EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100621/2025

Held in Glasgow on 24 April 2025

Employment Judge E Mannion

Mrs G McVicar	**Claimant** **Represented by:** **David Hay KC,** **Counsel**
Glasgow City Council	**Respondent** **Represented by:** **Frances Ross,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the claimant's application for interim relief is refused.

REASONS

Introduction

1. This is a claim for automatic unfair dismissal which asserts that the claimant was dismissed for trade union activities. This is contested by the respondent who state that they dismissed the claimant fairly for gross misconduct.

2. At the time of lodging her claim on 9 April 2025 the claimant made an application for interim relief. A hearing to consider this application was

scheduled and notice of hearing dated 11 April was served on the respondent. Given the short window between serving the notice of hearing and ET1 on the respondent and today's hearing, an ET3 response has not yet been lodged which is understandable in the circumstances.

3. Both parties brought with them a bundle of documents on which they were relying as well as relevant authorities. It is appreciated that in interim applications such as this one, a huge amount of preparatory work needs to be done in a very short space of time and I am grateful to the representatives before me and their instructing solicitors for undertaking this so diligently.

4. The claimant prepared an affidavit to supplement the ET1 and paper apart. The respondent prepared a witness statement from Mr Chris Cowan, dismissing officer. Rule 94 of the Employment Tribunal Procedure Rules 2024 states that the Tribunal "must not hear oral evidence" in an interim relief application unless there is a direction to do so. Neither party made an application for oral evidence. I explained to the parties that I would read these documents and consider them but that they were not viewed as sworn evidence per se, rather they would have the same relevance and weight as a paper apart to an ET1 or ET3. There was no difficulty in this.

5. I also explained to the parties that at this early stage in proceedings I would not be making any findings of fact. Both sides in their submissions brought me through the series of events which culminated in the claimant's dismissal and I was referred to relevant documents in the bundles prepared. For the avoidance of doubt, any reference to the narrative or documentation in this judgment is simply a re-statement of the position as set out by the parties. It is not to be taken as a finding of fact. That is the role of the Tribunal at the final hearing after evidence is heard.

Relevant law

6. Section 161 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") provides that an employee may make an application for interim

relief where they allege their dismissal is due to any of the prohibited grounds as set out in Section 152.

7. Section 152(1)(b) of the 1992 Act provides that a dismissal will be automatically unfair if the reason or principal reason for the dismissal was that the employee had taken part or proposed to take part in activities of an independent trade union at an appropriate time.

8. Section 161(2) of the 1992 Act provides that an application for interim relief should be presented along with an ET1 by the end of seven days immediately following the effective date of termination.

9. Section 161(3) of the 1992 Act provides that where the employee asserts that their dismissal was because of participation in trade union activities, the employee must also produce a certificate from an authorised trade union official. This certificate must be in writing, signed by an authorised trade union official of the independent trade union of which the employee was a member, state that at the time of dismissal the employee was a member of the union and that there appear to be reasonable grounds for supposing that the reason or principal reason for dismissal was as alleged in the ET1 complaint.

10. The test when determining whether an interim relief application should be granted was established in **Taplin v C Shippam Ltd 1978 ICR 1068 EAT** and is whether the claimant has a "pretty good chance of success" at the final hearing. This is a higher bar than a "real possibility" or "reasonable prospect of success" or a 51% or better chance of success. This test has since been endorsed in **Dandpat v University of Bath and another EAT 0408/09**. The burden of proof sits with the claimant in making this application. It is a higher burden than that at a final hearing where the Tribunal applies the balance of probabilities.

11. The EAT in **Al Qasimi v Robinson EAT/0283/17** confirmed that the approach the Tribunal should take in deciding an interim relief application is "to make as good an assessment as it felt able…..to form a view as to how the matter looked, as to whether the claimant had a pretty good chance and was likely to

make out her case". The Tribunal should avoid where possible findings of fact which might tie the hands of the future Tribunal who will hear the matter in full.

Submissions

12. Both representative made eloquent and detailed submissions. I do not intend to set these out here and have referred to these in part below. Both submissions were considered in full in coming to this decision. Any submission not explicitly referred to has still been considered by the Tribunal.

Decision

13. It was not in dispute that the claimant's application for interim relief was made within the required seven day window after her dismissal.

14. It was also not in dispute that her application was accompanied by a relevant certificate from a trade union official.

15. The outcome sought by the claimant was reinstatement and this was acceptable to the respondent

16. The narrative as set out by the parties is as follows. The claimant was employed by the respondent as a social care worker and for the last six or so years has been acting as the GMB convenor meaning that she does not undertake the duties and responsibilities of a social care worker. In January 2024, the claimant lodged a collective grievance on behalf of her members in respect of planned organisational change within a division of the social work department. This grievance was not upheld and reasons for this set out by the respondent by way of letter dated 15 April 2024. The claimant and another GMB official, Mr John Slaven spoke to members about potentially balloting for industrial action. The claimant perceived that management within the social work department and HR were hostile to her and the GMB union. On 14 May 2024, the GMB members within that division agreed that they would ballot for industrial action. The potential for industrial action was known to the respondent and discussed by the claimant and HR. On 9 May 2024, the claimant received an email with a spreadsheet attached, to her respondent

email account from another respondent employee who is a GMB official. The claimant was expecting to receive details of GMB members and their availability for a meeting. Due to an error, the attached spreadsheet contained sensitive personal data of service users. The claimant converted this spreadsheet to PDF format and sent it to her GMB email address which was her usual practice. She reviewed it later that evening and realising it was not the correct information, she deleted it. Sending this email externally triggered the respondent's Data Loss Prevention monitoring system. The claimant was suspended on 16 May 2024 to allow an investigation into the allegation of a significant data breach. An investigation followed and the matter proceeded to a disciplinary hearing. The claimant began a period of sickness absence due to work related stress before this hearing could take place. Ultimately the disciplinary hearing did not take place until 26 March 2025. Discussions around what reasonable adjustments could be made to this hearing were proposed but could not be agreed. The disciplinary hearing went ahead in the claimant's absence on 26 March. Mr Chris Cowan came to the decision to dismiss and set out his detailed reasoning in his letter dated 3 April 2025.

17. Mr Hay submitted that his application for interim relief has two strand or limbs. The first is that the activities for which the claimant was dismissed come under the protection of Section 152 as they are trade union activities. The second strand was that there was animus from the respondent towards the claimant because she had taken part in trade union activities in the months prior to the start of the disciplinary process and this takes her under the protection of Section 152.

18. On the first limb, Mr Hay submitted that the conduct for which the claimant was dismissed, that is emailing the spreadsheet of information to her external email address, was a trade union activity and that the considerations of confidentiality are not weighty enough to separate the activity from the conduct itself. This was disputed by Miss Ross who submitted that the claimant's actions amounted to gross misconduct and not a trade union activity.

19. I was brought to **Morris v Metrolink Ratp Dev Ltd [2018] EWCA Civ 1358** by Mr Hay and **Azam v Ofqual UKEAT/0407/14/JOJ** by Miss Ross. Both cases concerned a claim for automatic unfair dismissal under Section 152(1) on the basis that the claimant took part in activities of an independent trade union. Both cases also dealt with confidential information albeit with differing facts and circumstances. Neither case was on all fours with the case before us.

20. In **Morris**, the claimant was given a copy of a manager's diary which contained adverse comments about a number of employees who were the subject of a redundancy consultation. This diary was copied without the manager's knowledge or authorisation. The claimant informed HR of the diary and his concern that this manager was involved in the redundancy scoring when he should not have been. He was dismissed for storing and sharing private and confidential information. In **Azam** during negotiations on pay and grading, the respondent shared a confidential spreadsheet with the claimant which contained details of old and new grades. She was then dismissed for sharing this information with her members.

21. The claimants in both cases claimed that they were taking part in trade union activities and such their dismissal was automatically unfair. The EAT in **Azam** and the Court of Appeal in **Morris** considered whether the conduct which resulted in dismissal amounted to trade union activities thus bringing these dismissals within the ambit of Section 152. As the cases had differing outcomes – with the conduct falling outwith trade union activities in **Azam** and falling within trade union activities in **Morris** – it is understood why the parties referred to these particular cases.

22. However, on the whole I do not see that they necessarily bring me further than the finding of Philips J in **Lyon v St James Press Ltd [1976] ICR 413** (quoted in both **Morris** and **Azam**) where at page 418 he distinguished between a dismissal for carrying out trade union activities and a dismissal for conduct occurring in the context of such activities:

"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."

Page 419 also assists as it outlined such acts which would come outside of the protection of Section 152.

"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 a dismissal which would not be unfair."

23. It was Mr Hay's submission that the question is that of weight and gravity, that the conduct needs to be of substantial weight to take it outside of Section 152. He submitted that the real issue is that of culpability and that a mistake occurring in the context of trade union activities, which he stated was the case here, would not bring it outside of the ambit of trade union activities. He submitted that on the material available to the respondent, there was no suggestion that the gravity of the misconduct was anything like the gravity necessary to lose the protection of Section 152.

24. Mr Hay brought me to a number of documents to illustrate that the claimant in sending the spreadsheet to her external email was not engaged in culpable conduct and that there was insufficient information before the respondent at the time of dismissal to suggest this. Amongst other documents, I was brought to statements made by the claimant during the disciplinary investigation [pages 49-58] which set out the context in which the spreadsheet was received, why it was then sent to her external GMB address and that the GMB address it was sent it is hers rather than a generic address. I was also brought statements by Dr Meechan, the respondent's DPO [pages 74 – 78 claimant bundle] which covered the breach itself and statements from Mr McCallum [pages 79- 81 claimant bundle] on converting a document to PDF. The

dismissal letter at page 94 – 97 claimant bundle was interrogated and it was submitted that there were deficiencies in Mr Cowan's reasoning, as the claimant had not been asked about the following: her intention to cover her tracks; whether the GMB email address was accessible by others; the extent of security of the GMB email server; and a commitment to upholding the standards of behaviour in respect of data protection in the future. It was submitted that a recommended adjustment, to provide the claimant with questions in advance of the disciplinary hearing, was not complied with.

25. Miss Ross brought me through the chronology of events and in particular the procedure followed by the respondent once it was alerted to the potential data breach by their Data Loss Prevention monitoring system through to the attempts to organise a disciplinary hearing complete with appropriate adjustments and the decision to dismiss. She submitted that the Court of Appeal's finding in **Morris** is that matters of ill judgement should not lose the protection of Section 152 and submitted that the claimant's conduct does not fall within the description of ill judgment. Rather, she described the claimant's actions as an unquestionable serious data protection breach which impacted the rights of those whose data was contained within the spreadsheet. She submitted that the claimant saved the spreadsheet, renamed it, converted it to a PDF and emailed it to an external email server without business need or authorisation. As the data controller, the respondent lost the control of this data. The respondent viewed it as such a clear breach that they self-reported it to the Information Commissioner's Office. Amongst other materials, I was brought to a copy of the spreadsheet [page 85 respondent bundle] with the data removed to understand the layout and headings contained therein and the breadth of sensitive personal data that was contained within that. It was Miss Ross' submission that it would have been immediately clear on opening that the spreadsheet did not contain information of GMB members. The claimant's actions were contrasted with **Morris** where the confidential information remained internal to the respondent at all times.

26. I am reminded that it is not my role to decide if in fact the claimant's conduct falls within a trade union activity, and so gains the protection of Section 152.

Instead, I need to consider if the claimant's case is likely to succeed and by likely, whether there is a pretty good chance of success. The burden of proof falls to the claimant. It was acknowledged by both parties that this is a high bar and that the remedy itself is draconian in nature.

27. Mr Hay set out a strong stateable case that the claimant's conduct was within the remit of Section 152. Equally, Miss Ross set out a strong statable case as to why the conduct falls outside of that protection. Both positions are supported by documentation. I considered very carefully the contemporaneous materials I was referred to and the submissions of the parties. However, I do not consider that the high bar for interim relief has been met by the claimant on this line of argument. In assessing the materials I conclude there are very real areas of both legal and factual dispute as to the nature of the conduct and whether it falls outside the ambit of Section 152. Both parties take the opposite view with Mr Hay asserting the respondent had ample evidence to conclude the gravity of the claimant's conduct keeps it within the protections of Section 152 and Miss Ross arguing that the claimant acted in a clear breach of the respondent's IT acceptable use policy and data protection policy. There is of course an absence of evidence to allow us to test these positions given the type of application before me. Despite a convincing argument by Mr Hay, in my assessment of the materials, there was nothing within them that allows me to conclude that the claimant's case has a pretty good chance of success. In my broad assessment, both positions have equal though differing strengths.

28. The second limb of the claimant's application was that the respondent had an animus against the claimant due to her role as GMB convenor and her recent action on behalf of members and so used the email as an opportunity to remove the claimant from the respondent organisation. I was referred to a series of events and conversations between the claimant and various management and HR employees of the respondent in the months prior to her suspension as set out in the claimant's affidavit. Mr Hay was relying on **Royal Mail Group Ltd v Jhuti 2020 ICR 731 SC**, accepting that this situation is not a classic **Jhuti** case and that the circumstances in **Jhuti** were extreme. In his

submission, he pointed to the fact that Mr McBride participated in the trade union discussions and was then involved in the decision to suspend the claimant and had a hand in progressing the matter to a disciplinary hearing. He also pointed to the statement of Mr Cowan in the dismissal letter that mitigating evidence was not provided by the claimant, failing to recognise the explanations provided by the claimant at investigation stage.

29. Miss Ross in her submission argued that the suggested animus does not take into account the fact that the respondent is a heavily unionised workplace. They recognise a large number of trade unions [pg 161 respondent bundle] and given the 30,000 strong workforce, there are frequently industrial relations and industrial action issues to deal with. I was referred to notices of industrial action at page 149 to 160 of the respondent bundle, two of which were served in the last six weeks. Raising a collective grievance and considering industrial action were described as "run of the mill" for the respondent. She submitted that Mr Cowan had a credible and reasonable basis to come to the decision he did. As decision maker, only his mindset is relevant. She submitted that the ratio in **Jhuti** did not apply in this situation as there was no manipulation of Mr Cowan by anyone else in the respondent organisation. Mr McBride as commissioning officer did not carry out the investigation nor did he make the decision to dismiss. Miss Ross was relying on **Kong v Gulf International Bank (UK) Ltd EA-2020-000357-JOJ**.

30. Again, it is not for me at this very early stage in proceedings to make a finding that there was in fact animus by the respondent against the claimant and that they dismissed her so that she could not continue to advocate for her members. Rather, I am required to consider the material before me and assess if this line of argument from the claimant is likely to succeed. Having carefully considered the submissions and the materials before me, I do not find that the high bar required for granting the interim relief application has been met. There are considerable areas of factual dispute, in particular the tension as alleged between the claimant and management in the months prior to her suspension versus the position that engaging with union officials, collective grievances and industrial action is run of the mill for the respondent.

So too the views and knowledge of Mr Cowan as dismissing officer and Mr McBride's role in the process. Both sides set out a stateable claim, supported by documentation. There was not however enough in the materials to conclude that the claimant has a pretty good chance of success in this area of the claim.

Date sent to parties 30 April 2025