2020/46

Interim relief granted for employee who used union to lodge grievance over coronavirus measures (UK)

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Summary

This case involved an employee who claimed that he was unfairly dismissed for using a trade union to bring a grievance over measures his employer had taken on account of the coronavirus pandemic. The Employment Tribunal (ET) found that he was likely to be able to show at the full hearing of the case that this was an automatically unfair dismissal on grounds of his trade union membership or activities. It awarded the remedy of 'interim relief', ordering the employer immediately to reinstate him pending the full trial of the matter. The ET's decision might signal a potential rise in claims for interim relief in future cases.

Legal background

Unfair dismissal in the UK is a statutory claim which focuses on the reasonableness of the employer's decision to dismiss and/or the procedure it followed in carrying out the dismissal. In most situations, in order to qualify for the right to claim unfair dismissal, an employee must show a period of two years' continuous employment.

In an unfair dismissal claim, it is for the employee to show that he or she was dismissed. If so, the ET will uphold the claim unless the employer can show an acceptable reason for the dismissal. The list of potentially fair reasons includes, for example, lack of capability, misconduct and redundancy. If the employer establishes one of these reasons, the ET goes on to determine whether the dismissal was fair or unfair, the key question being whether the employer acted reasonably in dismissing the employee for the reason in question.

Certain categories of dismissal are, however, *automatically* unfair and no qualifying period of employment is necessary to bring a claim. These types of cases include:

- dismissal on grounds of an employee's trade union membership or activities;
- health and safety-related dismissals; and
- dismissal for making a protected disclosure (i.e. whistleblowing).

In the above three categories of automatically unfair dismissal claims, the ET can grant an employee the powerful, temporary remedy of interim relief, which is not available for ordinary unfair dismissal claims. It enables the ET to order the employer to continue employing the employee (or if it is unwilling to do so, to continue paying their salary) until the case is finally determined.

Interim relief orders can only be granted if, following an 'expeditious summary assessment', it appears to the ET that it is 'likely' that the claimant will succeed in his or her claim. 'Likely' in this context means more than a reasonable prospect of success. There is no need to establish that the claimant will definitely be successful at the final hearing, but the ET should consider whether there is 'a pretty good chance' (*Taplin – v – C Shippam Ltd [1978] IRLR 450*).

Facts

In March 2020, in response to the Covid-19 pandemic, Premier Fruits proposed that its employees take a 25% pay cut. It was under the impression that all employees had agreed to this but, in May, a trade union called United Voices of the World lodged a grievance over it on behalf of an employee, Mr Morales. Premier Fruits met with Mr Morales two days later and, although what happened at that meeting is unclear, he was not invited to a staff meeting taking place the next day.

During the staff meeting, a manager of the company was recorded as saying that "one particular person in the firm has decided to go to a union" and that this individual was "not obviously backing the company". The manager said he was "extremely upset and disappointed over this one person who decided to go to the union" and that "you can probably all guess who the person is as he is not stood in the office at this moment in time".

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He concluded: "I will not be dictated to by a union. What they did to the firm 12 years ago was disgusting".
Shortly afterwards, Mr Morales was asked to sign a document confirming that he would agree to accept a pay reduction, but he refused. At a grievance meeting on 20 May, he complained about victimisation for bringing his grievance. After the initial grievance was rejected, he appealed that decision and in addition complained about having been subjected to detriment on the grounds of trade union membership or activity. Premier Fruits proceeded to dismiss Mr Morales on 9 July, stating as the reason that it was "unable to sustain your full salary".
Mr Morales brought proceedings in the ET for automatic unfair dismissal based on his trade union membership or activities. He also sought interim relief in the form of immediate reinstatement pending the final hearing.

Judgment

The ET, after its assessment of the evidence before it, found that Mr Morales was likely to be able to show that he was dismissed because he had sought the assistance of his union to bring his grievance. This was because the manager had clearly acted extremely adversely in response to Mr Morales' action in doing so. The ET accordingly ordered his reinstatement by the company pending a full hearing, with immediate effect.

Commentary

Interim relief has traditionally only rarely been sought, mainly due to the very limited circumstances in which it is available. The Covid-19 pandemic may, however, lead to a significant increase in applications given that it has led to an increase in trade union activities in response to employers' measures in response to the pandemic, whistleblowing over concerns about workplace safety, and health and safety activities.
The pandemic has also led to a significant and lengthy backlog in the ETs. This makes interim relief applications increasingly attractive to claimants as a means of securing financial security pending their full hearing, as applications must be heard 'as soon as practicable'. In Mr Morales' case, he was dismissed on 9 July and reinstated just over a month later, on 12 August.
There have been other recent cases in the UK illustrating the serious consequences for an employer of a manager displaying hostility towards trade unions – for example, *Cadent Gas Ltd – v – Singh* ([2019] UKEAT 0024/19), in which the Employment Appeal Tribunal upheld a finding that an employee was unfairly dismissed because the disciplinary process was manipulated by a manager who was motivated by dislike of the employee's union activities.
The crucial lesson for employers is that they should take steps to avoid the risk of claims relating to union activities or membership arising in the first place. For example, they should ensure that all stages of investigations and disciplinary proceedings are carried out fairly and that trade union members and officials are not treated differently on account of their status. This is particularly important as the pandemic has seen rising unionisation, reflecting an increased anxiety over workplace health and safety and the risk of redundancies.

Comments from other jurisdictions

Austria (Hans Georg Laimer and Lukas Wieser, Zeiler Floyd Zadkovich): This is a very interesting decision as also under Austrian law employees of employers, who permanently employ five or more employees, enjoy protection against termination of their employment in case of a termination on grounds of trade union membership or activities.
Austrian courts have so far only granted interim measures in cases where a right of the employee to be employed is given. However, such a right to be employed is only given in rare circumstances, such as in the case of a neurosurgeon or an orchestral musician, who otherwise would suffer a quality loss, according to Austrian case law.
As a general right to be employed does not exist under Austrian law, Austrian courts would not grant an interim relief solely on the grounds of trade union membership or activities.
However, in proceedings concerning the continued employment the first instance court decisions in favour of the employee are immediately enforceable, independent of an appeal by the employer. Nevertheless, also in this case the employee does not have a general right to be employed. Thus, in case no right to be employed is given, the employee is only entitled to the remuneration since the previous termination, which may have to be paid back in case the employer prevails and did not make use of the employee's services.

Germany (Daniel Zintl, Ji Hoon Bang, Luther Rechtsanwaltsgesellschaft mbH): Protection against dismissal in Germany is regulated by the Protection against Dismissal Act (*Kündigungsschutzgesetz*, 'KSchG'). In addition to bringing an action against unfair dismissal under the KSchG, employees also have the possibility of applying for a temporary injunction for continued employment. However, temporary injunctions are subject to strict requirements.
Pending the decision in the main proceedings on the validity of the termination, an interim injunction is only possible if:
a. the termination is obviously invalid, or

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b. special reasons are credibly presented by the plaintiff that justify changing the usually applicable balancing of interests between employer and employee to the detriment of the employer.

The employee must make really serious interferences into their personality right plausible, which make it appear necessary to change the balancing of interests made by the large senate (*Großer Senat*) before a decision of the labour court in the process of protection against dismissal. The fact of temporary non-employment alone or the preservation of their job are not sufficient for this purpose. Conceivable reasons could be the maintenance and safeguarding of the employee's qualifications or the continuation of vocational training. These are ideal and not material reasons. The latter cannot justify a temporary injunction. These cases will probably remain exceptions. However, this can only be enforced by temporary injunction prior to the judgment of the dismissal protection proceedings if the dismissal is obviously invalid.

After a first instance judgment has been made in favour of the employee, with which the employee has at the same time secured their (provisional) continued employment in accordance with the application, there is generally no longer any room for a temporary injunction, because they can now enforce their right with the provisionally enforceable judgment on continued employment.

These specific requirements are not met in the present case. The employer has claimed that the company was no longer able to sustain the employee's salary in full. Whether or not there are urgent operational reasons which would justify a dismissal under § 1 KschG cannot be decided without further ado and therefore remains subject to judicial review. Accordingly, under German law, the employee cannot assert their request for continued employment on the basis of the general claim to continued employment by interim injunction. The mere accusation of the employee, that the dismissal was a sanction due to their contacting the union, would not be sufficient to justify grounds for a temporary injunction after the employer has presented a (possible) reason for the termination.

Subject: Unfair Dismissal, Collective Labour Law

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