

Interim relief in the Employment Tribunal

There has been considerable speculation about the potential for applications in the employment tribunal for interim relief to continue the employment contract, being brought by employees who have raised concerns about the safety of returning to their workplace after lockdown and who have been dismissed.

[Andrew Allen QC](#) provides a practical guide to the situations in which an employee can and cannot make such applications and sets out the legal tests and hurdles to be overcome for those making and defending such applications.

Introduction

[Sections 128 to 132 of the Employment Rights Act 1996 \(ERA\)](#) and [sections 161 to 166 of the Trade Union and Labour Relations \(Consolidation\) Act 1996 \(TULR\(C\)A\)](#) provide mechanisms, whereby, exceptionally, a dismissed employee can seek interim relief by making an application to an Employment Tribunal to continue the contract of employment pending the final determination of the case.

Applications for interim relief have been rare and interim relief orders even rarer – but there may be an uptick in such applications in these unusual Covid-19 times as employees are encouraged to return to work – in particular given that whistleblowing unfair dismissal is one of the categories of claim for which interim relief is available. Given the delays in the employment tribunal system, an order for interim relief can be very valuable for a dismissed employee. What follows is a practical guide for both employees and employers dealing with interim relief applications.

Key Points:

1. Only certain forms of alleged dismissal provide a gateway to an interim relief application including whistleblowing and trade union activities.
2. An application must be made within 7 days of dismissal. If an employee is dismissed on a Monday, the application must therefore be presented by the following Monday.
3. The test for the ET is whether the Claimant is 'likely to succeed' on all of the issues necessary to establish the claim – this is a high standard.
4. The order usually made is for continuation of the terms and conditions of employment until final determination of the claim – rather than any right to attend the workplace. In most cases this means payment. The tribunal has no power to require an employer to accept the employee back into the workplace if there is no agreement.
5. Any such continuation payments made prior to the final hearing are not recoverable if the Claimant is ultimately unsuccessful.

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Qualification for application for interim relief

An interim relief application may only be made if the reason or principal reason for dismissal is alleged to be one of the following narrowly defined categories (s128(1) ERA and s161(1) TULR(C)A):

- The carrying out of activities as a designated health and safety employee or performance of any functions as a health and safety representative section 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 s103A ERA
- Interference with trade union recognition or collective bargaining or balloting paragraph 161(2) of Schedule A1 TULR(C)A
- Blacklisting s104F ERA
- Grounds relating to trade union activities or activities s152 TULR(C)A – most of which require an authorised official of the trade union to certify the Claimant's membership and that there appear to be reasonable grounds for supposing that his dismissal was as alleged.

Note that a dismissal for refusing to return to the workplace or taking of other measures in circumstances of danger under ss100(1)(d) and (e) ERA are not gateways to an interim relief application. However if an associated disclosure to an employer has been made, this may well amount to a protected disclosure which may provide a pathway to an interim relief application as a whistleblower.

As part of unfair dismissal law, these are of course applications which may only be made by employees. Unlike the normal 2 year qualification period for ordinary unfair dismissal rights, there is however no qualification period of employment which must be served before an interim relief application can be made.

Interim relief is not available in cases of selection for redundancy for any of the above reasons given that the availability of interim relief hinges on the reason for dismissal (*McConnell and anor v Bombardier Aerospace/Short Brothers plc (No.2)* [2009] IRLR 201, NICA).

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Interim relief in the Employment Tribunal

Mechanism

The most important thing to note is that action must be taken swiftly. This is why nearly all interim relief applications have been supported by a trade union.

- An application must be made within 7 days of the effective date of termination s128(2) ERA / s161(2) TULR(C)A. It can be made before that date – e.g. during the notice period
- The usual requirement for claimants before the employment tribunal to have obtained an ACAS early conciliation certificate does not apply where the employee is also making an application for interim relief (Reg 3(1)(d) Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254)
- Tribunals are required under s128(3) ERA / s162(1) TULR(C)A to determine an application for interim relief 'as soon as practicable'. In current circumstances, it may in fact take quite a long time before such an application can be determined. However, these applications should be heard without oral evidence and therefore subject to the agreement of the parties and compliance with the principles of open justice, tribunals should be capable of dealing with interim relief applications by electronic means
- The tribunal must give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing s128(4) ERA / s162(2) TULR(C)A
- Postponement of an interim relief hearing is only possible in 'special circumstances' s128(5) ERA / s162(4) TULR(C)A. Such postponements can however take place where it is in the interests of justice to do so (*Lunn and anor v Aston Darby Group Ltd* [2018] ICR D11, EAT)
- An interim relief application may be heard by an employment judge sitting alone (s4(2)(a) and (c) Employment Tribunals Act 1996) and it is heard in public
- The application will be heard at a preliminary hearing under rules 53-56 of the ET Rules
- There is no requirement for the Respondent to expedite an ET3 Response Form

The test for the Employment Tribunal to apply is whether it appears to the tribunal that it is likely that on determining the complaint to which the application relates that it will find that the complainant has been unfairly dismissed for the asserted qualifying reason. The burden of proof is on the employee.

An approach as to the process to be followed by an Employment Tribunal in hearing an interim relief application has been suggested in *Raja v Secretary of State for Justice* UKEAT/0364/09/CEA.

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Interim relief in the Employment Tribunal

The EAT held at paragraph 25:

(25) What a Tribunal has to do in an application for interim relief 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 that the reason or reasons for the dismissal is one or more of those listed in section 129(1). What is clear is that the Tribunal must not attempt to decide the issue as if it were a final issue: Parkins v Sodexho Ltd [2002] IRLR 109 in the words of HHJ Altman at paragraph 29:

“Accordingly, it seems to us, that we must find that the Employment Tribunal erred in the question they asked themselves in reality, as to the reason for dismissal, by asking themselves what was the reason for dismissal and forming a judgment about it rather than asking whether it was likely that the reason would be a qualifying reason at the final hearing.”

In *Raja*, the EAT suggested that if presented with hundreds of documents containing detailed allegations, a tribunal should not simply reject the application but ask the parties to identify the parts of the claim form and documentation relevant to the question of interim relief.

In *Dandpat v The University of Bath* UKEAT/0408/09/LA, Underhill J stated at paragraph 17:

An application for interim relief is, as we have said, necessarily summary in character. It was in our view enough for the Tribunal to indicate the essential gist of its reasoning.

In *London City Airport v Chacko* [2013] IRLR 610 the EAT held at paragraph 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. The employment judge is then required to make as good an assessment as he is promptly able of whether the claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant is ultimately likely to succeed in his or her complaint to the employment tribunal but whether it ‘appears to the tribunal’ . . . ‘that it is likely’

and at paragraph 39

Parliament has entrusted an assessment to the employment judge on the front line. The statutory rubric requires the judge to assess how the matter ‘appears’ to him or her.

Such determinations will only be scrutinised on appeal in exceptional cases – particularly where perversity is alleged (*Chacko*, paragraph 39). The very nature of the exercise carried out by the Employment Tribunal is necessarily somewhat cursory given the short time scales dictates in s128 ERA / s161 TULR(C)A. Both sides must muster whatever information they can in a much shorter period than that usually allowed for preparation of a bundle and witness statements.

The tribunal will usually rely on the ET1 and any written response from the Respondent (the ET3 may well not have been submitted by that point); and on any relevant documents, written arguments and sometimes draft witness statements. Oral evidence is unusual and ET Rules 2013 Rule 95 expressly states that “the Tribunal shall not hear oral evidence unless it directs otherwise”.

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Interim relief in the Employment Tribunal

Meaning of 'likely'

Slynn J gave guidance in *Taplin v CC Shippam Ltd* [1978] ICR 1068 as to the meaning of 'likely' @ 1073H (my emphasis):

*Having considered all these matters which have been urged before us, we are unanimously of the view that the test proposed by Mr. Hands of a "reasonable prospect of success" is not one which should be adopted. The phrase can have different shades of emphasis, the lowest of which we do not think is sufficient. **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. The employee begins with a certificate from the trade union official certifying that there appear to be reasonable grounds for supposing that the reason for his dismissal was the one alleged. We consider that the tribunal is required to be satisfied of more than that before it can appear "that it is likely" that a tribunal will find that a complainant was unfairly dismissed for one of the stated reasons.***

*On the other hand we are not persuaded that there is a dichotomy between "probable" and "likely" as expressed by the chairman of the industrial tribunal. We find it difficult to envisage something which is likely but improbable or probable but unlikely and we observe that the Shorter Oxford English Dictionary definition does define "likely" as "probable." **Nor do we think that it is right in a case of this kind to ask whether the applicant has proved his case on a balance of probabilities in the sense that he has established a 51 per cent. probability of succeeding in his application,** as has at one stage been contended before us. Nor do we find Mr. Hand's alternative suggestion of a real possibility of success to be a satisfactory approach. This again can have different shades of emphasis. **It seems to us that the section requires that the employee shall establish more clearly that he is likely to succeed than that phrase is capable of suggesting on one meaning. On the other hand it is clear that the tribunal does not have to be satisfied that the applicant will succeed at the trial.** It may be undesirable to find a single synonym for the word "likely" but equally, we think it is wrong to assess the degree of proof which has to be established in terms of a percentage as we have been invited to do.*

*We think that the right approach is expressed in a colloquial phrase suggested by Mr. White. **The industrial 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.***

Although the chairman of the industrial tribunal expressed the burden of proof differently from the way which we have done we do not consider that there is any real difference of emphasis. He thought that "likely" meant more than "probable" and he regarded "probable" as being "51 per cent. or more." Accordingly we are not satisfied that he erred in law in his interpretation of the section.

Taplin was reaffirmed in *Dandpat* (see paragraph 20) and was also followed in *Raja* (see paragraph 26) and in *Ministry of Justice v Sarfraz* [2011] IRLR 562 where in paragraph 16, Underhill J stated:

In this context 'likely' does not mean simply 'more likely than not' – that is at least 51% - but connotes a significantly higher degree of likelihood.

Interim relief is a draconian measure. It runs contrary to the general principal that there be no compulsion in personal service. It is not a consequence that should be imposed lightly (*Dandpat*, paragraph 20).

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Interim relief in the Employment Tribunal

The 'likely to succeed' test applies to all elements of a claim including employment status (according to the EAT in *Hancock v Ter-Berg and another* UKEAT/0138/19) and illegality (according to the EAT in *Al Qasimi v Robinson* UKEAT/0283/17). It is not necessary to postpone a hearing on an interim relief application in order to determine a jurisdictional question such as employee status.

In claims based on trade union activity, the tribunal must focus on the activities themselves and not the way in which they are performed (*Mihaj v Sodexho Ltd* [2014] ICR D25).

The employment judge determining the interim relief application should not be the judge on the final hearing (*British Coal Corporation v McGinty* [1987] ICR 912, EAT).

Continuation Order

If the tribunal agrees with the Claimant's application, it must announce its findings and explain to both parties what powers it can exercise and in what circumstances it will exercise them and then invite the employer to reinstate or re-engage the employee on 'not less favourable' terms and conditions pending the final determination (s129(2) and (3) ERA / s163(2) TULR(C)A). If the parties agree, the tribunal can make an order to that effect. Failing agreement, unless it determines that the employee has unreasonably refused an offer of re-engagement, the tribunal will then make an order for the continuation of employment compliant with s130 ERA / s164 TULR(C)A which preserves pay and other benefits and continuity of employment. The amount of pay must be specified in the tribunal order, taking into account any amounts already paid by the employer.

Either party can make an application for a variation or revocation of a continuation of employment order on the ground of a relevant change of circumstances (s131 ERA / s165 TULR(C)A).

Payments made by the employer under a continuation order are not taxable as an "emolument of employment", but rather as a termination payment (*Turullols v HMRC* [2014] UKFTT 672).

The pay made under a continuation order is not reimbursed even if the employee loses at the final hearing of the unfair dismissal case.

Non-compliance

If, on application by the employee, a tribunal determines that an employer has failed to comply with an order of reinstatement or re-engagement or a continuation of employment order, the tribunal must make an order that the employee be compensated.

Practical tips

For the employee

- Act quickly – there is no need to obtain an ACAS Early Conciliation certificate
- Ensure that the application is submitted within the 7 day window and (if a trade union case) that the relevant certificate from a trade union official has been included with the application

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Interim relief in the Employment Tribunal

- Make a provisional assessment as to the merits of all elements of the claim including any potential jurisdictional hurdles – such as employment status – is the claimant ‘likely to succeed’ in relation to all such elements?
- Prepare an attractive short narrative that addresses all of the key elements of an automatic unfair dismissal case (e.g. for whistleblowing – make it clear what the disclosure was and when and to whom, why it was reasonably believed to be in the public interest and that it tended to show the relevant form of wrong doing and why it is alleged that the reason for the dismissal was the making of the disclosure)
- Focus on the reason for dismissal – but address any other potential areas of concern – do not let the employer take ownership of issues such as employee status

For the employer

- Respond quickly and efficiently. There may be very little time to prepare for an interim relief hearing – but a full response is not required at this stage
- Check whether the application was submitted (a) in time; (b) (if a trade union case) with the relevant certificate from a trade union official
- Check whether sufficient notice of the interim relief hearing (7 days) has been given by the tribunal
- Look at the merits of all elements of the claim including any potential jurisdictional hurdles – is there a specific weak element of the claimant’s claim on which attention can be focused
- Is there a fundamental dispute of fact – in relation to which a draft witness statement can be prepared? It is much less likely that a tribunal will be sufficiently satisfied that success is ‘likely’ if such a dispute exists
- In particular muster evidence pointing towards a potentially fair reason for the dismissal – do not (at this stage) be overly concerned about demonstrating procedural fairness

Find Out More

This article was written by [Andrew Allen QC](#), Head of the [Employment Team](#) at Outer Temple Chambers. The team would be pleased to discuss any related matter with you in the strictest of confidence. Please contact [Nicholas Levett](#) on +44 (0) 207 427 4908 for further information and to request future updates on this area of law.

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Relevant Legislation

The relevant sections of the Employment Rights Act 1996 state:

128 Interim relief pending determination of complaint

- (1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—
 - (a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—
 - (i) section 100(1)(a) and (b), 101A(d), 102(1), 103 or 103A, or
 - (ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or
 - (b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met, may apply to the tribunal for interim relief.
- (2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).
- (3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.
- (4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.
- (5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

129 Procedure on hearing of application and making of order

- (1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—
 - (a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—
 - (i) section 100(1)(a) and (b), 101A(d), 102(1), 103 or 103A, or
 - (ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or
 - (b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.
- (2) The tribunal shall announce its findings and explain to both parties (if present)
 - (a) what powers the tribunal may exercise on the application, and
 - (b) in what circumstances it will exercise them.
- (3) The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint
 - (a) to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or
 - (b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.
- (4) For the purposes of subsection (3)(b) "terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed" means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.
- (5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.
- (6) If the employer— (a) states that he is willing to re-engage the employee in another job, and (b) specifies the terms and conditions on which he is willing to do so, the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

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- (7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.
- (8) If the employee is not willing to accept the job on those terms and conditions
 - (a) where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and
 - (b) otherwise, the tribunal shall make no order.
- (9) If on the hearing of an application for interim relief the employer -
 - (a) fails to attend before the tribunal, or
 - (b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3), the tribunal shall make an order for the continuation of the employee's contract of employment.

130 Order for continuation of contract of employment

- (1) An order under section 129 for the continuation of a contract of employment is an order that the contract of employment continue in force
 - (a) for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and
 - (b) for the purposes of determining for any purpose the period for which the employee has been continuously employed, from the date of its termination (whether before or after the making of the order) until the determination or settlement of the complaint.
- (2) Where the tribunal makes such an order it shall specify in the order the amount which is to be paid by the employer to the employee by way of pay in respect of each normal pay period, or part of any such period, falling between the date of dismissal and the determination or settlement of the complaint.
- (3) Subject to the following provisions, the amount so specified shall be that which the employee could reasonably have been expected to earn during that period, or part, and shall be paid
 - (a) in the case of a payment for any such period falling wholly or partly after the making of the order, on the normal pay day for that period, and
 - (b) in the case of a payment for any past period, within such time as may be specified in the order.
- (4) If an amount is payable in respect only of part of a normal pay period, the amount shall be calculated by reference to the whole period and reduced proportionately.
- (5) Any payment made to an employee by an employer under his contract of employment, or by way of damages for breach of that contract, in respect of a normal pay period, or part of any such period, goes towards discharging the employer's liability in respect of that period under subsection (2); and, conversely, any payment under that subsection in respect of a period goes towards discharging any liability of the employer under, or in respect of breach of, the contract of employment in respect of that period.
- (6) If an employee, on or after being dismissed by his employer, receives a lump sum which, or part of which, is in lieu of wages but is not referable to any normal pay period, the tribunal shall take the payment into account in determining the amount of pay to be payable in pursuance of any such order.
- (7) For the purposes of this section, the amount which an employee could reasonably have been expected to earn, his normal pay period and the normal pay day for each such period shall be determined as if he had not been dismissed.

131 Application for variation or revocation of order

- (1) At any time between -
 - (a) the making of an order under section 129, and
 - (b) the determination or settlement of the complaint, the employer or the employee may apply to an [employment tribunal] for the revocation or variation of the order on the ground of a relevant change of circumstances since the making of the order.
- (2) Sections 128 and 129 apply in relation to such an application as in relation to an original application for interim relief except that, in the case of an application by the employer, section 128(4) has effect with the substitution of a reference to the employee for the reference to the employer.

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132 Consequence of failure to comply with order

- (1) If, on the application of an employee, an employment tribunal is satisfied that the employer has not complied with the terms of an order for the reinstatement or re-engagement of the employee under section 129(5) or (7), the tribunal shall—
 - (a) make an order for the continuation of the employee's contract of employment, and
 - (b) order the employer to pay compensation to the employee.
- (2) Compensation under subsection (1)(b) shall be of such amount as the tribunal considers just and equitable in all the circumstances having regard -
 - (a) to the infringement of the employee's right to be reinstated or re-engaged in pursuance of the order, and
 - (b) to any loss suffered by the employee in consequence of the non-compliance.
- (3) Section 130 applies to an order under subsection (1)(a) as in relation to an order under section 129.
- (4) If on the application of an employee an [employment tribunal] is satisfied that the employer has not complied with the terms of an order for the continuation of a contract of employment subsection (5) or (6) applies.
- (5) Where the non-compliance consists of a failure to pay an amount by way of pay specified in the order—
 - (a) the tribunal shall determine the amount owed by the employer on the date of the determination, and
 - (b) if on that date the tribunal also determines the employee's complaint that he has been unfairly dismissed, it shall specify that amount separately from any other sum awarded to the employee.
- (6) In any other case, the tribunal shall order the employer to pay the employee such compensation as the tribunal considers just and equitable in all the circumstances having regard to any loss suffered by the employee in consequence of the non-compliance.

The relevant sections of the Trade Union and Labour Relations (Consolidation) Act 1992 state:

161 Application for interim relief

- (1) An employee who presents a complaint of unfair dismissal alleging that the dismissal is unfair by virtue of section 152 may apply to the tribunal for interim relief.
- (2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).
- (3) In a case where the employee relies on [section 152(1)(a), (b) or (ba), or on section 152(1)(bb) otherwise than in relation to an offer made in contravention of section 145A(1)(d),] the tribunal shall not entertain an application for interim relief unless before the end of that period there is also so presented a certificate in writing signed by an authorised official of the independent trade union of which the employee was or proposed to become a member stating—
 - (a) that on the date of the dismissal the employee was or proposed to become a member of the union, and
 - (b) that there appear to be reasonable grounds for supposing that the reason for his dismissal (or, if more than one, the principal reason) was one alleged in the complaint.
- (4) An “authorised official” means an official of the trade union authorised by it to act for the purposes of this section.
- (5) A document purporting to be an authorisation of an official by a trade union to act for the purposes of this section and to be signed on behalf of the union shall be taken to be such an authorisation unless the contrary is proved; and a document purporting to be a certificate signed by such an official shall be taken to be signed by him unless the contrary is proved.
- (6) For the purposes of subsection (3) the date of dismissal shall be taken to be—
 - (a) where the employee's contract of employment was terminated by notice (whether given by his employer or by him), the date on which the employer's notice was given, and
 - (b) in any other case, the effective date of termination.

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162 Application to be promptly determined

- (1) An [employment tribunal] shall determine an application for interim relief as soon as practicable after receiving the application and, where appropriate, the requisite certificate.
- (2) The tribunal shall give to the employer, not later than seven days before the hearing, a copy of the application and of any certificate, together with notice of the date, time and place of the hearing.
- (3) If a request under section 160 (awards against third parties) is made three days or more before the date of the hearing, the tribunal shall also give to the person to whom the request relates, as soon as reasonably practicable, a copy of the application and of any certificate, together with notice of the date, time and place of the hearing.
- (4) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

163 Procedure on hearing of application and making of order

- (1) If on hearing an application for interim relief it appears to the tribunal that it is likely that on determining the complaint to which the application relates that it will find that, by virtue of section 152, the complainant has been unfairly dismissed, the following provisions apply.
- (2) The tribunal shall announce its findings and explain to both parties (if present) what powers the tribunal may exercise on the application and in what circumstances it will exercise them, and shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—
 - (a) to reinstate the employee, that is to say, to treat him in all respects as if he had not been dismissed, or
 - (b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.
- (3) For this purpose “terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed” means as regards seniority, pension rights and other similar rights that the period prior to the dismissal shall be regarded as continuous with his employment following the dismissal.
- (4) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.
- (5) If the employer states that he is willing to re-engage the employee in another job, and specifies the terms and conditions on which he is willing to do so, the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions; and—
 - (a) if the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect, and
 - (b) if he is not, then, if the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and otherwise the tribunal shall make no order.
- (6) If on the hearing of an application for interim relief the employer fails to attend before the tribunal, or states that he is unwilling either to reinstate the employee or re-engage him as mentioned in subsection (2), the tribunal shall make an order for the continuation of the employee's contract of employment.

164 Order for continuation of contract of employment

- (1) An order under section 163 for the continuation of a contract of employment is an order that the contract of employment continue in force
 - (a) for the purposes of pay or [any other benefit] derived from the employment, seniority, pension rights and other similar matters, and
 - (b) for the purpose of determining for any purpose the period for which the employee has been continuously employed, from the date of its termination (whether before or after the making of the order) until the determination or settlement of the complaint.
- (2) Where the tribunal makes such an order it shall specify in the order the amount which is to be paid by the employer to the employee by way of pay in respect of each normal pay period, or part of any such period, falling between the date of dismissal and the determination or settlement of the complaint.
- (3) Subject as follows, the amount so specified shall be that which the employee could reasonably have been expected to earn during that period, or part, and shall be paid—

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- (a) in the case of payment for any such period falling wholly or partly after the making of the order, on the normal pay day for that period, and
- (b) in the case of a payment for any past period, within such time as may be specified in the order.
- (4) If an amount is payable in respect only of part of a normal pay period, the amount shall be calculated by reference to the whole period and reduced proportionately.
- (5) Any payment made to an employee by an employer under his contract of employment, or by way of damages for breach of that contract, in respect of a normal pay period or part of any such period shall go towards discharging the employer's liability in respect of that period under subsection (2); and conversely any payment under that subsection in respect of a period shall go towards discharging any liability of the employer under, or in respect of the breach of, the contract of employment in respect of that period.
- (6) If an employee, on or after being dismissed by his employer, receives a lump sum which, or part of which, is in lieu of wages but is not referable to any normal pay period, the tribunal shall take the payment into account in determining the amount of pay to be payable in pursuance of any such order.
- (7) For the purposes of this section the amount which an employee could reasonably have been expected to earn, his normal pay period and the normal pay day for each such period shall be determined as if he had not been dismissed.

165 Application for variation or revocation of order

- (1) At any time between the making of an order under section 163 and the determination or settlement of the complaint, the employer or the employee may apply to an [employment tribunal] for the revocation or variation of the order on the ground of a relevant change of circumstances since the making of the order.
- (2) Sections 161 to 163 apply in relation to such an application as in relation to an original application for interim relief, except that—
 - (a) no certificate need be presented to the tribunal under section 161(3), and
 - (b) in the case of an application by the employer, section 162(2) (service of copy of application and notice of hearing) has effect with the substitution of a reference to the employee for the reference to the employer.

166 Consequences of failure to comply with order

- (1) If on the application of an employee an [employment tribunal] is satisfied that the employer has not complied with the terms of an order for the reinstatement or re-engagement of the employee under section 163(4) or [(5)], the tribunal shall—
 - (a) make an order for the continuation of the employee's contract of employment, and
 - (b) order the employer to pay the employee such compensation as the tribunal considers just and equitable in all the circumstances having regard -
 - (i) to the infringement of the employee's right to be reinstated or re-engaged in pursuance of the order, and
 - (ii) to any loss suffered by the employee in consequence of the non-compliance.
- (2) Section 164 applies to an order under subsection (1)(a) as in relation to an order under section 163.
- (3) If on the application of an employee an employment tribunal is satisfied that the employer has not complied with the terms of an order for the continuation of a contract of employment, the following provisions apply.
- (4) If the non-compliance consists of a failure to pay an amount by way of pay specified in the order, the tribunal shall determine the amount owed by the employer on the date of the determination. If on that date the tribunal also determines the employee's complaint that he has been unfairly dismissed, it shall specify that amount separately from any other sum awarded to the employee.
- (5) In any other case, the tribunal shall order the employer to pay the employee such compensation as the tribunal considers just and equitable in all the circumstances having regard to any loss suffered by the employee in consequence of the non-compliance.

ET Rules 2013

95 Interim relief proceedings

When a Tribunal hears an application for interim relief (or for its variation or revocation) under section 161 or section 165 of the Trade Union and Labour Relations (Consolidation) Act 1992 or under section 128 or section 131 of the Employment Rights Act 1996, rules 53 to 56 apply to the hearing and the Tribunal shall not hear oral evidence unless it directs otherwise.

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