

# Money for nothing?! How respondents can defeat an interim relief claim

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**Catherine Urquhart**

# Disclaimer

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This seminar is aimed at providing an oversight and should not be considered as an alternative to fully informed legal advice.

## About the speaker

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Catherine Urquhart (2010)

Catherine has spent ten years as a barrister, following a career in national newspapers as a writer and editor.

As an employment barrister she acts for a wide range of respondents, including schools, local authorities, charities and corporations. She also acts for claimants, including direct access clients, and volunteers at the ELIPS clinic.



# What is interim relief?

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- A temporary remedy for employees who are claiming unfair dismissal in certain limited circumstances
- If successful, the employee is reinstated, re-engaged, or simply paid his salary until the final hearing without having to attend work
- Originally created to try to prevent bitter industrial disputes
- Now commonly claimed in whistleblowing cases



# The 'gateway' to interim relief (1)

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## Employment Rights Act 1996

- Must come within the reasons for dismissal set out in s128(1)
- These include s128(1)(a): whistleblowing (s103A), carrying out certain health & safety activities (s100(1)(a) and (b)), or activities as a working time rep (s101A(1)(d)), or TUPE/redundancy consultation rep (s103)
- s128(1)(b): various trade union reasons

# The 'gateway' to interim relief (2)

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## **Trade Union and Labour Relations (Consolidation) Act 1992**

- Must come within the reasons for dismissal set out in s161 TURLCA:
- Member of independent trade union (s152(1)(a)); taken part in union activities (s152(1)(b)); used union services (s152(1)(ba)); resisted employer's inducements (s152(1)(bb)); not union member (s152(1)(c))
- In most of these cases, must provide union certificate: s161(3)

# The 'gateway' to interim relief (3)

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## Miscellaneous

- Dismissal in connection with the right to be accompanied at a disciplinary/grievance hearing: s12(5) Employment Relations Act 1999
- Dismissal in connection with the right to be accompanied at a study/training request meeting: Reg 18(5) Employee Study and Training (Procedural Requirements) Regulations 2010 (SI 2010/155)

## Further requirements

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- Applicant must be an employee, not a worker or self-employed
- Claim must be brought within seven days of effective date of termination: s128(2) ERA, s161(2) TULRCA
- Employee does not need two years' (or any minimum period) of service
- No need to have completed ACAS Early Conciliation

## The test: 'likely' to succeed at trial

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- Applicant must show he has a 'pretty good chance' of succeeding at the final hearing – Taplin v C Shippam Ltd [1978] ICR 1068, EAT
- The standard of proof is higher than 'a reasonable prospect of success' – Taplin
- The test is set 'comparatively high' due to the potential prejudice to the employer: Dandpat v University of Bath UKEAT/0408/09/LA

# What must the applicant show?

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- Must persuade the Judge that they will succeed in all elements of their claim at the final hearing
- This may include preliminary issues such as employment status:  
Hancock v Ter-Berg & Anor UKEAT/0138/19
- Burden of proof is upon the applicant

## How should the respondent prepare?

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- Deadlines are likely to be very tight as the application must be heard as soon as practicable (s128(3) ERA)
- The respondent must be given at least seven days' notice (s128(4))
- Put in an ET3 if possible
- Put in a signed witness statement, and disclose documents going to the reason for dismissal

# What happens at the hearing?

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- Oral evidence is not heard unless the Tribunal directs otherwise: ETs (Constitution & Rules of Procedure) Regs 2013, rule 95
- Heard by Judge sitting alone unless request for panel approved: r55
- Hearing is in public: r56
- Judge must make brisk, 'broad-brush' assessment of merits
- Judge cannot then conduct the final hearing



# What happens if interim relief is granted?

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- Employer asked to reinstate the claimant, or re-engage them on terms no less favourable than before (s129(3) ERA; s163(2) TULRCA)
- Employee has to agree to any re-engagement (s129(6) ERA; s163(5) TULRCA)
- If their refusal deemed unreasonable, no order will be made (s129(8)(b) ERA; s163(5)(b) TULRCA)

## Continuation of contract order

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- If reinstatement or re-engagement are not possible, the Tribunal will order the employer to continue to pay the employee's salary and other benefits, eg pension, up until the final hearing of the matter (ss129-130 ERA; ss163-164 TULRCA)
- A continuation order will also be made if the respondent fails to attend the interim relief hearing (s129(9)(a) ERA; s163(6) TULRCA)

# Steer v Stormsure Ltd

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[2020] 12 WLUK 427

- Seeking the right to apply for interim relief in cases where dismissal said to be due to discrimination and/or victimisation
- Cavanagh J finds that the inability to claim interim relief is a breach of Art 14 ECHR and gave permission to appeal to Court of Appeal, which may make a declaration of incompatibility with domestic legislation

## Possible effects of Stormsure

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- Would make interim relief available to workers, as well as employees
- May mean interim relief claims made in cases with multiple claimants
- Hearings would likely be broader, longer, more complex
- May tip 'balance of power' towards claimants
- Could be very costly for respondents

## Top tips for claimants

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- Act fast – claims must be submitted within 7 days of EDT
- Use the application to pressure the respondent to settle
- Be ready to deal with 'preliminary' points such as employee status
- Keep a keen focus on the reason for dismissal
- Try to anticipate the respondent's arguments

## Top tips for respondents

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- Try to put the best case possible on to paper – in a witness statement, if it is not possible to complete the ET3 in time
- Focus on the reason for dismissal
- Check the formalities have been complied with
- If interim relief granted, push for a final hearing as soon as possible
- Turn up! Otherwise an order will be made in the claimant's favour

Any questions?

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