Case No : 2601259/20

EMPLOYMENT TRIBUNALS

Between:

Mr Ian Bennett	**and**	Go Plant Ltd
Claimant		**Respondent**

RECORD OF A CLOSED TELEPHONE PRELIMINARY HEARING

Heard at: Nottingham **On:** Wednesday 22 July 2020

Before: Employment Judge P Britton (sitting alone)

Representation
For the Claimant: Mr J Roddy, Paralegal
For the Respondent: Mrs K Welch, Solicitor

JUDGEMENT

1. The claims based upon s13 (direct discrimination) and s18 (indirect discrimination) pursuant to the Equality Act 2020 are dismissed upon withdrawal.

2. The remaining claims continue.

3. Orders as to directions are hereinafter set out.

CASE MANAGEMENT SUMMARY

Discussion and Issues

1. The claim (ET1) was presented on 21 April 2020. It had been drafted by the Claimant's solicitors. It is in time and ACAS EC compliant. Subsequently a Response (ET3) was presented together with an application for strike out or a deposit and for reasons set out in the particulars of the response. This has not been the subject of any directions before today.

2. The main hearing is listed for a three day hearing before a full tribunal commencing 4 October 2021. Standard directions were issued, the first of which was that the Claimant supply a schedule of loss and which has happened. The deadline for the rest of the directions has yet to be reached.

3. Today was a detailed discussion including for me to evaluate the merits or otherwise of holding an open preliminary hearing on the basis that the claim or parts of it prima facie have no reasonable prospect of success or that a deposit should be ordered them having only little reasonable prospect of success. There is also the issue of whether the Claimant was a disabled person at the time of material events. This is currently not accepted by the Respondent. The disability relied upon by the Claimant is depression and anxiety. Little detail has as yet been provided by the Claimant in particular in terms of why he meets the definition at section 6 and schedule 1 of the Equality Act 2010 (the EQA).

4. The essential scenario starts with an incident on 15 January 2020 when in the course of his duties as an HGV driver for the Respondent he went to a construction site of the well-known housebuilder Galliford Try. It is an important customer of the Respondent. His task was to sweep the site using his sweeper vehicle and remove waste material. At the time he had been employed by the Respondent since 9 December 2016. He been employed by it before but it is from that date that the employment for the purposes of the claim starts.

5. There is no doubt that on site the Claimant engaged in a heated altercation first with a fork lift operative and then site management. Galliford immediately complained following it up with a written statement. The incident had been recorded both on CCTV and by some means currently unspecified also orally. The Claimant was suspended on full pay that same day by a manager of the Respondent, Kyle Wakeman. An investigation then took place conducted by Sheldon Gayler (SG) of HR. It was swift because prima facie the evidence received spoke for itself. On 16 January 2020 the Claimant was thus sent a letter requiring him to attend a disciplinary hearing on the 22nd. Set out was the charges he had to meet and that an outcome could be his dismissal .He was told of his right to be accompanied; provided with a copy of the relevant part of the Respondent's disciplinary handbook; and most important the transcript of the recording of the incident.

6. He duly attended the hearing, the minutes of which have been read to me by Mrs Welch. On the face of it the process and the way in which the meeting was conducted by KW meets best practice. The Claimant was accompanied by his chosen work colleague and told that if the outcome went against him he had a right of appeal. Again, not in dispute is that he did not exercise that right. Mr Roddy explaining to

me that the Claimant saw doing so as pointless. However, I note that the Respondent is a large company with branches across the country and an HQ at Ibstock in Leicestershire. The Claimant lives in Devon and I assume (yet to be particularised) that he worked out of a Respondent depot in the south west.

7. The Claimant had for some time been accommodated with a compressed 4 day working week in particular because of his caring responsibilities for his mother who suffers from dementia. It also appears the Respondent knew of such as the emotional upset following the death of his brother. But not pleaded in the claim is that he had therefore had sickness absences and anything specific at all yet as to whether the Respondent thus had constructive knowledge of the pleaded disability. In any event the Claimant told the disciplinary hearing that he had a letter from his GP. The minutes refer to it being a "fit note"[1] letter as to stress. Thus KW and the HR advisor considered, says the Response, that it was not relevant as in fact he had attended.

8. Going back to the minutes if correct, the Claimant said that he did not want to see the video as he had been in terms of the incident "100 percent wrong." He then gave mitigation first about the incidents and also reiterated when asked for a reassurance that it would not happen again. Also in mitigation, he referred to his personal circumstances including how his home had been repossessed and that "You don't know just how much stress I am under". He then said how his GP had wanted him to on Citalopram[2], "but I'm saying ok with the stress."

9. After some deliberation KW having conferred with the HR colleague decided that the incident, which as per the transcript included very abusive language by the Claimant including the site manager being " a stupid bitch" accompanied by threats, was so serious as to outweigh the mitigation: hence the summary dismissal, all of which was confirmed in writing with again reference to the Claimant's right to appeal.

10. So having withdrawn the direct and indirect claims primarily because the jurisprudence makes it difficult to sustain the same, the Claimant is bringing the following Claims under the EQA:
    (i) Unfavourable treatment because of something arising in consequence of the disability…" This would be pursuant to s15 of the EQA. Dismissal is obviously an unfavourable act. Thus the issue is was the Claimant disabled at the material time and was it the disability that led to him losing control of himself and thus explains his behaviour. If so then the Respondent as already pleaded that it would engage the defence of justification; namely that the behaviour was so serious as to mean that it was

[1] The now wording in common usage actually denoting usually a certified sickness absence.
[2] A prescription only anti-depressant.

proportionate to dismiss. The first limb of this section, namely how does the Claimant engage s15 has yet to be particularised by the Claimant. As it is I have been able to summarise it subject to that particularisation.

(ii) Failure to make reasonable adjustment pursuant to s20-22. This has yet to be particularised at all. What is the provision criteria or practice the Claimant says put him at a particular disadvantage because of his disability. What is the reasonable adjustment he says should have been made?

11. The Claimant is also bringing a claim for unfair dismissal pursuant to s98 of the Employment Rights Act 1996. Inter alia he pleads for a 25 percent uplift for breach of the ACAS CP. But he has given no particularisation save to suggest KW should not have chaired the disciplinary hearing, it seems based upon the proposition that he undertook the investigation. But, if the ET3 is correct, he didn't. Prima facie it is not breach of a fair procedure for the manager who suspends, which is usually seen as a neutral act, to hold the disciplinary hearing having not undertaken the preceding investigation. In all other respects given the pleaded scenario the disciplinary process would appear to have met best practice. I reiterate that the Claimant did not exercise his right of appeal.

12. Prima facie the reason for the dismissal was obviously gross misconduct and I am with Ms Welch that on the pleaded scenario the Respondent followed the process as per British Home Stores Ltd v Burchell. Thus, the Claimant will have to establish before the Tribunal that the decision to dismiss was outside the range of responses. Prima facie he is in difficulty other than the caveat as to KW not reading the GP letter. But, even if that was a failure, would it have affected the decision to dismiss; also, is there not prima facie a very substantial element of contribution?

13. Finally, there is a claim for Breach of Contract (notice pay). This was a summary dismissal. The Claimant will essentially have to persuade the Tribunal that the Respondent was not entitled to find given the evidence that he had fundamentally undermined trust and confidence.

14. It follows that this is a case where there are prima facie justified grounds as per the Respondent application for holding an open preliminary hearing to decide whether the claim or elements of it should be dismissed as having no reasonable prospect of success or a deposit of up to £1000 per claim, where there is only little reasonable prospect of success being ordered payable by the Claimant as a condition precedent of continuing; and of course with the potential cost consequences if he pays but loses.

15. Last there is the issue of whether the Claimant was disabled at the material time. Stress in itself is not enough. If of course he was not

disabled at the material time, then that is an end of all the remaining EQA based claims. Thus meaning the final hearing becomes confined to the unfair dismissal and breach of contract claims, should they still proceed, and which can it this case be heard comfortably in a day by a Judge sitting alone. As per the parties' agenda for today, there are only three witness namely the Claimant, KW and SG. Thus the attended PH will first deal with the disabled or not issue, and then, dependent of course on that adjudication, go on to consider the strike out / deposit applications.

16. Because of the continuing impact of the Corona Virus, the preliminary will be heard using the Cloud Video Platform (CVP).

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. By **Friday 7 August**, the Claimant will provide full particularisation of his remaining claims as per the framework I have identified above. He will send this to the Respondent and the Tribunal.

2. By **Friday the 4 September 2020**, he will supply a full copy of his medical notes together with an impact statement as to his disability. I have explained what the latter entails. Again, he will send this to the Respondent and the Tribunal.

3. The Respondent will reply by **Friday 18 September 2020**, first with an amended Response and second setting out whether it now accepts the Claimant is a disabled person for the purpose of the claim and if not its reasoning. It is not envisaged that it will deploy medical evidence in rebuttal.

4. For the purposes of the preliminary there will first be a Hearing Bundle. Thus, the following applies:
   (a) By way of first stage discovery the Respondent will send the Claimant by **Friday 2 October 2020** a proposed trial bundle index.
   (b) By **Friday 16 October**, the Claimant will reply adding at the appropriate space any additional document he requires in the Trial Bundle. If he has a copy of the document, he will copy it to the Respondent for inclusion in the Trial Bundle. If he does not, but believes it to be in the Respondent's custody or control, he will make that plain and that he requires it to be in the Trial Bundle.

5. By not later than **23 October 2020**, a single bundle of documents is to be agreed. The Respondent will have conduct for the preparation of the bundle. The bundle is to be bound, indexed and paginated. The bundle should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response and case management orders if relevant;
- documents which will be referred to by a witness;
- documents which will be referred to in cross-examination;
- other documents to which the tribunal's attention will be specifically drawn or which they will be asked to take into consideration.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is material to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally either be simple chronological order or chronological order within a number of defined themes e.g. medical reports, grievances etc
- correspondence between the tribunal and the parties, notices of hearing, location maps for the tribunal and other documents which do not form part of either party's case should never be included.

Unless an Employment Judge has ordered otherwise, bundles of documents should <u>not</u> be sent to the tribunal in advance of the hearing.

6. By not later than **Friday 6 November 2020**, there is to be mutual exchange of witness statements. The witness statements are to be cross-referenced to the bundle and will be the witness's main evidence. The tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. Witness statements should not routinely include a précis of any document which the tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the tribunal to draw from the document as a whole.

7. The parties will exchange written submissions not later than **three working days** before the hearing and when so doing copy the Tribunal.

8. There will be an open preliminary hearing to determine the issues as I have now set them out this will be by **Cloud Video Platform (CVP) on Monday 16 November 2020** commencing at 10am. It has been given 5 hours of hearing time. Further instructions will follow in due course from the Tribunal.

9. For the purposes of the presiding Judge via the Respondent, there will be delivered not later than three working days before the CVP hearing a copy of the Trial Bundle and the witness statements.

10. Finally save for the disability or not use issue, if still engaged; the issues will be determined on the papers and submissions. Sworn evidence will not be received.

NOTES

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) 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 or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management':

https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(iv) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

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Employment Judge Britton

Date: 22 July 2020

Sent to the parties on:

24/07/2020

For the Tribunal: