EMPLOYMENT TRIBUNALS

Claimant: Mr B E Smith

Respondent: Grafton Merchanting GB Limited

HELD AT: Sheffield **ON:** 21 May 2018

BEFORE: Employment Judge Rostant

REPRESENTATION:

Claimant: In person
Respondent: Mrs S Thompson, Solicitor

JUDGMENT

It is my judgment that it is not appropriate to issue to strike out the claimant's claims or to issue a deposit order.

REASONS

1. This claim first came before me at a preliminary hearing on 3 April 2018 and I refer to the case management order sent to the parties on 17 April. In that hearing I identified the nature of the claims before me and they were a claim of disability discrimination contrary to section 15 of the Equality Act 2010 and unfair dismissal. I gave the respondent an opportunity to amend its notice of hearing and to renew an application made at the original hearing that the claims be struck out or a deposit order be made.

2. The respondent, in compliance with my order, produced a detailed amended response, sent to the Tribunal on 4 May 2018, and that response included a renewed application of the claimant's claims both to be struck out on the grounds that they stood no reasonable prospect of success or in the alternative that a

deposit order be made on the grounds that they stood little reasonable prospect of success.

3. The matter was set down for a further hearing before me today 21 May and at that hearing Mrs Thompson for the respondent renewed her application.
4. The claimant's contention that he was unfairly dismissed and his complaint that he suffered section 15 discrimination both related to the claimant's dismissal by the respondent on 12 January 2017.
5. The claimant agrees with the respondent's contention that the reason for his dismissal was capability. By the date of his dismissal the claimant had been off work for almost seven months.
6. The respondent does not accept that the claimant meets the definition of disability but I have not decided the respondent's applications on the basis that the disability issue is resolved but rather approached it on the assumption that the claimant would satisfy the Tribunal of the fact of his disability and considered whether, if so, he could satisfy a Tribunal that his dismissal was a breach of section 15 of the Equality Act 2010.
7. The respondent concedes that if the claimant was a person with the disability then his dismissal was for a matter arising out of his disability namely the fact of his ill health absence. However, the respondent's case is that in all of the circumstances the dismissal would be justified. The claimant for his part relies on five matters that go to the unfairness of the dismissal and, he contends, refute the suggestion that the dismissal was for a legitimate aim and/or was a proportionate means of reaching that legitimate aim.
8. I listed the matters relevant for the hearing at paragraph 2.1.6 in my case management order of April 2018.
9. The respondent's contention is that this essentially a claim of personal injury wrapped up as a claim before the Employment Tribunal for disability discrimination and unfair dismissal. The respondent's case is that the claimant's claim really is that the conduct of his line manager Mr Bauer in sending him an email on 25 May has made him ill and that this is therefore essentially personal injury claim being pursued by other means. I take the view however that the claimant is entitled to draw to the Tribunal's attention any contribution made to the ill health that eventually led to his dismissal by the conduct of his line manager. I take that view because it seems to me that the authorities make it clear that one of the matters that the Tribunal should take into account when assessing the fairness of a capability dismissal and, by analogy, the proportionality of a decision to dismiss where the absence from work arises from disability, is the contribution, if any, of the respondent's conduct to the claimant's ill health.
10. The claimant's contention is that he was not unwell until he received an email from Mr Bauer which caused him to be unwell. The email, a relatively brief one dealt with Mr Bauer's concern that the claimant had failed to engage in the proper process when booking holiday. My own view is that this part of the claimant's case suffers from two significant problems. The first is that the medical evidence, such as it is, does not support the claimant's contention that his illness was caused by Mr Bauer's email. At best the evidence points to Mr Bauer's email being the last straw which tipped the claimant's existing ill health into an incapacity for work. The medical evidence points to a number of other factors

causing the claimant to be unwell, including the claimant's previous history of anxiety and recent personal events. As an aside, and if it be relevant, I take the view that it is unlikely that the Tribunal would conclude that Mr Bauer's conduct was all the more blameworthy for his knowing that the claimant was likely to be affected by the email in that particular way. That would depend on the claimant satisfying the Tribunal that Mr Bauer knew that the claimant had a history of mental ill health. In fact, the claimant had had a fortnight off work with anxiety in 2014 and there was no other record of the claimant's ill health or proneness to anxiety on the respondent's record and furthermore Mr Bauer did not arrive with the respondent until 2016.

11. The second and even more significant problem for this part of the claimant's argument is that although the respondent should, in fairness, have regard to any contribution its own management made to the claimant's ill health in deciding whether or not to dismiss him, that does not mean that dismissal could never be fair or proportionate. By the time the claimant was dismissed he had been off ill for several months and there was no evidence that he would be fit for work in the foreseeable future. Indeed, to the contrary, the claimant was saying that he could give no date on which he would return to work and the respondent had no encouragement from the occupational health reports that it had obtained as part of the capability process.

12. The claimant's next complaint is that he was required to attend a meeting in August 2016 that he was not ready or fit for. The difficulty here for the claimant is that the evidence shows that he was sent a letter a week before the meeting giving him the date of the meeting and inviting him to contact the respondent if he felt that he was not able to attend that meeting. Although the claimant now says he has a good reason for not having done so, he accepts that he did not tell the respondent that he was not capable of attending a meeting, nor did he turn the respondent's managers away when they arrived at his door for that meeting, which had always been scheduled to take place at the claimant's house. In the circumstances, although the claimant may now say that that meeting was something that he was not ready for, it is very difficult to see how the respondent behaved unfairly or disproportionately in holding the meeting, which was otherwise fully in line with its own procedures. Furthermore, the letter of invitation appears to be temperate and unthreatening in its nature.

13. The claimant then complains that during the course of that meeting Mr Bauer refused to accept responsibility for the claimant's ill health. It is true that Mr Bauer appears to have been prepared to apologise for the fact that the claimant had become ill but it is certainly also true that Mr Bauer did not accept responsibility for that illness. My own view is that that refusal cannot be regarded as unfair or unreasonable or contribute to a disproportionate dismissal. Mr Bauer doubtless to this day maintains that his email in relation to holiday was proportionate and reasonable and he had no reason to take the view that it was likely to have the effects upon the claimant's ill health that the claimant now claims. As I have remarked above, the respondent still maintains that the claimant cannot establish as a matter of fact that the email in question caused his ill health. The claimant may not have been very happy about Mr Bauer's refusal to accept the responsibility but I am at a loss to see how that could contribute to a finding of unfairness or disproportionally in relation to the dismissal.

14. The claimant then complains about the failure of Mr Bauer to provide notes of the meeting despite the fact that he took notes. I agree with the claimant that that was a meeting which ought to have been noted and the notes ought to have been sent to the claimant. By all accounts the meeting went on for some while and it was obviously important that as part of the process the meeting be properly documented. It seems that Mr Bauer used his handwritten notes to communicate privately with human resources and I have no criticism of that but if he was capable of doing that he was capable of producing a set of notes setting out, if not verbatim at least in substance, what had been covered in the meeting and a copy of those notes ought to have gone to the claimant. I therefore agree with the claimant when he expresses his unhappiness at the respondent's failure to provide those notes. I do not however take the view that on its own, or even in combination with any other matter, this fact is likely to render the dismissal unfair or disproportionate. Most significantly, the notes were not part of a disciplinary process and did not record any contested areas of fact and furthermore they were of a meeting which happened in August and the claimant was not dismissed until January. In-between the meeting in August and the claimant's dismissal in January there was a grievance meeting before Mr Cherryholme at which the claimant ventilated all his concerns about the respondent and there was a capability hearing in early December at which the same matters were gone over with Mr Lee. Both of those meetings were fully noted and the claimant had access to the notes and makes no complaints about those. I therefore take the view that although regrettable, and a breakdown in what should be proper procedure, the absence of those notes certainly could not render the dismissal unfair or contribute to a finding of disproportionally.

15. It will be seen that up to this point the claimant's grounds for alleging breach of section 15 and/or an unfair dismissal are not grounds that in my view are likely to find favour with a full Tribunal and if these were all then I would have certainly been considering striking out the claim of unfair dismissal and probably issuing a deposit for the claim under section 15. However, there remains an issue which was identified at the last hearing and which is still a matter of some mystery. That is the question as to whether or not the respondent gave any or any proper consideration to the possibility of the claimant returning to work but reporting to a different line manager. I am told today by Mrs Thompson that Mr Cherryholme did give that matter consideration when deciding whether or not to uphold the claimant's grievance. He is said to have ultimately rejected the idea and I have been given, in the amended response, the reasons for that. I am also told that Mr Lee gave similar thoughts to similar matters when deciding whether or not to dismiss the claimant and, for similar reasons, dismissed that as a possibility. The problem for the respondent is that none of that thinking has made its way into any form of document, or at least none before me, with the exception of a brief mention by Mr Lee of his having considered alternative arrangements for the claimant's employment. Without the evidence of Mr Cherryholme and Mr Lee, properly tested in cross-examination, I cannot conclude that these two claims have little or no reasonable prospect of success. Indeed, were the Tribunal to conclude that proper consideration had not been given to the possibility of the claimant working under a different manager the Tribunal might well conclude that dismissal was disproportionate, at least until that consideration had been entered into, and might well conclude for the same reason that the dismissal was unfair. Much will depend upon the evidence of those two managers and I take the view that the claimant is at the very least entitled to see what that evidence would be

in the form of a witness statement and that this is a matter that really can only be decided on the basis of oral evidence, in the absence of any useful documentary support for the respondent's position now.

16. Having said all that, although I am not prepared even to make a deposit order for either claim because of that lack of evidence, I pointed out to Mr Smith that most of the rest of the matters that he is relying on were in my view unlikely to aid him at a full hearing and advised Mr Smith that his claim therefore rested very much on the credibility of those two witnesses and that even if their evidence was rejected it would not necessarily mean that the Tribunal concluded that dismissal was unfair or that it was disproportionate. For those reasons I have rejected the respondent's applications but because of the view that I have expressed in rejecting the applications I have indicated to the parties that I do not think it appropriate that I should be the judge at the next hearing.

Employment Judge Rostant

Date: 29 May 2018

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