

Whistleblowing: Interim relief applications where ‘employee’ status in dispute

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Dr Colin Hancock v Ter-Berg and anor (UKEAT/0138/19/BA)

(Decision date: 25 July 2019; Published: 12 November 2019)

The issue

1. Whether the right to make an application for interim relief pursuant to s.128 ERA 1996 applies only to those who have been conclusively determined to be employees, or whether employment status can itself be one of the matters for assessment on a summary basis at the interim relief stage.

The facts

2. C is a dentist. On 1 April 2013 he entered into an agreement with a dental practice, R, to provide services at its premises. The contract expressly provided that it was not to constitute a contract of employment.
3. Pursuant to the contract, C was provided with equipment, furniture, a dental nurse, staff, materials, drugs, supplies, and the services of a dental laboratory. C was required to arrange his own professional indemnity insurance, to take holidays upon giving notice to the owner of the practice, to carry out a certain number of units of dental activity, be compliant with R's policies, and to pay his own tax and NI. He was also entitled to paternity and adoption leave. C was allowed to appoint a locum in the event that his failure through ill-health or other cause to use the facilities for a continuous period of 20 days or more. The locum had to be acceptable to R and the primary care organisation, NHS England Midlands and East.

4. In 2016, R engaged another dentist, AT. C had concerns about AT's professional practices and treatment of patients. He raised these concerns on numerous occasions between September 2017 and August 2018, including by raising the matter to external organisations.
5. On 1 August 2018, R invited C to a meeting to discuss his concerns. C could not make the date proposed for the meeting and suggested an alternative date. However, R did not respond to that suggestion and instead, by letter dated 9 August 2018, notified C that his contract was to be terminated with 3 months' pay in lieu of notice. No reason was given for the termination.
6. On 5 November 2018 C issued proceedings in the ET claiming that he had been automatically unfairly dismissed under s.103A ERA, in that the reason for his dismissal was that he had made protected disclosures. He also applied for interim relief pursuant to s.128 ERA. He sought a continuation of his employment pending final determination of the case under s.129 ERA.
7. Section 128(2) provides that an ET shall not entertain an application for interim relief unless it is presented to the ET before the end of the period of 7 days immediately following the EDT. Under s.128(3), an interim relief application must be determined 'as soon as practicable' after receiving the application. However, R applied for it to be postponed, arguing that C's employment status had to be determined separately as a preliminary issue. It argued that it was a prerequisite of an application for interim relief that it be made by an "employee", and that that question should be determined before any consideration of the application for interim relief.

The ET decision

8. R's application for a postponement of the interim relief application pending a determination of the employee issue was refused.
9. The ET considered that the "likely to succeed" test under s.129 ERA applied not just to the reason for dismissal but also to the contested issue of employee status. It determined that C had a 'pretty good chance' of success in showing that he was an employee and that he was dismissed for having made protected disclosures (Taplin v C Shippam Ltd [1978] ICR 1068 EAT followed).
10. R appealed on the grounds that the ET erred in entertaining the application for interim relief before first concluding that C was indeed an employee.

The EAT decision (Choudhury P)

11. The EAT dismissed the appeal.
12. It held that the plain and ordinary meaning of s.128 is that the right to seek interim relief is conferred on an employee. However, if that status is disputed then the issue of employee status becomes yet another issue to be determined on the complaint, just as it would be for a claim of ordinary unfair dismissal. Each and every issue that might be relevant to a claim of unfair dismissal is part of the “complaint” to be determined by the ET¹.
13. S.129 requires the ET to be satisfied that it is likely that “*on determining the complaint which the application relates the Tribunal will find that the reason or principal reason for dismissal*” was one of the proscribed reasons. The ET will clearly need to consider the likely outcome of the eventual determination of the complaint. The provision does not preclude an ET from having regard to the merits of other elements of the claim aside from the reason for dismissal. Instead, if it were not to have regard to such matters at the interim relief stage, then it would not be considering the likely outcome on determination of the complaint (but only part of it), and those words would be rendered otiose².
14. That construction was consistent with the intention of the interim relief regime, that being to provide a speedy remedy to preserve the status quo pending the full hearing. R’s contention that there should be a PH to determine conclusively whether C was an employee before determining the application for interim relief would cause delay and would undermine the interim nature of the remedy under s.129.

Comment

15. It might be thought that following this decision the interim relief procedure could be open to abuse by persons who are not even arguably employees or who clearly did resign voluntarily. However, the EAT dealt with this possibility / issue head on by stating that: “*The experienced Tribunal hearing the interim relief application would undoubtedly quickly nip such abusive claims in the bud on the basis that the applicant gets nowhere near the LTS threshold in respect of those issues. Even*

¹ Paragraph 35 of the Judgment.

² Paragraph 38 of the Judgment.

cases where an applicant was able to establish a 51% chance of establishing employee status would not be eligible for interim relief...³.



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³ Paragraph 45 of the Judgment.