Neutral Citation Number: [2024] UKIPTrib 2

Case No: **IPT/23/329/CH**

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 02 August 2024

Before:

LADY CARMICHAEL
MR JUSTICE CHAMBERLAIN

- -

Between:

EFG	**COMPLAINANT**
- v -	
THE SECURITY SERVICE	**RESPONDENT**

- -

Hearing date: 21 November 2023

- -

JUDGMENT

Lady Carmichael and Mr Justice Chamberlain:

Introduction

1 This is the judgment of the Tribunal, to which both members of the panel have contributed.

2 The complainant brought proceedings under s. 65(2)(a) of the Regulation of Investigatory Powers Act 2000 (RIPA) and made a complaint under s. 65(2)(b) of the same Act. The proceedings and complaint raise allegations of procedural unfairness in the respondent's conduct of a review of his developed vetting (DV) clearance. The process for review of his DV clearance started on 5 August 2022. For a variety of reasons, including an attempt to challenge the process in the civil courts, the process had not been concluded by November 2023.

3 This judgment relates to the complainant's application for an interim injunction. He sought:

(a) an injunction restraining the respondent from continuing its DV review panel process and/or from proceeding with a hearing in that process on 23 November 2023; and

(b) an injunction restraining the respondent from terminating the complainant's contract of employment pending the outcome of the substantive proceedings.

4 We refused the applications at a hearing on 21 November 2023 and gave brief reasons orally. As applications to the tribunal for interim injunctive relief are relatively unusual, we indicated that we would provide fuller reasons in writing.

Jurisdiction

5 It was common ground that the tribunal had jurisdiction to grant interim relief, at least in proceedings brought under s. 65(2)(a) RIPA. Where such proceedings are brought, the jurisdiction to grant interim relief is conferred in terms by s. 67(6) RIPA. It may fall for consideration in another case whether the Tribunal has the power to grant interim relief in a case where a complaint is made under s. 65(2)(b), but no proceedings are brought under s. 65(2)(a). In this case, however, there are proceedings under s. 65(2)(a), so we do not need to determine that question and do not so.

The proper approach to applications for interim relief

6 The parties were also *ad idem* as to the proper approach to applications for interim relief. We accepted the parties' submissions. Although s. 67(6) RIPA is silent as to the test to be applied when considering whether to make an interim order, s. 67(2) provides as follows:

> "Where the Tribunal hear any proceedings by virtue of section 65(2)(a), they shall apply the same principles for making their determination in those proceedings as would be applied by a court on an application for judicial review."

7 The intention of Parliament appears to have been to confer on the Tribunal, in the fields where it has jurisdiction, the judicial review jurisdiction that would otherwise be exercised by the High Court (in England & Wales and Northern Ireland) or the Court of Session (in Scotland). Accordingly, we consider that the principles applicable to interim relief in judicial review proceedings in those courts should also apply to applications for interim relief before the Tribunal.

8 The applicable principles so far as the courts in England and Wales and Northern Ireland are concerned were recently summarised by the Court of Appeal in *R (Public*

and Commercial Services Union) v Secretary of State for the Home Department [2022] EWCA Civ 840. Singh LJ (giving the judgment of the court) said this:

> "Interim relief
>
> …
>
> 75. The grant of interim relief is governed by the well-known test and principles set out by the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. The questions that arise are usually:
>
> (1) Is there a serious question to be tried?
>
> If the answer to that question is "yes", then two further related questions arise; they are:
>
> (2) Would damages be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction?
>
> (3) If not, where does the 'balance of convenience' lie? The first question indicates a threshold requirement.
>
> 76. It is common ground that the test is modified in the public law context. As Sir Clive Lewis puts it in *Judicial Remedies in Public Law* (6th ed., 2020) at paragraph 8-024:
>
> 'Further, the adequacy of damages as a remedy will rarely determine whether or not it is appropriate to grant or refuse an interim injunction. For that reason, the courts will normally need to consider the wider balance of convenience and in doing so, the courts must take the wider public interest into account.'
>
> 77. In *R (Governing Body of X) v Office for Standards in Education* [2020] EWCA Civ 594 [2020]; EMLR 22 Lindblom LJ (with whom Sir Geoffrey Vos C and Henderson LJ agreed) commented, at paragraph 66:
>
> '66. There is support at first instance for the proposition that, in a public law claim, the court will generally be reluctant to grant interim relief in the absence of a "strong prima facie case" to justify the granting of an interim injunction … This is not to say that the relevant case law at first instance supports the concept of a "strong prima facie case" being deployed as a "threshold" or "gateway" test in such cases, but rather that the underlying strength of the substantive challenge is likely to be a significant factor in the balance of considerations weighing for or against the granting of an injunction.'"
>
> The 'balance of convenience'
>
> 78. The language of 'balance of convenience' is well established but, as the judge observed, the court is concerned not with convenience as such but balancing the risk of prejudice or, as it has been expressed in some of the authorities, the balance of justice or the relative risk of injustice. The risk arises from the inevitable fact that a court cannot deal with the final merits of litigation early on and yet it may be necessary to grant a remedy in the meantime while the parties prepare their cases. It may turn out at the end of

the day that the court has granted or refused a remedy which a party was or was not entitled to.

79. The purpose of considering the balance of convenience or justice was helpfully set out by the Privy Council in *National Commercial Bank Ltd v Olint Corporation Ltd* [2009] UKPC 16; [2009] 1 WLR 1405, at paragraphs 16 to 17, by Lord Hoffmann:

> '16. … The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. …'
>
> 17. … the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other."

The merits

Submissions for the complainant

9 The complainant submitted that the following features of the vetting review process were procedurally unfair and in some instances also incompatible with the complainant's rights under Articles 6, 8 and 14 of the European Convention on Human Rights ("ECHR"), and that they gave rise to serious questions to be tried:

(a) the complainant provided information to members of the vetting team at a meeting when he had not been told the purpose of the meeting and had not been cautioned, and the information was now being deployed against him in the review process;

(b) the respondent failed to implement recommendations made by occupational health advisers as to adjustments to the process that would assist the complainant's participation;

(c) the complainant required to access redacted material relevant to the process during set periods in conditions of security that caused him difficulty in participating effectively in the process; and

(d) the complainant had no effective access to independent legal advice because his legal advisers could not view the material relevant to the DV review process.

10 The complainant submitted that the balance of convenience favoured him. Damages could not afford an adequate remedy. If the complainant's DV clearance were withdrawn, it was very likely he would lose his employment. It would be very difficult for him to pursue a claim for unfair dismissal if he were dismissed on national security grounds. There was no particular reason why the hearing in the review process required to take place on 23 November 2023 in the face of the concerns the complainant had highlighted about procedural fairness.

Submissions for the respondent

11 The respondent challenged the factual accuracy of the complainant's contentions about a number of the features of the review process. The complainant had been given an adequate opportunity to review the material relevant to that process. He had been allowed to make and retain notes, subject to their being checked to ensure that they would not compromise the complainant or national security. Some of the material involved was classified and needed to be safeguarded in a secure environment and by redaction. The complainant had independent legal advice although his lawyer was not allowed to participate in the review process. The complainant's lawyer had delayed in providing details necessary to progress a process to grant him security clearance.

12 The respondent submitted that the tribunal should stay proceedings to allow internal procedures, including any appeal, to be completed. Judicial review was a remedy of last resort. The complainant should pursue all available alternative remedies, including the review process itself and any appeal from it. There was a strong public interest in safeguarding national security, and that called for the review process to be completed as quickly as possible.

Submissions of Counsel to the Tribunal ("CTT")

13 CTT submitted that there was a close analogy with cases in the civil courts relating to attempts to restrain an employer from proceeding with an investigative or disciplinary process. The relevant principles were those summarised by Green J in *Al-Mishlab v Milton Keynes Hospital NHS Foundation Trust* [2015] EWHC 3096 at [16]-[21].

(a) A contractual obligation to act fairly in an internal process affecting the employee's employment might be imposed through the implied duty of trust and confidence. That was not a general obligation to act fairly, but a "severe" test which required consideration whether the employer's conduct was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties, without reasonable and proper cause: Gregg v Northwest Anglia NHS Trust [2019] ICR 1279 at [113]-[117] per Coulson LJ.

(b) As a general rule it was not appropriate for courts to intervene to remedy minor irregularities in the course of employment procedures: their role was not the micromanagement of proceedings.

(c) The courts should be slow to intervene when a process is continuing which might resolve the dispute between the parties. There was a public interest in allowing internal processes to run their course.

14 CTT identified the following points for consideration in relation to whether there was a serious issue to be tried. Article 6 ECHR would almost certainly apply to the vetting process given its presumed decisive impact on the complainant's employment. Article 6 did not, however require disclosure of all material to a person refused vetting clearance: *Various Claimants v (1) Security Service (2) GCHQ* [2022] UKIP Trib 3. To the extent that the complainant said that Article 6 required the presence of a legal adviser at a vetting hearing, he would need to address the principles in *R(G) v Governors of X School* [2012] 1 AC 167. Article 6 would not generally require the right to legal representation but may do if the vetting process was decisive of the right to practise in a particular profession.

15 The claim so far as based on Article 8 and/or Article 8 read with Article 14 appeared to relate to a lack of reasonable adjustments during the process and intrusive questioning when the complainant was vulnerable. The former would give rise to consideration whether the claim was properly brought to the tribunal relying on those articles, rather than a claim relying on the reasonable adjustment provisions of the Equality Act 2010:

Various Claimants, paragraph 40. As to the latter, vetting necessarily and inevitably involved intrusive questioning about a subject's personal life.

16 As to balance of convenience, the role of the court when asked to intervene in an employment-related investigative or disciplinary process, as characterised in *Al-Mishlab* was a relevant matter. Contrary to the respondent's submission, the respondent's internal process could not be regarded as an alternative remedy which ought to be exhausted, where that process was itself being impugned as unlawful. There was a very strong public interest in safeguarding national security, but that did not necessarily call for the process to be concluded as quickly as possible, particularly where the process had already been going on for some time without any identified harm to national security. The complainant would not be adequately protected by remedies available at the conclusion of the proceedings. If his DV clearance were removed, he would presumably be dismissed. It was very doubtful whether this tribunal could order his reinstatement with payment of back pay. A claim to the employment tribunal would be unlikely to succeed, given the terms of section 10 of the Employment Tribunals Act 1996: see *B v BAA plc* [2005] ICR 1530.

Decision

17 We assumed in the complainant's favour, but without deciding the point, that he had raised a serious question for trial. We concluded that the balance of convenience nonetheless favoured the respondent. In doing so we took into account the following matters:

(a) There would be prejudice to the complainant if his vetting were to be withdrawn and his employment terminated as a result.

(b) However, as became clear in the course of submissions, the complainant had already submitted responses to the respondent in the course of the vetting review process. Counsel accepted that it would be open to him to submit, in the course of the process, that his responses ought to be left out of account. That told against the proposition that prejudice arising from the features of the process that counsel had identified would be irremediable.

(c) No decision had yet been taken on the substantive issue of DV clearance. No final decision had been taken as to the material he might yet receive in the vetting review process. It remained open to the complainant to make representations to the respondent about both of those matters until the process had concluded.

(d) There was a public interest in allowing the process to run to its conclusion. The courts had deprecated attempts to micromanage analogous procedures.

(e) This tribunal has jurisdiction to quash a vetting decision once such a decision has been taken by the respondent, with the result that the decision would be *void ab initio* (i.e. as if never taken). Although there was no guarantee that, if dismissed the complainant would be reinstated following a quashing order by the Tribunal, a decision to dismiss taken on the basis of a withdrawal of DV clearance later quashed by this tribunal would be hard to defend.

(f) The underlying merits of some aspects of the complainant's case appeared to be relatively weak:

(i) It is generally not straightforward to determine before the conclusion of a process whether or not it will comply with Article 6 or common law standards of fairness. The process needs to be looked at as a whole,

including the procedural safeguards available at each stage, including the avenues for appeal and review.

(ii) The jurisdiction of this tribunal to examine matters which may not be capable of disclosure to the complainant is one of the factors that requires to be taken into account in assessing whether the vetting process as a whole is fair.

(iii) The complainant submitted that the failure to provide his legal representatives access to the material represented a breach of his Article 6 rights. But there is no absolute right to legal representation in disciplinary processes which the complainant submitted were broadly analogous processes. The right arises only in particular circumstances. Even accepting for present purposes the broad analogy, it was not self-evident that Article 6 required that legal representatives be involved to any particular extent in a DV process where one of the security and intelligence agencies was the employer.

(iv) We considered it likely that the respondent would succeed at trial at least to some extent in arguing that the process for providing information to the complainant and inviting his response required particular measures to protect the security of the information and to the safety of the complainant himself.

(v) The complainant submitted that material used in the process was obtained unfairly because he spoke to members of the vetting team at a meeting without being cautioned. No authority was offered for the proposition that a caution would be required in the circumstances.

18 For these reasons, we refused the complainant's applications for interim injunctive relief.