EMPLOYMENT TRIBUNALS

Claimant: Mr W Wawrzyniak

Respondent: Cramscene Limited

HELD AT: Leeds **ON:** 19 and 20 October 2017

BEFORE: Employment Judge Wedderspoon
Mr W Roberts
Mr M Brewer

REPRESENTATION:

Claimant: Mrs Wawrzyniak (the Claimant's wife)
Respondent: Mr B Hendley, Consultant

Interpreter: Mrs P Cain for the Claimant

JUDGMENT

The unanimous Judgment of the Employment Tribunal is that:

1. The Claimant's claim section 15 of the Equality Act is well founded and succeeds.
2. The Claimant's claim section 21 and 22 of the Equality Act is not well founded and fails.
3. The Claimant's claim for breach of contract is well founded and succeeds and the Claimant is awarded one week's notice pay.
4. The Claimant's claim for holiday pay is well founded and succeeds. He is awarded 9.5 days of outstanding holiday pay.
5. The claim for a failure to provide terms and conditions is well founded and succeeds. The Claimant will be awarded 4 weeks pay.
6. There have been significant breaches of the ACAS Code of Practice and the Claimant will be awarded 25% uplift on his damages.
7. A remedy hearing is fixed for one day on 6 December 2017.

REASONS

Claims

1. The Claimant pursued a number of claims before the Employment Tribunal including section 15 and section 21 claims under the Equality Act 2010, a breach of contract claim limited to one week's notice, holiday pay and a failure to provide terms and conditions.
2. It was determined by Employment Judge Lancaster in a previous Order that the Claimant was dismissed on 23 February 2016 by the Respondent and was disabled within the meaning of section 6 of the Equality Act 2010 at the material time.

Issues

3. The relevant issues to be considered at the final hearing were set out in Case Management Orders by Employment Judge Maidment on 16 December 2016 and by Employment Judge Lancaster on 22 March 2017 as follows:-

Section 15: Discrimination arising from disability

The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within section 39 Equality Act is the Claimant's dismissal. No comparator is needed.

Does the Claimant prove that the Respondent treated the Claimant as set out above?

Did the Respondent treat the Claimant as aforesaid because of the "something arising" in consequence of the disability?

Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

Reasonable adjustments: section 20 and section 21

Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely the requirement for the Claimant to carry out his normal duties at work as a lift operator/driver.

Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that due to the Claimant's physical impairment his mobility and use of his foot was restricted thus impacting upon his normal duties at work.

Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the Claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

allocating the Claimant to work in the Respondent's workshop.

providing to the Claimant the use of an automatic vehicle as opposed to one requiring the manual use of gears.

Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

[In the alternative where a reasonable adjustment of the provision of an automatic vehicle is sought, the Claimant will maintain that but for the provision of an ***auxiliary aid*** *the Claimant would be put at a substantial disadvantage in terms of his ability to fulfil his duties at work in comparison with persons who are not disabled].*

Unpaid annual leave – Working Time Regulations

What was the Claimant's leave year?

How much of the leave year had elapsed at the effective date of termination (23rd February 2016)?

In consequence, how much leave had accrued for the year under regulations 13 and 13A?

How much paid leave had the Claimant taken in the year?

How many days remain unpaid?

What is the relevant net daily rate of pay?

How much pay is outstanding to be paid to the Claimant?

Is an uplift to be applied to any award by reason of the complete failure of the Respondent to comply with the ACAS code of practice when dismissing the Claimant?

Breach of contract

It is not in dispute that that Respondent dismissed the Claimant without notice.

Does the Respondent prove that it was entitled to dismiss the Claimant without notice because the Claimant had committed gross misconduct in that he committed a breach of health and safety requirements on 7th December 2015 NB This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the gross misconduct.

It is not in dispute that the Claimant's contractual entitlement was to 1 weeks' notice. By reason of his sickness absence he would not have been able to work during the notice period but by reason of section 88 (1) (b) of the Employment Rights Act 1996 he would therefore be entitled to full pay and not sick pay only.

Is an uplift to be applied to any award by reason of the complete failure of the Respondent to comply with the ACAS code of practice when dismissing the Claimant?

4. The Tribunal heard from the Claimant and his witness Mr Kolpa and heard from Mr Charles Haigh the director of the Respondent's company. The Tribunal was provided with a bundle of documentation from the Respondent of 113 pages and provided with a Claimant's bundle of 72 pages. In addition it was provided with sick notes exhibited C1 and a particulars of injury report form exhibited C2.

The law

5. Discrimination arising from disability pursuant to section 15 of the Equality Act 2010 does not require a comparison with another worker's treatment. It is not unlawful if the employer can prove he did not know and could not reasonably have been expected to know that the worker had a disability. Where the question of knowledge is an issue the Claimant must establish that the individual that took the decision being challenged either knew or ought to have known of the Claimant's disability (**IPC Media Limited v Miller** [2013] IRLR 707).
6. The unfavourable treatment must be because of the relevant something and that something must itself arise in consequence of the disability (**Pnaiser v NHS England** UK EAT/0137/15).
7. In any event discrimination arising from disability can be justified where the treatment is a proportionate means of achieving a legitimate aim section 15(1)(b) of the Equality Act 2010. The burden is on the Respondent to establish justification. The test to be applied by the Tribunal is an objective one. The Tribunal should take into account the reasonable needs of the Respondent's organisation but make up its own mind whether the actions of the Respondent were justified.
8. In reasonable adjustment claim under section 21 of the Equality Act 2010 the Claimant is required to at the first stage:
    a. Establish the PCP relied upon and;
    b. To demonstrate the substantial disadvantage.

    The burden shifts to the Respondent to show that no adjustment or further adjustment should be made (**Project Management Institute v Latif** [2007] IRLR 579.
9. In accordance with the case of Secretary of State for Work and Pensions Job Centre Plus v Higgins (UK EAT 579/12 of 2014 ICR 341) the Tribunal should approach this claim by making explicit findings identifying:
    a. The PCP;
    b. The persons who are not disabled with whom comparison is made;
    c. The nature and extent of any substantial disadvantage suffered by the employee;
    d. Any steps it could have been reasonable for the employer to take.
10. Factors to be taken into account whether an adjustment is reasonable is taking account of paragraph 6.28 of the Code of Practice:-
    a. Whether taking any particular steps would be effective in preventing a substantial disadvantage;
    b. The practicability of the step;
    c. Financial and other costs and disruption;

d. Employer's financial or other resources;

e. Type and size of employer.

11. Whether adjustments are reasonable in the circumstances will be determined by the Tribunal objectively following **Morse v Wiltshire County Council** [1998] IRLR 352 and **HM Land Registry v Wakefield** [2009] All England Reports 205.

Facts

12. The Respondent is in the business of crane hire and employs 25 employees including three Polish workers. Over time the Respondent has employed approximately two other individuals who suffered from disabilities.

13. Mr Haigh has run the family business for approximately 55 years. The Tribunal found he purported to have less knowledge of employment law and employee rights would have been expected of a person in business running an enterprise for nearly 55 years. Mr Haigh tended to trivialise the need for documentation including an employee's statutory right for an employment contract. Mr Haigh failed to provide the Claimant with a contract of employment stating it was sufficient to have an oral contract and said he believed it was only necessary to provide a written contract when somebody was employed for two years. Although the Respondent's business is a small family one, the Tribunal found it was sufficiently large enough and to have existed long enough to have placed health and safety at a priority particularly in view of the heavier equipment and machinery that was used. However the Tribunal found that there was a lack of focus by this Respondent on health and safety issues in the context of the nature of its business and heavy machinery used.

14. Mr Kolpa who gave evidence for the Claimant who the Tribunal found to be a credible witness gave examples of health and safety concerns he had whilst he was employed by the Respondent which included jacking vehicles on gravel, placing axle stands on gravel and transporting oil manually. The Tribunal took the view that such practices were manifestly unsafe and exposed both him and other employees to danger. He gave evidence which the Tribunal accept. As a result of his concerns he resigned after one week.

15. The Tribunal found the evidence of Mr Haigh vague and unsatisfactory. Mr Haigh had very little grasp of the administrative side of the business. On a number of occasions he was unable to provide explanations about what appeared to be inconsistent correspondence sent by the Respondent to the Claimant. For example in an email sent to the Claimant on 23 February it refers to a P45 being sent. However the only P45 disclosed by the Respondent in this litigation is a P45 prepared on 21 March 2017 13 months later dated the end of employment being 1 April 2016. This was also inconsistent with the dismissal email dated 23 February. Furthermore no acknowledgement for the Respondent's internal investigation, in the bundle purportedly sent to the HSE.

16. The Tribunal also noted that despite an email being sent to the Claimant on 23 February dismissing him from employment there was a letter of the same date purportedly written to the Claimant suggesting a meeting with him. It was therefore inconsistent with the dismissal contained in the email.

17. The Tribunal do accept that correspondence was sent by the Respondent to a relative of the Claimant at an address. There appears to have been some breakdown in this communication. The Tribunal find as a fact that the Claimant

attended the Respondent's premises in response to a request by the Respondent to provide a personal injury form and attended the Respondent's premises on 26 February providing such a form to the Respondent. The Respondent did not take the opportunity to discuss the accident with the Claimant at this stage.

18. The Tribunal finds that the Claimant to have been an experienced crane operator who had worked in a number of different European countries. He had received a good reference from an employer situated in Hasselt. On 30 October 2013 it was stated that the Claimant had a "high quality of work".

19. The Tribunal finds that the Claimant was sufficiently trained and competent within the industry to be aware as to unsafe and safe working practices. He was also aware of the licensing requirements in his industry and appeared to meet those. In respect of health and safety issues the Claimant was spoken informally to on two previous occasions by Mr Haigh. First when the Claimant had failed to adhere to the instructions of a banks man when reversing a crane, and secondly when the Claimant failed to adhere to the ground operative's instruction when loading. There is no evidence before the Employment Tribunal as to any formal investigation conducted by the Respondent in respect of these matters. These incidents appear to the Tribunal to be significant health and safety breaches which endangered others. However the Respondent took no formal action on these matters. This demonstrated to the Tribunal the Respondent's lip service to health and safety issues.

20. On 7 December 2015 the Claimant went into the office of Mr Haigh. Mr Haigh informed him that there was no work for him to do at that time but he would let the Claimant know if he did. Mr Haigh mentioned to the Claimant there was an alternative job which he had allocated to Connor to put up Christmas decorations that afternoon. Connor was preparing the crane for this work.

21. The Tribunal finds that the Claimant sought out Connor to see if he could assist him. We find that Connor suggested to the Claimant that he could assist. The Claimant decided the manner he would assist was by propping a ladder against a container so to attach chains to a basket located on top of the container. These were then to be attached to the crane. There were a number of pallets in the way. The Tribunal finds that the Claimant genuinely believed that the only way he could remove the basket from the top of the container was effectively by using the ladder to access the basket with chains and attach these to the basket. It was the Claimant's genuine and reasonable view he could not use the JCB in the space close to the container and decided to attach the chains to the basket in the manner described. The Claimant was unable to extend the ladder fully because it was defective. He failed to foot the ladder and he unfortunately sustained a fall.

22. In the circumstances the Tribunal found that the Claimant committed a serious error of judgment. The usual practice would be to use a JCB to attach the fork to remove the basket from its usual location on the top of the container. However the Tribunal reject the Respondent's suggestion that the acts of the Claimant amounted to gross misconduct so that the Respondent was entitled to summarily dismiss the Claimant. The actions of the Claimant are consistent with the culture of the organisation, namely its disregard, lack of focus of health and safety; namely cutting corners.

23. Further the Tribunal do not accept there was an absolute bar on using ladders on site. Indeed there was a ladder located on site. In making a finding that this issue was not gross misconduct entitling summary dismissal, but rather an error

of judgment the Tribunal takes into account the evidence of the Respondent that the Claimant had committed serious errors in the past but as above these were neither investigated nor was the Claimant disciplined as a result.

24. Post accident the Respondent carried out an internal investigation. Their findings were approved by Mr Haigh. Two experts mentioned within the report were the two sons of Mr Haigh. The Respondent's evidence is that this report was submitted to the HSE but no acknowledgment of this report is found in the bundle of documents disclosed by the Respondent. Nor did the HSE appear to check whether the suggested recommendations were put in place by the Respondent to avoid a future accident. The Tribunal finds the report was prepared some time between the receipt of the Claimant's personal injury report on or about 10 February and his dismissal on 23 February and not within the 24 hours initially suggested by Mr Haigh in his evidence. The Tribunal considers this report with some caution in particular its criticisms of the Claimant for failing to attach a harness. Having seen the photographs and heard the description of the accident the Tribunal finds it difficult to see what the Claimant could have attached the harness to until he got to the top of the ladder. The Tribunal have some concerns as to the lack of independence of this report.

25. The Tribunal do find that the Respondent did engage in some correspondence with the Claimant via a family address. The Tribunal finds that the Claimant came with a PI form to the Respondent's premises in early February 2016 and not January 2016 as purported by the Claimant. However the Respondent provided no welfare to check on the Claimant's condition or any follow up. The Tribunal does not accept the Respondent's evidence that the Claimant failed to comply with the requests to meet; the Claimant attended the Respondent's premises when requested with the personal injury form.

26. By email the Claimant's wife on 1 February informed the Respondent that the Claimant was not going to be able to work for at least several months. On 8 February the Claimant was chasing his sick pay. On 9 February the Respondent requested the personal injury form from the Claimant in order to pay the sick pay. By 10 February the Respondent had the personal injury form.

27. The Respondent failed to reply to correspondence from the Claimant and from HMRC which has not been explained adequately by the Respondent. On 23 February 2016 the Respondent gave notice by email to the Claimant's wife that the Claimant had been dismissed.

SUBMISSIONS FINDINGS

28. Mr Hendley submitted on behalf of the Respondent that a schedule of loss prepared by the claimant showed the Claimant had worked 0.8 x 5.6 weeks = 4.48 weeks namely 22.4 days. He had taken 13 days leaving a balance of 9.5 days owing.

29. He submitted pursuant to the case of Weary v Westminster [1999] IRLR 288 conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment. He submitted on this occasion the Claimant had gone off on a frolic on his own and not followed regular procedure by using a ladder, failing to foot it, working unsupervised and conducting a high risk job.

30. The Respondent submitted the sick note stated "fracture of calcareous". Although the Claimant's wife's email stated the Claimant would be off for several months, there was a lot of correspondence between the parties and no issue of the Claimant's absence was raised.

31. The Respondent submitted the section 15 Equality Act 2010 claims must fail relying upon the case of Wilcox v Birmingham CAB [2011] EQLR 50. It was submitted Mr Haigh did not know the long term substantial effect. He further relied upon the case of Gallop v Newport City Council [2014] IRLR 211, CA that the task of the Employment Tribunal is to ascertain whether at the material times the Respondent had actual or constructive knowledge of the section 1/schedule 1 facts constituting the Claimant's disability. He also relied upon IPC Media v Millar (UKEAT/0395/12) and submitted there was no evidence that the relevant decision-taker was aware of the Claimant's absence history and the burden of proof had accordingly not shifted.

32. He submitted the Respondent's decision to dismiss the Claimant was justified because as a business it needed a safe working environment; Hensman v Ministry of Defence (UKEAT/0067/14).

33. Further the Respondent submitted Mr Haigh was not aware that the Claimant was disabled so there was no duty upon the Respondent to make a reasonable adjustment.

34. He accepted the Claimant had not been provided with a written contract but invited the Tribunal in the light of the size of the Respondent's family business to make an order limited to two weeks pay.

35. In respect of the lack of dismissal procedure and dismissing the Claimant by email, the Respondent submitted the procedure was a sham.

36. On behalf of the Claimant, the Claimant's wife submitted the Respondent was fully aware the Claimant was dismissed at the date of the dismissal. The Respondent failed to hold a meeting with the Claimant before dismissing him. As a result of the Respondent's conduct, the Claimant was deprived of receiving any further benefits. The method used to dismiss the claimant was illegal. There was a failure to follow health and safety procedures; the Claimant was not provided with any further training. The employer failed to make any contact with the Claimant prior to making the decision to dismiss. He made no welfare contact with the Claimant either.

37. The Respondent did not respond to letters from the Court, HMRC or the Claimant. Following the accident the Claimant was not given first aid because there was no person responsible for the first aid there. In fact he was dismissed also to hide the Respondent's own health and safety negligence. The Respondent got rid of a disabled "problem" employee.

38. Mr Hendley for the Respondent further submitted that if the Respondent had adopted a different procedure it would have fairly dismissed for the Claimant's failure to respond to correspondence from the Respondent which was also an act of gross misconduct.

39. The Respondent submitted any uplift on compensation should be limited to 8%. It was a business with only 25 employees with limited resources.

40. The Claimant's wife submitted the uplift should be 25% for a total failure of procedure.

FINDINGS

41. The Tribunal finds that the Respondent decided to dismiss the Claimant because Mr Haigh took the view that the Claimant would be on long-term sick. The Employment Tribunal reject the Respondent's evidence the Claimant was dismissed because the Claimant had done something unsafe. The Tribunal takes into account the Respondent's own case that it suggested the Claimant had committed serious health and safety breaches before which had not been formally investigated by the Respondent or that the Claimant was disciplined. In fact the Tribunal finds that on the basis the Respondent had seen sick notes for referring to the Claimant's fractured heel, he was committed to a heavy manual job, and the Claimant's wife had informed the Respondent he was to be off work for a long time; it was the absence which caused Mr Haigh to take a decision that he should dismiss the Claimant. The finding by Judge Lancaster is that the absence was related to his disability.

42. The Tribunal find that there was adequate material for the Respondent to know or the Respondent ought to know that this absence was related to a disability. Furthermore had the employer taken the reasonable step to consult with the Claimant and seek medical evidence or advice it would have been clear that this Claimant was suffering a disability within the meaning of the Equality Act 2010. An employer cannot fail to arm himself with material in the hope he can then suggest he had no idea that an employee was disabled. As found by the Tribunal on the basis of the information available to the Respondent he should have known that the Claimant was disabled within section 6 of the Equality Act 2010.

43. The Respondent's case pursued before the Tribunal was that the Claimant was dismissed for a health and safety breach. For the reasons stated above, the Tribunal reject this submission. The Respondent did not seek to justify its decision to dismiss on the basis of the claimant's absence. The Respondent's case has been it was justified to dismiss the Claimant because it wanted a safe work place. The Tribunal has also rejected this contention. In the circumstances, the Respondent has the burden of establishing the justification defence and the Respondent's case having been rejected, the Tribunal finds that the section 15 claim is well founded and succeeds.

44. The Tribunal however comment as follows. In the Claimant's bundle there is medical evidence which indicates in March of 2017 the Claimant continued to suffer significant symptoms and had changed careers into an administrative role. It will be an issue at the remedy hearing when this Respondent acting for a non discriminatory reason would have been justified to dismiss the Claimant. Inevitably the Tribunal find the Claimant would have been dismissed at some stage and it will be an issue for the remedy hearing when this would have taken place for a non discriminatory reason.

45. In respect of the reasonable adjustment claim the Claimant was employed as a crane operative. We accept Mr Hague's evidence that it was not a workplace which was awash with light work. In fact there were no vacancies at the material time. The Tribunal considers that at this time there was no reasonable adjustment as contended in the pleaded case that this Respondent could have carried out to accommodate this Claimant. In those circumstances the reasonable adjustment claim is not well founded and is dismissed.

46. In respect of the breach of contract claim, on the basis that the Tribunal has found that this was not gross misconduct entitling the Respondent to dismiss the

Claimant summarily he is entitled to one week's notice. As regards holiday pay the evidence was limited in this regard from the Claimant. The schedule of loss pleads 3.08 weeks. The Respondent's contentions is that 13 days had been taken leaving 9.5 days owing. The Tribunal make an award of 9.5 days.

47. There was a failure by this Respondent to provide any terms and conditions of employment to the Claimant. We accept that this is a family business but it is not so small that it cannot provide the statutory entitlement to this employee for the period that he was employed with them, namely May 2015 to February 2016 with no terms and conditions. The employer had been in business for a considerable period of time and we award four weeks in the circumstances.

48. In regards to the ACAS Code of Practice no process was followed by this employer. Contrary to good industrial practice the Respondent failed to obtain any medical material from this Claimant. We take the words from the Respondent's representative; "the process was with respect shambolic" and therefore in these circumstances there will be a 25% uplift on damages. This case will be listed for a remedy hearing for one day where the issues to be determined are as follows:-

    a. Level of the injury to feelings award.

    b. When the Respondent would have been justified to dismiss the Claimant for a non-discriminatory reason.

    c. The calculation of the 9.5 days of holiday pay.

    d. The four weeks compensation for a lack of terms and conditions.

    e. One week pay for notice.

    f. The uplift to be applied.

49. At the end of the hearing it was determined that we would have a remedy hearing on 6 December 2017. The Claimant will provide a statement setting out the way that he contends he suffered in terms of injury to feelings and provide that statement to the Respondent and to the Tribunal by 9 November 2017.

Employment Judge Wedderspoon

Date: 14 November 2017