Money for nothing?!

HOW RESPONDENTS CAN DEFEAT AN INTERIM RELIEF CLAIM

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SPEAKER

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Catherine is a former journalist who switched to law and is now an established civil practitioner, with a particular focus on employment law.

She has wide experience of hearings in Employment Tribunals and County Courts across England and Wales, and she has also represented clients in the High Court and before panels such as the Criminal Injuries Compensation Authority and the National Midwifery Council.

Catherine is qualified to accept instructions from members of the public on a Direct Access basis.

In her former life, Catherine spent nearly 20 years as a journalist, the last ten as travel editor of The Times. She finds the skills she learned on newspapers – such as interviewing and listening to people, arguing with the editor, and getting to grips with large amounts of information in a short time – translate well to her work as a barrister. Clients tell her that they value her wide experience of life and the workplace. She has a calm manner with nervous witnesses and understands that litigating to the bitter end is not always the answer – but if the fight is unavoidable, she is a strong advocate on her clients' behalf.

Catherine appears for both claimants and respondents in the Employment Tribunal, with clients including local authorities, schools and universities, hotels, private companies of all sizes, and charities. She undertakes all types of employment work, from advising on the merits of a claim to drafting documents, from attending preliminary hearings through to multi-day final hearings at tribunals around the country – and, since the coronavirus pandemic, by video link.

In particular, she has experience of 'ordinary' and automatically unfair dismissal; redundancy; whistleblowing; discrimination based on sex, race, pregnancy and maternity, religion and belief, age, and disability, including hearings to determine disability status; disputes over employment status; and interim relief. She regularly acts for clients in judicial mediations and is experienced in drafting and advising on settlement agreements.

Catherine also regularly writes articles, and presents seminars in-house at solicitors' firms, on aspects of employment law. Recent topics include: getting the best evidence from your witness; how to deal with covert recordings; managing long-term sickness absence; and an update on discrimination on the basis of religion or philosophical belief.

INTRODUCTION

1. Interim relief sounds like an amazing deal for an employee who believes they have been unfairly dismissed. If they can persuade a judge that they are likely to win their claim at the final hearing, the judge can order their former employer to keep paying their salary until the trial! Given the lengthy delays in the employment tribunal system, surely making this application is a no-brainer for a recently dismissed employee?

2. Anecdotal evidence suggests that interim relief applications are gaining in popularity, with the increasing number of employees losing their jobs, and the pandemic making the already slow tribunal system even more sluggish – many claims currently being issued won't be heard until 2022.

3. But interim relief is a tricky beast. A sacked employee has many hurdles to overcome in order to get it, and awards are rarely made. For employers, it's draconian, because if they are ordered to keep paying their former employee, they can't recover that money even if they ultimately defeat the claim. So the aim of this article, which accompanies the online talk given by the author, is to explain how interim relief applications work, the test that must be overcome in order to succeed, and how respondents can best defend an application for interim relief.

Finally, it considers the very recent, potentially significant, decision in *Steer v Stormsure Ltd* which may lead to a dramatic expansion of the availability of interim relief.

WHAT IS INTERIM RELIEF?

4. In the employment context, "interim relief" is a mechanism whereby an employee who has been dismissed, in certain situations can apply for an order that the employment relationship with their former employer continues until the final hearing of their claim. If successful, the applicant will either be given back their old job, given another job with the same employer, or failing that will simply continue to be paid their salary, until the final hearing.

5. This is an unusual remedy, because it is rare that the courts will compel an employer to continue to employ someone – it offends the principle that parties are free to contract (or not contract) with whomsoever they wish.

6. Interim relief has its origins in trade union law. As Girvan LJ said in *Bombardier Aerospace/Short Brothers plc v McConnell & Ors* [2008] IRLR 51: "The interim relief provisions were a response to the problem of dismissals of trade unionists which have the potential to generate suspicion of victimisation which on occasions can result in industrial unrest and industrial action… an application for interim relief is intended to head off industrial trouble before it begins or at least before it becomes

too serious by allowing an employment tribunal to give a preliminary ruling at an emergency hearing."

7. Over time the scope of the relief has expanded, and it can now be sought in a number of situations specifically identified by Parliament as never being fair dismissals. It has become particularly popular in cases where an ex-employee claims they were dismissed for making a protected disclosure – or "whistleblowing".

WHAT TYPES OF DISMISSAL ALLOW AN EX-EMPLOYEE TO BRING A CLAIM FOR INTERIM RELIEF?

8. An applicant must bring himself within the narrow confines of s128(1) of the *Employment Rights Act 1996* ("ERA") by claiming that the reason, or if more than one the principal reason for their dismissal, is one of the following:

- Carrying out certain health and safety activities (s100(1)(a) and (b) ERA) – but note, dismissals arising out of health and safety matters as set out in s100(1)(d) or (e), such as refusing to return to the workplace in circumstances of danger, are not caught;
- Certain activities as a working time workforce representative (s101A(1)(d) ERA);
- Performing any functions as a trustee of a relevant occupational pension scheme (s102(1) ERA);
- Performing certain functions as an employee representative for the purpose of TUPE or redundancy consultation (s103 ERA);
- Whistleblowing (s103A ERA);
- Blacklisting (s104F ERA);
- Various trade union reasons including obtaining or preventing union recognition, collective bargaining or balloting under paragraph (not section!) 161 of Schedule A1 of the *Trade Union and Labour Relations (Consolidation) Act 1992* ("TULRCA").

9. There is also a parallel provision for employees to apply for interim relief at section (not paragraph!) 161 of TULRCA if they claim their dismissal is unfair because it relates to trade union membership or activities under s152 TULRCA. In most of these cases, the applicant must also provide a certificate signed by an authorised official of the union to certify the applicant's membership or proposed membership of the union, and that there appear to be reasonable grounds for alleging his dismissal was for the prohibited reason (s161(3) TULRCA).

10. There are two further situations where interim relief can be claimed:

- dismissal in connection with the statutory right to be accompanied at a disciplinary or grievance hearing (s12(5) *Employment Relations Act 1999*), and
- dismissal in connection with the statutory right to be accompanied at a meeting to consider a request to enter into study or training (Reg 18(5) *Employee Study and Training (Procedural Requirements) Regulations 2010* SI 2010/155).

11. Some types of claims for automatically unfair dismissal do not provide a gateway to an interim relief application. For example, if the claimant says that they were selected for redundancy because they made a protected disclosure, this does not allow them to claim interim relief, because s105(6A) ERA (relating to allegations that selection for redundancy was due to whistleblowing) is not one of the "gateway" provisions listed in s128 ERA. The selection process might make a redundancy unfair, but the selection was not in itself the reason for the dismissal, and interim relief is focused on the reason for the dismissal. Moreover, in a genuine redundancy situation the remedies offered via interim relief, such as reinstatement, may simply no longer be available.

12. Thus interim relief is only available in a narrow set of situations – the employee who claims he was unfairly dismissed for the more common conduct or capability reasons cannot apply for interim relief.

13. As is clear from the limited circumstances in which interim relief can be obtained, the guiding principle behind it is that these are activities that are considered to be in the broader public interest, not just in the private interest of the individual bringing the claim. Clearly, the right to trade union membership, and to make whistleblowing disclosures, are very much in the wider public interest.

FURTHER REQUIREMENTS FOR MAKING AN INTERIM RELIEF APPLICATION

14.

- The applicant must be an employee: workers (or the self-employed) cannot obtain interim relief;
- The claim must be brought within seven days of the effective date of termination: s128(2) ERA; s161(2) TULRCA. If the employee is working their notice, they can make the application during the notice period. Seven days is a very tight time limit, and it is not possible to extend it.

However:

- The employee does not need two years' service, unlike with an "ordinary" unfair dismissal claim;
- The employee does not need to have gone through the ACAS Early Conciliation

process before making the application (reg 3(1)(d) of the Employment Tribunals (Early Conciliation: Exemption & Rules of Procedure) Regulations 2014). Box 2.3 on form ET1 makes clear that an interim relief application is one of the exemptions to the requirement to complete ACAS Early Conciliation.

THE HIGHEST HURDLE: PERSUADING THE JUDGE IT IS 'LIKELY' THEY WILL SUCCEED AT TRIAL

15. To obtain interim relief, under s129 ERA (or s163 TULRCA), the applicant must persuade the Tribunal that it is *"likely"* that they will succeed at the final hearing in proving that the reason or principal reason for their dismissal was the inadmissible reason they rely on. This is where most applications fail, as it is a high test.

16. The word *"likely"* has been extensively considered by the courts. In *Taplin v C Shippam Ltd* [1978] ICR 1068, EAT, Slynn J held (¶1074F) that in an application for interim relief, the tribunal should "ask themselves whether the applicant has established that he has a 'pretty good' chance of succeeding in the final application to the tribunal."
He also made clear that the standard of proof is higher than that of a reasonable prospect of success: "We do not consider that Parliament intended that an employee should be able to obtain an order under this section unless he achieved a higher degree of certainty in the mind of the industrial tribunal than that of showing that he just had a 'reasonable' prospect of success" (¶1074B).

17. The result of this is that a claimant seeking interim relief has to reach a higher standard of proof at that hearing than applies at the final hearing!

18. Despite challenges over the years, *Taplin* is still good law. For example, in *Dandpat v University of Bath* (UKEAT/0408/09/LA) (Underhill P presiding) it was held (at ¶20) that "Taplin has been recognised as good law for 30 years. We see nothing in the experience of the intervening period to suggest that it should be reconsidered… We do in fact see good reasons of policy for setting the test comparatively high… in the case of applications for interim relief. If relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the claimant, until the conclusion of proceedings: that is not [a] consequence that should be imposed lightly."

19. And in *London City Airport Ltd v Chacko* (UKEAT/0013/13/LA), Mr Recorder Luba QC observed (at ¶10): "It must, on the authority of Taplin, be established that the employee can demonstrate a pretty good chance of success. While that cannot substitute for the statutory words, it has been the guiding light as to the meaning of "likely" in this context that has been applied over the subsequent three or more decades by the EAT".

20. A claimant who successfully obtains interim relief, but does not succeed at the final hearing, is not obliged to repay the salary he received, even if he did no work for the employer between the interim relief and the final hearings. There is no mechanism to recover that money. As Mr Justice Wood (President) said in *Initial Textile Services v Rendell* (UKEAT/383/91) at page 3: "it is abundantly clear that money paid under the provisions will be irrecoverable and there is no provision for paying it into a fund or into a Court; there is no limit of time for the period which is relevant…". This potentially punitive feature of interim relief is one reason that the hurdle claimants must overcome is set so high.

21. In the first instance case of *Marshall & Ors v The Doctors Laboratory Ltd* (2203491/2020), heard at Central London ET in July 2020, the respondent argued a novel point on which there is no authority: that because the money cannot be recovered if the claimant does not ultimately succeed, an order for interim relief is an interference with the right to property as set out in Article 1 of Protocol 1 of the European Convention on Human Rights.

22. Interim relief is a unique jurisdiction, without the provision of a cross-undertaking in damages as would be made by the High Court when granting an injunction to continue an employment contract. Further, the order for interim relief is a "blunt instrument" because it does not take account of the likelihood of any reduction that may ultimately be made if the claimant succeeds, in respect of contributory fault or *Polkey*. For these reasons, in *Doctors Laboratory* the respondent argued that the *Taplin* test should be applied even more stringently, and the claimants must show that they are "practically certain" to succeed at the final hearing.

23. EJ Goodman dismissed this argument, holding that the test already set out in *Taplin* and other authorities – which is higher than the balance of probability – is sufficient to protect respondents. But the argument illustrates just how onerous an order for interim relief can be on a respondent.

WHAT MUST THE APPLICANT SHOW TO OBTAIN AN ORDER FOR INTERIM RELIEF?

24. To demonstrate that it is *"likely"* (to the standard discussed above) that they will succeed in making out their claim at the final hearing, the applicant must persuade the Judge of this in relation to all the elements of the claim that would be considered at the final hearing. The burden is on the applicant to prove their case.

25. Take for example a whistleblowing claim, which is a common basis for an interim relief application. The applicant must succeed on each element of the claim. So, as Underhill P put it at ¶14 of *Ministry of Justice v Sarfraz* (UKEAT/0578/10/ZT), "in order to

make an order under sections 128 and 129 the Judge had to have decided that it was likely that the Tribunal at the final hearing would find five things: (1) that the Claimant had made a disclosure to his employer; (2) that he believed that the disclosure tended to show one or more of the things itemised at (a) to (f) under section 43B; (3) that that belief was reasonable; (4) that the disclosure was made in good faith; and (5) that the disclosure was the principal reason for his dismissal". (Note that since the decision in *Sarfraz*, the "good faith" test has been replaced with a test of whether the applicant reasonably believed the disclosure to be in the public interest.)

26. This rule does not just apply to the merits of the claim itself, but to all elements that must be proved at the final hearing. So for example, if there is a dispute over the employment status of the claimant who seeks interim relief (which, as noted above, is only available to employees), the judge hearing the interim relief application should also consider the employment status issue and decide whether, on the *Taplin* basis, it is likely that the applicant will show that they are an employee at the final hearing (*Hancock v Ter-Berg and Anor* (UKEAT/0138/19). This case also held that an interim relief hearing should not be delayed while an initial issue such as employee status is decided. All these matters should be decided at the interim relief hearing.

27. Another example of what might be thought a preliminary issue being considered at the interim relief application is that of the alleged illegality of the contract: this, if raised, can also be considered and decided to the same *Taplin* standard: *Al Qasimi v Robinson* (UKEAT/0283/17).

HOW SHOULD THE RESPONDENT OPPOSE AN APPLICATION FOR INTERIM RELIEF?

28. A respondent may have little time to deal with this application: under s128(3) ERA the tribunal must hear the application "as soon as practicable after receiving the application" albeit it must give the employer at least seven days' notice of it (s128(4) ERA). It is very hard to postpone the hearing of the application – under s128(5) ERA there must be "special circumstances" before that can happen (although the availability of a direct access barrister has been held to constitute "special circumstances": *Lunn and Anor v Aston Darby Group Ltd and Anor* UKEAT/0039/18).

29. So the respondent must act fast. Ideally it should put in a witness statement, and provide key documents, going to the heart of what the respondent says was the (fair) reason for dismissal. As the Judge is making a broad-brush assessment of the merits, it will be hard for an applicant to persuade the Tribunal that it is "likely" that they will succeed at the final hearing if there is a cogent alternative narrative from the respondent.

30. In a statement prepared for the interim relief hearing, there is no need to go too

deeply into peripheral issues or procedural matters: the focus should be on the reason for the dismissal. Note however that as a fuller witness statement will no doubt be required for the final hearing, the statements for each hearing should be consistent with each other. A respondent whose position changes at the final hearing will then face obvious difficulties.

31. If the respondent has time to put in its ET3 before the interim relief hearing, so much the better, but this is not expected and will not always be possible.

WHAT HAPPENS AT THE INTERIM RELIEF HEARING?

32. Interim relief applications are generally decided at a hearing based on the papers before the Judge, plus the parties' oral submissions, and the usual rule is that no oral evidence is heard. Rule 95 of Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the Regulations") says that the Tribunal "shall not hear oral evidence unless it directs otherwise". There is nothing to stop a party asking to cross-examine the other side's witness(es), but permission for this may not be granted. Hearings often have limited time. These days, an interim relief application is likely to be held remotely over a video platform.

33. Rule 95 also specifies that rules 53 to 56 of the Regulations apply to interim relief hearings, and these provisions make clear that the interim relief hearing is a preliminary hearing, it is heard by a Judge sitting alone (although there is provision to apply for a panel under rule 55), and it is a public hearing. This last point has very recently been examined in depth in the EAT in *Queensgate Investments LLP & ors v Millet* (UKEAT/0256/20/RN), handed down earlier in January 2021, with HHJ Tayler concluding that applying for interim relief amounts to determining a preliminary issue, as while it does not determine overall liability it determines liability in respect of the right or otherwise to interim relief, and so it requires a public hearing.

34. The Tribunal will inevitably have far less material before it than at the final merits hearing. Often, it may have nothing more than the claimant's ET1 claim form. The respondent is under no obligation to provide its ET3 response early in order to present it for the interim relief hearing, although an employer who can provide it in time may wish to do so.

35. The authorities show that the Judge hearing the application needs to make a brisk, summary assessment based on the material available. As Mr Recorder Luba QC put it in *Chacko* at ¶23: "The application falls to be considered on a summary basis. The employment judge must do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases … what this requires is an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he has.

The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim."

36. And in *Parsons v Airplus International Ltd* (UKEAT/0023/16/JOJ), HHJ Shanks observed (at ¶8): "On hearing an application under section 128 the Employment Judge is required to make a summary assessment on the basis of the material then before her of whether the Claimant has a pretty good chance of succeeding on the relevant claim. The Judge is not required (and would be wrong to attempt) to make a summary determination of the claim itself … her decision will inevitably be based to an extent on impression …".

37. The Judge who hears the interim relief application should not conduct the final hearing: *British Coal Corporation v McGinty* [1987] ICR 912.

WHAT HAPPENS IF THE APPLICANT SUCCEEDS AT THE HEARING?

38. This can be a heavy burden for an employer. As s129(3) ERA and s163(2) TULRCA set out, if the applicant succeeds, the Tribunal will ask whether the employer is prepared to reinstate them into their old job, or to re-engage them on terms at least as favourable as those of their old job.

39. The employee has to agree to any re-engagement for that to be ordered (s129(6) ERA; s163(5) TULRCA). If their refusal is considered unreasonable, the Tribunal will not make any order (s129(8)(b) ERA; s163(5)(b) TULRCA).

40. Reinstatement or re-engagement may not be appealing to an employer who may well not wish to have that former employee back in their workforce, having just dismissed them. If neither reinstatement nor re-engagement are possible, the Tribunal will order a continuation of the contract, so the employer has to continue to pay the successful applicant but will not have the benefit of their labour (ss129-130 ERA and ss163-164 TULRCA). Note that a continuation order will also result if the respondent does not attend the hearing of the interim relief application (s129(9)(a) ERA; s163(6) TULRCA), so an employer must not ignore the application – it could turn out to be an expensive mistake.

41. If there is a significant change of circumstances after the interim relief hearing but before the final hearing, either party can apply to the Tribunal to vary or revoke the order made at the interim relief hearing (s131 ERA; s165 TULRCA).

42. If an employer fails to comply with an order for re-instatement or re-engagement made at an interim relief hearing, the employee can apply for an order for continuation of the contract and for compensation (s132 ERA; s166 TULRCA).

THE DECISION IN *STORMSURE*

43. Suddenly, interim relief is having a moment in the spotlight. In December 2020 – just before the end of the Brexit transition period – Cavanagh J heard the interesting, and potentially significant, case of *Steer v Stormsure Ltd* in the EAT ([2020] 12 WLUK 427). The date of the hearing was important, because after 31 December 2020, the effect of EU law on domestic legislation is effectively frozen, so Cavanagh J made a particular effort to hear the case while his judgment could still apply in England and Wales, were he to find in favour of the appellant.

44. The case considered whether interim relief should be available in cases where the employee is dismissed because of discrimination or victimisation. As set out above, that is not currently permitted, and to extend interim relief to this larger class of claims would be a hugely significant development.

45. Ms Steer had been dismissed on grounds which she said amounted to sex discrimination and victimisation. She sought interim relief, which of course is not currently available, and so the Tribunal dismissed her claim. She appealed to the EAT on the basis that interim relief *should* be available under the Equality Act 2010, and the fact that it wasn't meant that the Equality Act was not compatible with EU law or the European Convention on Human Rights.

46. Cavanagh J did not agree that the EU law principles of effectiveness and equivalence were infringed by the fact that interim relief is not available for discrimination claims. However, he did conclude that this situation was a breach of Article 14 of the European Convention on Human Rights (prohibition of discrimination) when read with Article 6 (right to a fair trial). The Government had not chosen to intervene in this appeal, so Cavanagh J was unable to discern whether there was a justification for the difference in treatment between claimants in discrimination and victimisation claims, and those in whistleblowing claims.

47. Section 4 of the Human Rights Act 1998 gives the power to make a declaration of incompatibility between domestic and European law, which invariably leads to the Government amending domestic law to render it compatible. However, the EAT does not have the power to make such a declaration: it must come from a higher court. Cavanagh J therefore gave permission to Ms Steer to appeal to the Court of Appeal so that it can consider this issue further and, if appropriate, make the declaration of incompatibility.

WHAT MIGHT BE THE RESULT OF *STORMSURE*?

48. If interim relief became available in cases of dismissal arising out of discrimination or victimisation, it would be hugely significant. Cavanagh J said this "would have major policy and practical consequences, the effects of which the EAT is not equipped to evaluate", and explained this by reference to eight likely results (at ¶150-159):

1. It would provide an interim remedy for some discrimination/victimisation cases (ie dismissals) which is not available for other types of discrimination/ victimisation cases, which is counter to the scheme of the Equality Act 2010, which makes the same remedies available for all forms of discrimination and victimisation;

2. It would broaden interim relief so that it was available to workers as well as employees, potentially leading to huge practical consequences;

3. It would likely lead to a far larger number of interim relief claims being brought, perhaps leading to further delays in the tribunal system;

4. Employers would be exposed to substantial, irrecoverable costs;

5. Interim relief may be sought in multiple claims, for example arising out of a large-scale redundancy exercise in which it is claimed that the selection criteria are indirectly discriminatory on grounds of sex;

6. The range of issues which the ET will potentially have to address at the interim relief hearing will be much wider and, given that discrimination claims can be nuanced, may lead to far more complex hearings in order to establish that the claimant has a "pretty good chance" of succeeding at the final hearing;

7. Claimants' ability to bring these claims will affect the "balance of power" between claimants and respondents and, for example, it may make respondents more likely to settle, even in unmeritorious cases;

8. It may mean that an employer facing a discrimination/victimisation dismissal case may have to pay significant sums to a claimant without them having established the employer's liability at a full and detailed hearing.

For these reasons, the Court of Appeal decision will be awaited with particular interest.

TOP TIPS FOR CLAIMANTS

- Act fast – the application for interim relief must be submitted within seven days of the effective date of termination.
- Use the application to put pressure on the respondent to settle – especially if interim relief is awarded.
- Ensure that all the elements of the claim that need to be decided at the final hearing are thought through: is there a good argument on each stage?
- Keep the focus on the reason for the dismissal but be prepared to deal with peripheral issues such as employment status if that is likely to be in dispute.
- The employer may not yet have served the ET3, so the employee needs to think carefully to anticipate the arguments the respondent is likely to run.

TOP TIPS FOR RESPONDENTS

- Put in as strong a case on paper as can be prepared in the short time available.
- Check that the employee has complied with all the formalities set out above.
- Make sure that the Tribunal has given the correct notice of the hearing of at least seven days.
- Focus on the reason for the dismissal and if possible, put in evidence as to the fair reason the respondent will rely on.
- Focus on chipping away at any obvious weaknesses in the claimant's case.
- If interim relief is awarded, argue for as early a final hearing as possible.
- Above all, turn up! Failure to attend the hearing automatically results in an order being made in the claimant's favour.

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THE EMPLOYMENT GROUP

The Employment Group at 42 Bedford Row is thirty-five members strong. Members regularly appear for both employers and employees before the ET, EAT, High Court and Appellate Courts. Members have appeared not only in England and Wales but also in Employment Tribunals in Jersey, Scotland and Northern Ireland.

The Group is well represented across all levels of experience and includes members of the Attorney General's Panel of approved counsel, a Fee-Paid Employment Judge, a Deputy Chair of the Jersey Employment and Discrimination Tribunal as well as barristers recognised by the Chambers and Partners Guide to the Legal Profession and the Legal 500 as leaders in their field.

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The Employment Group provides expertise in:

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