



The nuts and bolts of Employment Law during COVID-19: Interim Relief

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Outline

- Introduction to interim relief
- When is it available?
- Procedure
- Legal test
- Powers of the Tribunal
- Practical tips

Introduction

- A dismissed employee can apply to the Employment Tribunal to continue the contract of employment pending the final determination of the case, but only in certain types of unfair dismissal cases.
 - Sections 128-132 of the Employment Rights Act 1996 (ERA)
 - Sections 161-166 of the Trade Union and Labour Relations (Consolidation) Act 1996 (TULR(C)A)

- Such applications are rare. However, they are available in whistleblowing unfair dismissal cases – more such cases may be on the horizon with the return of employees to the workplace during COVID-19.

- The employee needs to act quickly, and in any event within 7 days of the effective date of termination. As most of these applications are backed by trade unions, those acting for claimants may wish to remind trade unions of the availability of this remedy.

Availability of interim relief

- Available only when the reason/principal reason for dismissal falls within the defined categories as provided by s128(1) ERA and s161(1) TULR(C)A:
 - Health and safety cases (s100(1)(a) and (b) ERA) – careful, no other health and safety cases
 - Working time workforce or representative cases (s101A(d) ERA)
 - Occupational pension scheme trustee (s102(1) ERA)
 - Collective redundancy or TUPE representative or candidate (s103 ERA)
 - Protected disclosure (s103A ERA)
 - Trade union recognition or collective bargaining (Schedule A1 para 161(2) TULR(C)A)
 - Blacklists (s104F ERA)
 - Grounds relating to trade union activities (s152 TULR(C)A)

Availability of interim relief – categories

s128(1) ERA

Health and safety cases s100(1)(a) and (b) ERA



Health and safety cases.

(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a)having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b)being a representative of workers on matters of health and safety at work or member of a safety committee—

(i)in accordance with arrangements established under or by virtue of any enactment, or

(ii)by reason of being acknowledged as such by the employer, the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee

Availability of interim relief – categories

s128(1)ERA

Working time cases s101A(1)(d) ERA



Working time cases.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(d)being—

- (i)**a representative of members of the workforce for the purposes of Schedule 1 to those Regulations, or
- (ii)**a candidate in an election in which any person elected will, on being elected, be such a representative, performed (or proposed to perform) any functions or activities as such a representative or candidate.

Availability of interim relief – categories

s128(1)ERA

Trustees of occupational pension schemes s102(1)

ERA



Trustees of occupational pension schemes.

(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that, being a trustee of a relevant occupational pension scheme which relates to his employment, the employee performed (or proposed to perform) any functions as such a trustee.

Availability of interim relief – categories s128(1)ERA Employee representatives s103 ERA



Employee representatives.

(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee, being—

(a)an employee representative for the purposes of Chapter II of Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 (redundancies) or regulations 9, 13 and 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006], or

(b)a candidate in an election in which any person elected will, on being elected, be such an employee representative,

performed (or proposed to perform) any functions or activities as such an employee representative or candidate.

(2)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee took part in an election of employee representatives for the purposes of Chapter II of Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 (redundancies) or regulations 9, 13 and 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006

Availability of interim relief – categories

s128 ERA
Protected disclosure s103A ERA



Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure

Availability of interim relief – categories

s128 ERA

Detriment Schedule 1A para 161(2) TULR(C)A



The reasons are that—

- (a)**the employee acted with a view to obtaining or preventing recognition of a union (or unions) by the employer under this Schedule;
- (b)**the employee indicated that he supported or did not support recognition of a union (or unions) by the employer under this Schedule;
- (c)**the employee acted with a view to securing or preventing the ending under this Schedule of bargaining arrangements;
- (d)**the employee indicated that he supported or did not support the ending under this Schedule of bargaining arrangements ;
- (e)**the employee influenced or sought to influence the way in which votes were to be cast by other workers in a ballot arranged under this Schedule;
- (f)**the employee influenced or sought to influence other workers to vote or to abstain from voting in such a ballot;
- (g)**the employee voted in such a ballot;
- (h)**the employee proposed to do, failed to do, or proposed to decline to do, any of the things referred to in paragraphs (a) to (g).

Availability of interim relief – categories

s128(1) ERA

Blacklist s104F ERA



(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal relates to a prohibited list, and either—

(a)the employer contravenes regulation 3 of the 2010 Regulations in relation to that prohibited list, or

(b)the employer—

(i)relies on information supplied by a person who contravenes that regulation in relation to that list, and

(ii)knows or ought reasonably to know that the information relied on is supplied in contravention of that regulation.

“the 2010 Regulations” means the Employment Relations Act 1999 (Blacklists) Regulations 2010

Availability of interim relief – categories

s161 TULR(C)A

Union membership or activities s152 TULR(C)A



(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,

(bb)had failed to accept an offer made in contravention of section 145A or 145B, or

(c)was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused, or proposed to refuse, to become or remain a member

Procedure



- Application must be made within 7 days of the effective date of termination (s128(2) ERA, s161(2) TULR(C)A), on an ET1 (note any additional requirements, e.g. provide trade union certificate under s 161 TULR(C)A). May be made before (e.g. during notice period)
- Note, **no** ACAS EC certificate is required
- The Respondent does **not** need to expedite the ET3
- The application is heard in public, at a preliminary hearing and may be heard by a judge sitting alone – the application is **summary in character**

Procedure

- The Tribunal must give the Respondent a copy of the application together with the notice of hearing **not later than** 7 days before the date of hearing
- The Tribunal is required to determine an application for interim relief ‘as soon as practicable’ – in the current climate the Claimant may see a delay in listing of the preliminary hearing. Such applications are heard without evidence – the parties can agree and ask the Tribunal to conduct the hearing virtually in an effort to expedite the process
- Interim application hearings can only be postponed in ‘special circumstances’, and when it is in the interests of justice to do so (*Lunn and anor v Aston Darby Group* [2018] ICR D11, EAT)

Legal test – “It is likely that”

- The Tribunal must **not** determine what the reason for the dismissal was, but rather ask itself whether it was likely that the reason would be a qualifying reason at the final hearing (*Raja v Secretary of State for Justice* UAEAT/0364/09/CEA)
- “In this context ‘likely’ does not mean simply ‘more likely than not’ – that is at least 51%’ – but connotes **a significantly higher degree of likelihood**” (our emphasis) (*Ministry of Justice v Sarfraz* [2011] IRLR 542)
- The test applies to all elements of the claim, including any disputes on employment status

Powers of the Tribunal

- If the Tribunal finds for the Claimant, it must announce its findings and what powers it can, and when it will, exercise.
- It will invite the Respondent to reinstate or re-engage the Claimant on 'not less favourable terms and conditions', and if the parties agree, such order will be made
- If the parties cannot agree to such order, and as long as the Respondent's refusal is not unreasonable, the Tribunal will make a pay continuation order – preserves pay and other benefits. The amount of pay should be stated in the order
- The order can be varied or revoked upon application of the parties on the ground of a relevant change in circumstances
- The Respondent cannot seek reimbursement of payments made pursuant to a continuation order, even if the Claimant ultimately is unsuccessful
- If the Respondent is not complying with a continuation order, the Claimant can apply to the Tribunal for (and the Tribunal has the power to make) a compensation order.

Practical tips for the Claimant

- Trade Unions to be reminded of the availability of this remedy, and to advise employees of the need to collate evidence throughout the disciplinary/dismissal process to enable quick action
- Take a critical approach to the claim, so to limit the scope of attack that the Respondent can deploy:
 - Ensure all procedural requirements are met (e.g. trade union certificate attached if needed)
 - Break down the claim into its composite elements, and assess whether the Claimant is likely to succeed on all elements (this includes any jurisdictional questions)
 - Ensure that the key points (on all elements) are provided in a succinct and persuasive summary, and that the 'reason for dismissal' is adequately set out – this is even more important in cases that are document-heavy

Practical tips for the Respondent

- No ET3 is required, however an efficient response is vital

- Ensure that the response addresses:
 - Procedural challenges (incl. whether the Tribunal provided sufficient notice)
 - Jurisdictional challenges
 - Substantial disputes – if there is a dispute of fact, the Tribunal will be in difficulty finding for the Claimant
 - Point towards a potentially fair reason for dismissal



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