



## EMPLOYMENT TRIBUNALS

Claimant    Mr E Lynch  
Represented by                                      Mr N Toms, Counsel

Respondent    London Underground Ltd  
Represented by                                      Miss J Shepherd, Counsel

Employment Judge Silverman (sitting alone)

Orders, Reasons and Directions held on 5 November 2010 at London South

### ORDER

1. The Claimant brought two claims before the Tribunal, one of which relates to unfair dismissal and the other to actions short of dismissal on trade union grounds. By order of the Tribunal the two cases have been conjoined and are to be dealt with together.
2. The hearing on 5 November 2010 was an application by the Claimant for an interim relief order under S128A ERA 1996.
3. The Tribunal heard submissions from both parties' representatives and also read witness statements prepared by the Claimant, his witnesses Mr B Whitehead and Mr B Munro and for the Respondent from Miss A Stewart. The Tribunal was also directed by the parties' representatives to read selected pages from the agreed bundle and from the supplementary bundle prepared by the Claimant.
4. The Tribunal was also referred by both parties' representatives to the case of *Taplin -v- C Shippam Ltd [1998] ICR 1088* in relation to the onus of proof to be established by the Claimant in this type of application.
5. In order to grant the application requested by the Claimant the Tribunal must be satisfied that there exists prima facie evidence not merely that the Claimant is likely to succeed in his unfair dismissal claim but also that his claims will succeed on the grounds that his dismissal was automatically unfair because the principal reason for the dismissal was on either (or both) trade union or health and safety grounds. Further the Claimant must establish that, following the Taplin guidance (see above para 4) the Claimant's chance of success on these grounds is strong i.e. more than a 51% chance on the balance of probabilities.

6. The Tribunal considered the following aspects of the evidence presented by the Claimant which suggested that the requirements of the burden of proof had been satisfied by the Claimant.

6.1 The fact that the Claimant was following instructions given to him (albeit incorrect instructions) by staff at Network Rail and the Respondent as supported by documentary evidence (pp44-47).

6.2 That the Claimant had openly admitted the wrongdoing and had not concealed any facts from the Respondent.

6.3 That a comparable case which was patently of greater severity than that of the Claimant had been dealt with more leniently.

6.4 That other staff of the Respondent who had given the Claimant wrong instructions were not disciplined.

6.5 That the Claimant's union/health and safety roles were referred to four times during the disciplinary hearing and as an aggravating factor in the decision of the disciplinary panel without apparent justification.

6.6 That the Respondent's procedures for disciplinary action were not correctly followed and in particular that a manager with whom the Claimant was known to be in a dispute appeared to be involved in the decision to instigate formal disciplinary proceedings.

7 The Respondent indicated to the Tribunal that they would not reinstate the Claimant.

8 That being so the Tribunal makes a continuation order under s130 ERA 1996.

9 The Respondent is ordered to continue to treat the Claimant's contract of employment as continuing in force from the date of termination (13 October 2010) until the determination or settlement of this complaint.

10 The amount which the Respondent is to pay the Claimant for each four weekly period or part thereof falling between the date of termination and the date of determination or settlement is £2326.93.

11 Payment for the period from 13 October 2010 until 5 November 2010 shall be made by 3 December 2010.

12 The following directions apply to both the above numbered cases.

13 The applications will be heard by a full Tribunal sitting at Croydon commencing at **10.00am on 14 March 2011** and will continue on **15-17 March 2011** (4 days total). It is hoped that this time allocation will enable

both liability and remedy to be dealt with. The parties agreed this date at the hearing of the present application.

14. No later than 28 days before the hearing date the claimant shall supply to the respondent a Schedule of Loss, that is a document setting out against each and every claim for monetary compensation the amount properly claimed for such claim. The amount claimed shall be shown in a money column and, if a calculation has been made to arrive at the amount, then the calculation shall also be shown. The Schedule shall also show such amounts (if any) as the claimant offsets by way of credit and a total figure of the total the claimant claims in these proceedings.
15. On or before **10 January 2011** the parties shall prepare and exchange a list of all documents which are or have been in their respective possession or power relating to the matters in issue in these proceedings.
16. On or before **31 January 2011** and upon reasonable notice the parties shall produce to each other the documents listed in their respective lists as in their possession and shall permit the other party to take copies of such documents. If preferred, this part of this order may be complied with by supplying photocopies of such documents upon payment of reasonable photocopying charges.

#### **Trial Bundle of Documents**

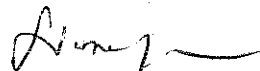
17. The Respondent shall prepare a consolidated bundle of copy documents with copies for the Tribunal hearing.
  - 17.1 For this purpose, no later than **7 February 2011** the Claimant shall supply to the Respondent a list of all documents which that party intends to introduce into evidence or otherwise rely upon at the Tribunal hearing, and shall supply one clean and legible copy of all documents the originals of which are not already in the possession of the Respondent.
  - 17.2 The bundle shall contain a copy of each document both parties intend to use at the Tribunal hearing, together with a list of contents, with each page numbered, avoiding duplication and be so bound or otherwise held together, so as to open flat.
  - 17.3 No later than 21 days before the hearing (**21 February 2011**) the Respondent shall supply one copy of the bundle to the Claimant.
  - 17.4 The Respondent shall bring five identical bundles of the copy documents to the Tribunal hearing.
18. The parties shall prepare a written statement for each witness (including the claimant or respondent who will give evidence personally) who it is

intended will be called to give evidence on their behalf at the tribunal hearing. Such witness statements shall:

- 18.1 be typed in double spacing;
- 18.2 contain the evidence-in-chief of such witnesses;
- 18.3 be laid out in short consecutively numbered paragraphs;
- 18.4 set out in chronological order, with dates, the facts which the witness can state;
- 18.5 omit any matter not relevant to the issues in this case;
- 18.6 identify the source of any information which the witness does not know first hand;
- 18.7 refer by page number in the bundle of documents to any document mentioned in the statement;
- 18.8 be signed

to the intent that such statements shall be read out by the respective witnesses at the tribunal hearing. Each party shall ensure that there are six copies of each statement of their own witnesses available at the tribunal hearing not contained in a bundle of documents.

19. No evidence-in-chief may be given or expanded upon by a witness other than the evidence contained in the written statement of that witness without the leave of the Tribunal. No witness may be called by a party to give evidence at the Tribunal hearing other than a witness in respect of whom a written witness statement has been prepared and exchanged or with the leave of the Tribunal.
20. On **28 February 2011** (or 14 days before the hearing date) there shall be a simultaneous exchange of witness statements by each party providing to the other one copy of each witness statement for each of the witnesses that party intends to call to give evidence at the tribunal hearing.



Employment Judge Silverman

Dated 22 November 2010

London South

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#### NOTES

- (1) Any person who without reasonable excuse fails to comply with this Order shall be liable on summary conviction to a fine of £1,000.
- (2) Further, if this Order is not complied with, the Tribunal, under Rule 13(1); may (a) make an Order for costs or preparation time against the defaulting party, or (b) strike out the whole or part of the claim, or, as the case may be, the response, and, where appropriate, direct that the respondent be debarred from responding to the claim altogether.
- (3) You may make an application under Rule 12(2)(b) for this Order to be varied or revoked.