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EMPLOYMENT

# Interim Relief – A concise practical guide

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# Interim Relief – A concise practical guide

## 1. INTRODUCTION

- 1.1 Has anyone else noticed an upturn in sightings of the relatively rare interim relief animal in the Employment Tribunal? Anecdotally, it is something we have noticed in Chambers. It is likely to remain an anecdotal impression given the difficulty in obtaining reliable or detailed statistics in respect of ET claims. Nonetheless, it has been sufficiently noticeable that we thought it merited a short Practical Guide.

## 2. THE OUTLINE

- 2.1 **Sections 128–132 of the ERA 1996** and **sections 161–166 of TULR(C)A 1992** provide a dismissed employee, in certain circumstances, with the right to apply to the Tribunal to order reinstatement, re-engagement or the continuation of his contract of employment pending the determination or settlement of his unfair dismissal complaint ('interim relief').
- 2.2 The employee must have
  - 2.2.1 Presented an unfair dismissal complaint and
  - 2.2.2 Alleged that the reason or principal reason for dismissal was one of the following:
    - The carrying out of activities as a designated health and safety employee or performance of any functions as a health and safety representative **s100(1)(a) and (b) ERA**
    - Performance of any functions or activities as a working time workforce representative or candidate **s101A(d) ERA**
    - Performance of functions as the trustee of an occupational pension scheme **s102(1) ERA**
    - Performance of any functions or activities as a collective redundancy or TUPE representative or candidate **s103 ERA**
    - Whistleblowing / that s/he made a protected disclosure **s103A ERA**
    - Blacklisting **s104F ERA**
    - Interference with trade union recognition or collective bargaining or balloting **paragraph 161(2) of Schedule A1 TULR(C)A**
    - Grounds relating to trade union activities or activities **s152 TULR(C)A** (generally requiring an authorised official of the trade union to certify the claimant's union membership and that there appear to be reasonable grounds for supposing that his dismissal was as alleged).
- 2.3 Interim relief is not available in respect of discrimination complaints (**Steer v Stormsure Ltd [2021] EWCA Civ 887**).
- 2.4 The application for interim relief must be made within 7 days of the effective date of termination (**s.128(2) ERA**; and **s.161(2) TULR(C)A**). It can be made earlier, for example, during the notice period and before the EDT.





- 2.5 The Tribunal can make an interim relief order where it is satisfied it is 'likely' that the Tribunal at final hearing will find that the reason the claimant was dismissed was the asserted proscribed and qualifying reason (above).
- 2.6 Likely in this context means 'pretty good chance' of succeeding (**Taplin v C Shippam Ltd [1978] IRLR 450**, EAT). This, in turn, means "a significantly higher degree of likelihood that just 'more likely than not'" (**Ministry of Justice v Sarfraz [2011] IRLR 562**, EAT).
- 2.7 In other words, the standard of proof at interim relief stage is more onerous than at final hearing. The burden of proving the case to that standard is on the claimant.
- 2.8 The claimant must show the requisite prospects of success in relation to each essential element of the unfair dismissal complaint (**Simply Smile Manor House Ltd and ors v Ter-Berg [2020] ICR 570**).
- 2.9 The order usually made is for continuation of the terms and conditions of employment until final determination of the claim (i.e. ongoing contractual payments and benefits) rather than a reinstatement or re-engagement order. The Tribunal has no power to require an employer to accept the employee back into the workplace if there is no agreement between the parties to this effect.
- 2.10 Payments made under a continuation of contract order are not recoverable in the event the employee loses his or her unfair dismissal claim at final hearing.

### 3. THE PROCEDURE

- 3.1 Tribunals are required to determine an application for interim relief as soon as practicable (**s.128(3) ERA, s.162(1) TULR(C)A**).
- 3.2 The Tribunal must provide the respondent with a copy of the application and not less than 7 days' notice of the interim relief hearing (**s.128(4) ERA, s.162(2) TULR(C)A**).
- 3.3 An application for interim relief is heard by an Employment Judge sitting alone. It is heard in public (**Queensgate Investments LLP v Millet [2021] ICR 863**, EAT).
- 3.4 The claimant is likely to rely on the Claim Form / Grounds of Complaint, any relevant documents and, possibly, written submissions. The claimant (indeed, either party) may adduce signed witness statement(s). The respondent is likely to rely on the Grounds of Resistance (if submitted prior to the hearing), any relevant documents and, possibly, written submissions.
- 3.5 The Tribunal will not hear oral evidence unless there is a specific direction to the contrary (**rule 95 ET Rules 2013**).
- 3.6 The process followed has been variously described as 'necessarily summary in character' (**Dandpat v the University of Bath UKEAT/0408/09 [17]**), 'an expeditious summary assessment' of the parties' cases (**London City Airport v Chacko [2013] IRLR 610 [23]**, EAT) and 'what a Tribunal has to do is to examine the material put before it, listen to submissions and decide whether at the final hearing on the merits "that it is likely that" that Tribunal will find the reason for dismissal is one or more of those listed...What is clear is that the Tribunal must not attempt to decide the issue as if it were a final issue' (**Raja v SoS for Justice UKEAT/0364/09M [25]**).

### 4. PRACTICAL TIPS

- 4.1 Self-evidently, both parties will have to act expeditiously. It will be important to prioritise how best to put the key issues and evidence before the Tribunal.





### For the claimant

- 4.2 Ensure the procedural requirements are met in terms of the 7-day time limit and, if a trade union case, that the relevant trade union certificate is included.
- 4.3 Decide how best to address all the key elements of the ‘automatically’ unfair dismissal and the proscribed reason relied upon: is this in the Claim Form or by an alternative means such as a witness statement or detailed written application or submissions?

### For both claimant and respondent

- 4.4 Both parties are likely to focus on the reason for dismissal (albeit remaining alert to any potential areas of concern on the facts of the individual case)
- 4.5 Both parties will need to consider the practicality of adducing witness statements in the relatively short timeframes involved.
- 4.6 Both will also need to consider the advisability of committing to a detailed witness statement at an early stage and whether to address only a limited number of issues or single issue in this way.
- 4.7 What are the key relevant documents, if any, which must be disclosed at this stage?

### For the respondent

- 4.8 The respondent may find it is prudent to prioritise drafting a detailed Grounds of Resistance setting out its positive case in order that the EJ can clearly see the disputed issues of fact or law and the nature of the dispute.
- 4.9 Consider focussing on any fundamental disputes of fact and jurisdictional issues. A claimant is less likely to be able to persuade a Tribunal that s/he has a pretty good chance of success at final hearing if a significant factual dispute exists and the parameters of the dispute are made clear to the Tribunal.

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