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# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE ELLIOTT  
(sitting alone)

**BETWEEN:**

Mr A H Thomas

Claimant

AND

London Underground Ltd

Respondent

**ON:** 24 January 2011

**Appearances:**

**For the Claimant:** Mr N Toms, Counsel

**For the Respondent:** Mr D Grant, Counsel

## **JUDGMENT ON APPLICATION FOR INTERIM RELIEF**

The Judgment of the Tribunal is that:-

1. The Claimant's application for interim relief under section 161 of the Trade Union and Labour Relations (Consolidation) Acts 1992 is successful.
2. There is an order for continuation of the Claimant's contract of employment from the date of its termination on 16 December 2010 until the determination or settlement of the complaint.

## **REASONS**

1. This is an application for interim relief under section 161(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") in which the Claimant complains that his dismissal was unfair by reason of section 152 of

the 1992 Act. He relies on section 152(1)(b) of the 1992 Act stating that his dismissal is unfair because the reason or principal reason was that he had taken part in the activities of an independent trade union at an appropriate time.

### **Background**

2. The Claimant worked for the Respondent from July 1981 until his dismissal on 16 December 2010. He had 29 years complete years of service and an unblemished disciplinary record. He was a train operator.
3. The Claimant had been a member of the RMT union (previously NUR) for the duration of his employment and said that he played an active role in the union. At the date of this hearing he said he is currently on the Executive of the Regional Council and was recently elected Assistant Branch Secretary.
4. He was dismissed for gross misconduct following a disciplinary hearing which took place across two dates, the 10 and 16 December 2010. The dismissing officer was Mr Kieran Dimelow, a service control manager.
5. The gross misconduct relied upon were two incidents on 4 October 2010 for being offensive, abusive, intimidating, bullying, malicious or insulting to two employees namely a tube lines employee Mr Phillip Worf at Morden Station Gate line and a station supervisor Mr Joloaso at Kennington station.

### **The Issues**

6. The parties confirmed that there was no dispute as to compliance with the necessary procedures under section 161 of the 1992 Act in terms of making this application for interim relief.
7. There was also no dispute that the Claimant's activities had taken place at "an appropriate time" for the purposes of section 152 of the 1992 Act.
8. It was identified by both Counsel at the outset that the only issue for the Tribunal was under section 163 of the 1992 Act as to whether it appeared 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.

### **Applicable Law**

9. Section 163 of the 1992 provides:

#### **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.

10. Section 152(1)(b) of the 1992 Act provides:

**152 Dismissal [of employee] on grounds related to union membership or activities**

(1) For purposes of [Part X of the Employment Rights Act 1996] (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, . . .

11. The parties relied upon two leading authorities: *Taplin-v-C Shippam Ltd [1978] IRLR 450* and *Raja-v-Secretary of State for Justice EAT/0364/09*.

12. In the Taplin case the EAT held under the relevant provisions then in force under the Employment Protection Act 1975 that:

In order to determine for the purposes of an application for interim relief under s.78 of the Employment Protection Act whether it is "likely" that an applicant will be found to have been dismissed on grounds of trade union membership or activities, the correct approach is for the Industrial Tribunal to ask itself whether the applicant has established that he has a "pretty good" chance of succeeding in the final application to the Tribunal. In order to obtain an order under s.78 an applicant must achieve a higher degree of certainty in the mind of the Tribunal than that of showing that he just had a "reasonable" prospect of success.

13. In the Raja case, His Honour Judge Birtles, in deciding an application for interim relief under similarly worded provisions in section 129(1) of the Employment Rights Act 1996, said that he could see "no reason to depart after some 31 years from the authority of Taplin" and that the appellant in that case, Mr Raja, was required to show that he had a "pretty good chance of success".

### Documents

14. The documents in front of the tribunal were:
  - i. The pleadings; ET1 and ET3
  - ii. A bundle produced by the Respondent containing 221 pages. From page 72 onwards, the bundle comprised copies of still photographs from relevant CCTV footage taken on the day of the incident 4 October 2010.
  - iii. Witness statements from the Claimant, from Mr Steve Hedley, the regional organiser for the union and Mr Kieran Dimelow the dismissing officer for the Respondent.
  - iv. Written submission from the Claimant running to nine pages.
  - v. A chronology from the Respondent running to four pages.
  - vi. Extracts from the Respondent's disciplinary procedure marked company disciplinary interview (CDI) and marked "C4" for the Tribunal's reference.
15. In accordance with paragraph 17(iii) of his Honour Judge Birtles' Judgment in Raja and given the volume of paperwork in this case, I asked the parties to direct me to those of parts of the Claim Form and the relevant documentary evidence which were covered by section 161. An agreed reading list was put forward and we adjourned for one and a half hours to allow me to read the documents.
16. The parties were in agreement that the procedure then to be followed was that they would return to present their submissions which they duly did.

### The Evidence

17. The evidence on the paperwork was that the Claimant was dismissed in relation to two incidents which took place on 4 October 2010 which was a strike day on London Underground. There was no dispute that the Claimant was on annual leave on that day and the CCTV stills in the bundle showed

that he was not in uniform.

18. It was also not disputed that he had been on a picket line earlier in the day at Morden Station. There was some degree of consensus in relation to the two incidents on 4 October 2010 although there was dispute as to the details of exactly what took place on each occasion. The first incident, which can be described as the Morden station incident, the Respondent alleged that the Claimant swore at Mr Philip Worf a Tube Lines employee who was working at the Gate line and it was alleged that the Claimant called Mr Worf f\*\*\*ing sick or f\*\*\*ing stupid. The Claimant denied using that language but admitted that a conversation took place between himself and Mr Worf.
19. The second incident, which can be referred to as the Kennington station incident, involved the Claimant entering the supervisor's office. There is some dispute as to whether he fully entered the office; the CCTV stills showed him in the door frame and it is questionable as to exactly how far he had gone into the room. However the allegation was that he called supervisor Mr Joloaso a "scab" and a "strike-breaker". The use of the words scab and strike-breaker were admitted on behalf of the Claimant.
20. The Respondent's case was that this amounted to gross misconduct under paragraphs 3.2.2 and 3.7.7 of the Respondent's Code of Conduct which was in the bundle. Paragraph 3.2.2 says that employees must avoid *"initiating or provoking violent situations or otherwise behaving in a manner which is offensive, abusive, intimidating, bullying malicious or insulting to fellow employees customers and contractors and other with whom they may come into contact in the work place"*. Paragraph 3.7.7 says that employees *"must not do anything whilst on or off duty which could damage LUL's reputation and/or lead to criminal charges against them"*.
21. The Claimant also referred to a document labelled C4 which is a document headed Company Disciplinary Interviews "CDI" and appears to form part of the Respondent's Discipline Support Pack. This says (at page 18 of 23) that *"summary instant dismissal will be given for the most serious offences e.g. physical violence, theft, fraud or gross negligence"*.
22. The Claimant's case was that his actions fell nowhere this level of severity particularly in the context of what was described as "inflamed passions" on a day of industrial action.
23. The trade union activities relied upon by the Claimant were confirmed by Mr Toms as twofold; (a) that the Claimant was a long standing trade union activist and (b) that he was acting on the instructions of his Regional Officer Mr Hedley in investigating possible safety breaches by unqualified staff. Mr Hedley in his witness statement described the Claimant as "a thorn in management's side" and that he was instrumental in making the strike at the Morden depot successful.

### Likelihood of Success

24. The burden of proof in this matter is on the Claimant and is described in Taplin as being higher than a reasonable prospect of success. The Claimant must show that he has a "pretty good chance of success" at the full hearing. It is not for this Tribunal to make findings of fact which is a matter for the full hearing. The role of this Tribunal is to make a decision as to the likelihood of the prospect of success at the full hearing, based on the material before me today which is identified at paragraph 14 above.
25. It is for the Tribunal to make a broad assessment on the available material as to what is likely to happen at the full hearing. My decision, based on the available material, is that the Claimant has a pretty good chance of success at the full hearing for the following reasons.

### Findings on the Claimant's prospects of success

26. It was undisputed that the incident took place on a strike day. The Claimant was a trade union activist and he had been on a picket line earlier in the day. It is not disputed that the Claimant had a conversation with Mr Phillip Worf a Tube Lines employee questioning what he was doing. The Claimant denies swearing at Mr Worf but admitted at the disciplinary hearing that he may have used a word such as "dumb" or "silly" in addressing Mr Worf.
27. So far as the Morden station incident is concerned the Claimant admits the use of the words "scab" and "strike-breaker". There is a useful email from a member of the public, a Ms Hannah Donnell, dated 6 October 2010 who was present in the supervisor's office on the date of the Morden station incident. In her email she said *"again the man [the Claimant] persisted to ask the question at which point he did become slightly agitated. His behaviour was fairly disrespectful but nobody was aggressive they just told him he couldn't ask that, it was none of his business and asked him to leave"*.
28. My finding on the prospects in this respect is that the Claimant was not aggressive and this is borne out by the email from Ms Donnell which says that "nobody was aggressive". It also appears from the documents that the Claimant was regretful and apologetic for his actions. There was also an Incident Report Form completed by the station supervisor (Mr Joallaso) who had been called a scab and strike-breaker. This stated (on page 7a of the bundle) under the heading *"Findings of immediate investigation - basic cause: union/strike related issues"*.
29. This is compelling evidence as to the view of the Claimant's conduct on the day. The Claimant's actions, if proven, were likely to amount to misconduct but my view is that they did not reach the threshold set out in section 3.2.2 of the CDI document labelled C4 (and set out in paragraph 20 above).
30. The Claimant admitted his wrongdoing, he was regretful and it is also notable that he had 29 years unblemished service. The reasons for dismissal are set out at page 34 of the bundle being the disciplinary outcome signed by Mr K

Dimelow the dismissing officer. This states the reason for dismissal as "*a major considerate for us is the degree of trust and confidence the company may expect in the future. We note that you have not accepted full responsibility for your actions on the day and these amounted to a fundamental breach of trust between you and London Underground*".

31. However even on the Respondent's own note of the disciplinary outcome at page 33 of the bundle, the Claimant admitted that he was wrong and that he regretted the whole incident. This is therefore inconsistent with the dismissing officer's finding that he had not accepted full responsibility for his actions.
32. Insofar as paragraph 3.7.7 of the Code of Conduct was concerned, which provides that employees should do anything whilst on or off duty which could damage the Respondent's reputation, it was not disputed that the Claimant was not in uniform and Mr Phillip Worf in the notes of his investigatory interview at page 47 of the bundle initially saw the Claimant as a member of the public. As the Claimant was not in uniform on that day and he could only be perceived as a member of the public it is highly unlikely that his actions would have brought the Respondent into disrepute.
33. I therefore find that it is likely that the Tribunal will find at the full hearing that the reason for dismissal was that the Claimant had taken part in the activities of an independent trade union at an appropriate time contrary to section 152 (1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992.

#### **Orders under section 163 of the 1992 Act**

34. I explained to the Claimant the Tribunal powers under section 163(2) of the 1992 Act in terms of reinstatement or reengagement. A brief adjournment took place to allow the Respondent's Counsel to take instructions on the Respondent's willingness to reinstate the Claimant according to either section 163(4) or 163(5) of the 1992 Act. Following that adjournment the Respondent's position was confirmed that it was not willing to reinstate or reengage the Claimant.
35. The Tribunal therefore orders continuation of the contract of employment pursuant to section 164 of the 1992 Act. This is an order that the contract of employment continues in force for the purpose of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters and for the purposes of determining any period for which the employee has been continuously employed from the date of its termination on 16 December 2010 until the termination or settlement of the complaint.
36. For the purposes of section 164(2) of the 1992 Act, the amount to be paid to the Claimant by way of pay in respect of each normal four-weekly pay period falling between the date of dismissal and the date of the termination of the complaint is £3,252.96 and this should be pro-rated for the period 17 to 31 December 2010. The Claimant's staff travel pass is also to be reactivated as this is a benefit derived from his employment.

**ORDERS**

1. The hearing is to take place over four days from **23 to 26 May 2011** inclusive for full merits and remedy and to include time for the Tribunal's deliberations. No postponement of the hearing will be granted unless there are exceptional unforeseen circumstances.
2. Any remaining disclosure of documents to take place on or before **14 February 2011** by list of all documents which are of have been in the parties possession or power relating to the matters in issue in these proceedings.
3. On or before **28 February 2011** the parties shall produce to the other party the documents listed in their respective lists. This order may be complied with by supplying photocopies of such documents upon payment of reasonable photocopying charges.
4. No later than **28 February 2011** the Claimant shall provide to both the Respondent and to the Tribunal a Schedule of Loss as to future loss and loss of pension.
5. The Claimant shall prepare a consolidated bundle of copy documents with copies for the Tribunal hearing by supplementing the existing bundle used at the hearing today. By no later than **18 April 2011** the Claimant shall supply one copy of that bundle to the Respondent. The Claimant shall bring five identical copies of bundle to the Tribunal hearing.
6. The parties shall prepare a written statement for each witness (including the Claimant) who it is intended will be called to give evidence a the Tribunal hearing. Such witness statements shall be typed in double spacing, contain the evidence in chief of such witnesses, be set out in chronological order, omit any matter not relevant to the issues in the case, identify the source of any information which the witness does not know first hand, refer by page number in the bundle of documents to any document mentioned in the statement to the intent that the statements shall be read out by the respective witnesses at the hearing. Each party shall ensure that there are six copies of each statements of their own witnesses available at the tribunal hearing.
7. On or before **9 May 2011** there shall be simultaneous exchange of witness statements for each witness that party intends to call to give evidence at the Tribunal hearing.

**NOTES**

1. *This Order constitutes a notice of Hearing pursuant to rule 14(4) Employment Tribunals Rules of Procedure 2004. At the Hearing all parties will have the opportunity to submit written representations and to advance oral argument. If a party wishes to submit written representations for consideration to the Hearing s/he shall present*



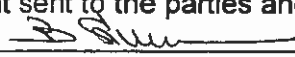
them to the Employment Tribunal Office not less than 7 days before the Hearing and shall, at the same time send a copy to all other parties.

2. Failure to comply with an Order for DISCOVERY/INSPECTION may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under section 7(4) of the Employment Tribunals Act 1996.
3. The Tribunal may also make a further Order (an "Unless Order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 19 or hold a pre-hearing review or a Hearing.
4. An Order may be varied or revoked upon application by a person affected by the Order or by an Employment Judge on his or her own initiative.



Employment Judge Elliott

Date: 07.02.2011

Judgment sent to the parties and entered in the Register on: 09 : 02 : 2011  
 for Secretary of the Tribunals