

Whistleblowing: Interim relief

Published 11 December 2019

An application for interim relief can be brought in a whistleblowing claim for unfair dismissal even where employment status is in dispute.

THE FACTS

Where an employee is claiming unfair dismissal under the whistleblowing legislation, they can apply for interim relief. The effect of a successful application for interim relief is that the tribunal makes an order for the continuation of the claimant's employment pending final determination of their case. This means that the claimant is paid until the full hearing. An application for interim relief will only be successful if it appears to the tribunal that the claimant is "likely to succeed" in establishing at full trial that the protected disclosure was the reason, or principal reason, for the dismissal.

Mr Ter-Berg is a dentist who entered into a license with a dental practice, Simply Smile Manor House Ltd, under which he was granted a license to practise at its premises. The contract with Simply Smile stated that it was not a contract of employment. However, aspects of the arrangement were consistent with employment status.

Mr Ter-Berg raised concerns, internally and externally, about the professional practice and treatments carried out by another dentist at Simply Smile. Soon afterwards, he was given three months' notice of the termination of his contract. No reason was given for this.

Mr Ter-Berg issued tribunal pleadings claiming that he had been unfairly dismissed for making a protected disclosure. He applied for interim relief. Simply Smile applied to postpone the interim relief hearing, arguing that Mr Ter-Berg could only apply for interim relief if he were an employee, and that there should be a preliminary hearing to decide on his employment status.

The employment tribunal declined to postpone the hearing, holding that an interim relief application was, by its very nature, a provisional assessment of whether the applicant was likely to succeed. It held that the "likely to succeed" test covered both the reason for the dismissal and any dispute as to whether the applicant was an employee. It proceeded with the hearing and, after hearing the evidence and submissions, it found that Mr Ter-Berg had a "pretty good chance" of establishing that he was an employee and that he had been dismissed for making a protected disclosure.

Simply Smile appealed to the EAT on the ground that the tribunal had erred in entertaining the application for interim relief before first concluding whether Mr Ter-Berg was an employee.

The EAT dismissed the appeal, holding that an application for interim relief can be brought even where employment status is in dispute. The "likely to succeed" test should be applied at the interim relief hearing to all elements of the complaint, including the issue of employment status.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Applications for interim relief in whistleblowing claims are fairly rare, and the "likely to succeed" test is a high benchmark: the claimant has to persuade the tribunal that they have a "pretty good chance of success". However, for employers, this judgment may increase the likelihood of a frustrating scenario where an ex-employee is granted interim relief, and paid up until the full hearing date, but is then unsuccessful in their whistleblowing unfair dismissal claim.

Interim relief may also be sought in cases of automatically unfair dismissal for trade union membership and activities and activities as a health and safety representative, a working time representative, a pension scheme trustee, or an employee representative for TUPE or collective redundancy purposes.

[Hancock v Ter-Berg and another UKEAT/0138/19](#)

Authors



Ceri Fuller
London - Walbrook
cfuller@dacbeachcroft.com



Zoë Wigan
London - Walbrook
zwigan@dacbeachcroft.com



Hilary Larter

Leeds

hlarter@dacbeachcroft.com

DAC
DAC BEACHCROFT