Centre. His job include moving stock and/or recycling around the warehouse using an Order Picker Truck (OPT). It is not in dispute that the claimant was dismissed on 22nd June 2024, on the respondent's case, in relation to events that occurred on 17th May 2022.
 7. The claimant's case, as set out in his ET1/Claim form is that he was dismissed for raising health and safety concerns (s100 ERA) and/or whistleblowing (s103A ERA

- 1996) . He contends that “ *My job was to flag up drivers who pushed two pallets rather than just one which hurt an employee’s legs on one occasion.*”, but that when he “*...reported driver’s registration numbers in to the Goods Out Office they put them in the bin.*” He alleges that this has happened often in the ten years he has been employed by the respondent. Specifically in relation to the incident on 17th May 2022 he alleges “*..I was spat at in the face by a driver I was reporting for breaching H and S (pushing 2 trucks) ... I was pushed in the chest also..*”
8. In the internal documents he refers to victimisation for having raised the issue in relation to drivers pushing two pallets, and for the purposes of this hearing (and in the absence of the claimant) I will assume that those are the health and safety /public interest disclosures relied on as the reason or principal reason for dismissal.
 9. The respondent disputes this for the reasons set out below.

Law

10. “Likely” - The tribunal can only make one of the orders set out in section 129 if it holds that it is “likely” that the tribunal which determines the complaint will find (in this case) that the reason or principal reason fell within s100 and/or s103A. “Likely” in the context of s129 means that there is “a good chance” that the tribunal will find in the claimant’s favour; and a good chance means something more than the balance of probabilities, indeed a significantly higher likelihood (*Ministry of Justice v Sarfraz [2011] IRLR 562 per Underhill P*). That test applies to all aspects of the claimant’s claim that may be in issue.
11. The respondent submits that there are a number of fundamental aspects of the claim which are in dispute, and that on the information before the tribunal there is not a good chance that the final tribunal will find in the claimant’s favour in respect of any of them. They are:
 - i) Health and safety – The claimant had not been designated to carry out health and safety activities (s100(1)(a); and was not a health and safety representative (s100(1)(b); but there were five health and safety representatives (s100 (1) (c). He cannot therefore bring himself within any of those subsections.
 - ii) On the evidence, which appears not to be in dispute, he did not leave or refuse to return to his place of work or take appropriate steps to protect himself or other persons because he reasonably perceived serious and imminent danger (s100(1)(d) and (e). He cannot therefore fall within those subsections either.
 - iii) As a result any claim based on s100 ERA 1996 is bound to fail, or at very least cannot be held to be likely to succeed as there is a genuine issue as to whether he can bring himself within the ambit of the section at all. .
 - iv) Protected Disclosures – The claimant does not set out in his claim form any specific details of any public interest disclosure; and it is not possible on the limited

information available to assess whether it is likely that he can establish whether he in fact made any.

- v) Reason or principal reason for dismissal- In any event the respondent submits that irrespective of the assessment of any health and safety/public interest disclosures, that the reason for the dismissal was gross misconduct which is supported by witness evidence. There is nothing, at least at present, to indicate that the reason given was not the true reason, and the claimant cannot show that it is likely that the reason for dismissal will not be accepted by the tribunal.
12. Reason for Dismissal – The respondent contends (in summary) that the claimant was dismissed for gross misconduct in displaying aggressive and threatening behaviour including shouting and swearing at a driver; using his OPT as a force to prevent movement of the driver; and driving the OPT into a barrier. He was dismissed for gross misconduct having admitted to swearing at the driver; admitted to not being able control himself that day and admitted using his OPT as a weapon/barrier to prevent the driver from moving forward, there being in any event four witnesses to the claimant repeatedly driving his OPT into the pallets being pushed by the driver.
13. The respondent submits that, as is set out in the bundle, it carried out a fair procedure and that the conclusion that the claimant had committed gross misconduct was at very least a reasonable conclusion in the light of the eyewitness evidence and his own admissions.

Conclusions

14. In my judgment the respondent is correct that there is a genuine issue as to whether the claimant can bring himself within either s 100 and/or s103A; whilst it is obviously possible that the claimant will succeed in respect of one or both, I am not satisfied that at this stage it is possible to hold that it is “likely” (as defined above).
15. Secondly I accept that there is a genuine issue as to the reason for dismissal and that at present the respondents explanation is supported by a body of documentary evidence. It cannot in my view be held at this stage to be likely that at the final hearing that the tribunal will conclude that this was not the genuine reason for dismissal.
16. It is not my task to determine whether the claimant will succeed or fail on any of his contentions on the balance of probabilities, but whether on the basis of the information before me the higher standard applicable to interim relief applications has been reached. As in my judgement it has not the claimant’s application for interim relief is dismissed.
17. Directions – Further directions will be given on receipt of the respondent’s ET3/Grounds of Resistance.

**Employment Judge Cadney
Dated: 14th August 2024**

**Judgment entered into Register
And copies sent to the parties on**

4 September 2024

**Jade Lobb
for Secretary of the Tribunals**