EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Christopher Alec Brian Woods	v	T & B Blasting Services Limited

Heard at: Norwich by CVP **On: 3 and 4 October 2024**

Before: Employment Judge W Anderson
A Chinn-Shaw
W Smith

Appearances
For the claimant: B Trainor (director of the respondent)
For the respondent: J Bradbury (counsel)

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is upheld.
2. The claimant's claim of disability discrimination under s15 Equality Act 2010 is upheld
3. The claimant's claim of wrongful dismissal is upheld.
4. The claimant's claim that the respondent failed to provide a statement of employment particulars is upheld.
5. The claimant's claims of disability discrimination under s13 and s20 Equality Act 2010 are dismissed.

REASONS

Background

1. The claimant was employed by the respondent as a grit blaster from 1 September 2016 until his dismissal on 17 March 2023. Early conciliation commenced on 2 May 2023 and ended on 13 June 2023. The claim was filed on 4 July 2023.

2. The claimant claims that he was unfairly dismissed and discriminated against on the grounds of disability. The respondent denies discrimination and states that the claimant was fairly dismissed for the reason of capability

The Hearing

3. The parties filed a joint bundle of 108 pages which included a witness statement from the claimant and a witness statement from Mr Trainor of the respondent. Both witnesses attended the hearing and gave evidence. In addition, the tribunal received written submissions from Ms Bradbury on behalf of the claimant.

4. The hearing was previously postponed at the request of Mr Trainor due to his wife's ill health. A further postponement was sought before this hearing but was refused by EJ Postle on 25 September 2024.

5. On the morning of the first day of the hearing Mr Trainor was unable to connect to the hearing except by telephone. The hearing was postponed until 2pm to allow him to rectify this. Mr Trainor joined the hearing at 2pm but became disconnected again when trying to view the bundle. He was unable to view the whole of the bundle, and the hearing was adjourned until the following day. On the second day of the hearing Mr Trainor was unable to connect until 11:30am. As the time allocated for the hearing was effectively reduced from two days to a little over half a day, judgment was reserved.

6. In order to try and minimise costs and save time at any subsequent hearing, the tribunal asked the parties to address the matter of injury to feelings so that it could make a decision on the level of any injury to feelings award should the claimant be successful in his discrimination claim. There was not sufficient information in the bundle so that the same approach could be taken with financial loss.

7. At the end of the hearing a further remedy hearing was listed for a half day on 7 January 2025, should it be required. Ms Bradbury noted that the claimant may make an application for costs in respect of any remedy hearing.

8. Mr Trainor said a number of times throughout the hearing that he should not be there, that his wife was ill, that he was going to get a solicitor to come for the second day and later that he had expected to have a solicitor on the second day. The respondent had been represented by a solicitor until a few days before the hearing. No applications were made after the decision of EJ Postle on 25 September 2024. The tribunal assisted Mr Trainor to participate in the hearing by adjourning on a number of occasions as described above, having breaks whenever he needed to attend to his caring duties and changing the order of evidence.

Issues

9. The issues below were agreed by the parties at the case management hearing on 12 January 2024 and recorded in the order of EJ Warren dated 26 January 2024.

Dismissal

1. What was the reason or principal reason for dismissal? The Respondent relies upon the potentially fair reason of capability.
2. If the reason was capability, did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant? In other words, was the Respondent's decision to dismiss within the range of reasonable responses of the reasonable employer? Answering that question will usually entail considering:

a. Whether the Respondent genuinely believed that the Claimant was no longer capable of performing his duties;
b. Whether the Respondent adequately consulted the Claimant;
c. Whether the Respondent carried out a reasonable investigation, including finding out about the up to date medical position; and
d. Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant.

Direct Disability Discrimination

3. The detriment relied upon is dismissal.
4. Was that less favourable treatment?
5. Was the Claimant treated less favourably than a hypothetical comparator

Discrimination Arising from Disability (Equality Act 2010 s.15)

6. Did the Respondent treat the Claimant unfavourably by dismissing him?
7. Did the Claimant's inability to carry out his duties arise from his disability?
8. Was the Claimant's dismissal because of his inability to carry out his duties?
9. If so, was his dismissal a proportionate means of achieving a legitimate aim? The Respondent says that its aim was fulfilling the requirement of having an employee able to carry out the role of Sand Blaster.
10. This question will usually entail the Tribunal considering in particular:-
    a. Whether the treatment was an appropriate and reasonably necessary way to achieve those aims;
    b. Whether something less discriminatory could have been done instead; and
    c. How the needs of the Claimant and the Respondent should be balanced.

Failure to Make Reasonable Adjustments (Equality Act 2010 sections 20&21)

11. The PCP relied upon is the practice of dismissing employees who are unable to carry out their duties by reason of illness or injury without allowing for a period of recovery.
12. Disabled people are more likely to be disadvantaged by such a PCP as they are more likely not to be able to carry out their duties for a period or periods of time.
13. Did the PCP put the Claimant at substantial disadvantage compared to someone without his disability in that he was unable to carry out his duties for a period of time?
14. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at that disadvantage?
15. The reasonable adjustment contended for is to have allowed the Claimant a period of time to recover from his injury, in particular until 29 May 2023, (the date on which he was able to take up alternative employment as a Driver).

Law

Equality Act 2010

10. S13 Direct Discrimination
    (1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

11. S15 Discrimination arising from disability
    (1) A person (A) discriminates against a disabled person (B) if—
    (a) A treats B unfavourably because of something arising in consequence of B's disability, and
    (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
    …

12. S20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

Employment Rights Act 1996

13. S94 The right.
    (1) An employee has the right not to be unfairly dismissed by his employer.

14. S98 General
    (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
        (a) the reason (or, if more than one, the principal reason) for the dismissal, and
        (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
    (2) A reason falls within this subsection if it—
        (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
        (b) relates to the conduct of the employee,
        (c) is that the employee was redundant, or
    …
    (3) In subsection (2)(a)—
        (a) *"capability"* , in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, …
    (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
        (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
        (b) shall be determined in accordance with equity and the substantial merits of the case.

15. S86 Rights of employer and employee to minimum notice.
    (1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

> (a) is not less than one week's notice if his period of continuous employment is less than two years,
> (b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and
> (c) …

Findings of Fact

16. The claimant was employed by the respondent as a grit blaster from 1 September 2016 until 17 March 2023.

17. The respondent is a company providing blast cleaning and industrial painting services. At the relevant time is had two shareholder directors, Mr Trainor and Mr Bishop. Mr Trainor did not work in the business, having stepped back to care for a relative, other than to attend twice a week to carry out administrative tasks. Mr Bishop was absent on sick leave from 1 February 2023 to 22 May 2023.

18. The other employees were the claimant and a fourth person whose role was to maintain the premises.

19. On 29 January 2023 the claimant suffered a serious injury to his hand while at home. This injury included tendon and artery damage. Stitching and skin grafts were required.

20. The claimant was absent from work due to this injury from 30 January 2023 until his dismissal on 17 March 2023.

21. On 14 March 2023 Mr Trainor called the claimant. The claimant states that Mr Trainor asked about his recovery and the claimant told him that he had an appointment in two days and would have a better update after that. The claimant states that Mr Trainor called a second time, approximately fifteen minutes later, and asked how the claimant would feel if Mr Trainor laid him off. The claimant said that it would be unfair.

22. Mr Trainor's account of the conversation is that the claimant told him that he remained unfit for work, required surgery and did not know when or whether he would return to work. Mr Trainor says he concluded from the claimant's description of his injury that he would never be able to use a handheld grit blasting unit safely and effectively, and as there was no alternative work he told the claimant he would be laid off.

23. Mr Trainor confirmed in cross examination that when he made this decision, he had not seen the injured hand, nor had he seen or asked for any medical evidence regarding the prognosis.

24. In an email to the respondent's solicitor dated 18 April 2023 Mr Trainor said:

> *I did not lay Chris off because of his disability. I laid him off because I couldn't get a straight answer from him. I asked him 'do you think you will ever come*

back here Chris' his answer was 'Well I don't really know'. I had no one to replace him so I had to employ another person to take his place.

25. Ms Bradbury asked Mr Trainor about this in cross examination, and he confirmed that what he said in that email set out his views.

26. The tribunal finds that Mr Trainor dismissed the claimant because the claimant could not give him a return date and because Mr Trainor had formed the view that the claimant would not be able to safely operate a handheld grit baster again.

27. Following his conversations with the claimant on 14 March 2023 Mr Trainor called someone who had previously enquired about employment as a grit blaster and offered him permanent employment.

28. On 15 March 2023 the claimant emailed Mr Trainor, heading his email 'Dismissal' asking for written reasons for his dismissal. Mr Trainor responded as follows:

"You dismissed yourself Chris I asked you if you think you'll ever come back to work here you said I don't really know, you have to go in for more skin graphs it sounded like you don't really won't to come back, that's the way I read it seems that I was reading you wrong"

29. In an email exchange Mr Trainor told the claimant '*when your hand gets better and your doctor declares you fit to work come in and see me, if we are still operational and if we can afford to we will find you a job. In the meantime your P45 etc is in the post.'* This was confirmed in a telephone conversation of the same date, 17 March 2023.

30. The claimant received a payment for accrued untaken holiday on 14 March 2023 in the sum of £428.70. He did not receive notice pay.

31. The claimant was entitled, based on his length of service, to notice pay of six weeks.

Submissions

32. For the respondent, Mr Trainor said that the claimant did not need to bring the case. He said that he needed to get a grit blaster. Mr Trainor said that the claimant was not discriminated against and could have come back to work. He could have spoken to Mr Bishop, who is a relative of the claimant's, when Mr Bishop returned, to put it right. Mr Trainor said that the claimant's feelings were not hurt, and the claimant had damaged the company more than the respondent had hurt his feelings.

33. Ms Bradbury relied on her written submissions with some additions which are referred to in the decision below. She said that this was a simple case, the facts were not disputed, and it was more of a case for the respondent to respond to rather than for the claimant to assert. There was no process or consultation in respect of dismissal and the reason for dismissal was the claimant's injury. The respondent accepted the injury was a disability. She

noted that in relation to the question of how long it was reasonable for the respondent to wait for the claimant's return, the respondent had not provided any evidence, had not explained why it could not go to an agency or advertise for a local worker on a temporary basis, particularly where the training for the role took only a matter of hours. No process had been undertaken in relation to dismissal, there was no notice period, and no notice pay.

Decision and Reasons

Unfair Dismissal

34. The question the tribunal needs to answer is whether the dismissal was fair or unfair. This is a two-stage process. The first stage is for the respondent to show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.

35. Section 98 of the Employment Rights Act 1996 identifies a number of potentially fair reasons for dismissal which include at s98(2)(a) the capability of the employee. The tribunal is satisfied on the evidence that the claimant was dismissed for capability reasons. The claimant had injured his hand and had been absent for work for almost seven weeks at the time of dismissal. He did not know at that time when or if he would be able to return.

36. The tribunal must then decide if, in the circumstances (including the size and resources of the respondent) the employer acted reasonably or unreasonably in treating capability as a sufficient reason for dismissing the employee (s98(4)(a)).

37. As Ms Bradbury set out in her submissions, the EAT found in *East Lindsey District Council v Daubney 1977 ICR 566, EAT*, that '*unless there are wholly exceptional circumstances, before an employee is dismissed on the grounds of ill health, it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position.*'

38. Mr Trainor confirmed in oral evidence that he made the decision to dismiss the claimant on 14 March 2023 after their telephone conversations. During the first conversation the claimant said that he did not know when he could return but would have more information on 16 March 2023. It was clear from the evidence that Mr Trainor believed then, and still does, that the claimant would never be able to return to grit blasting. This view was not supported by any medical evidence. Mr Trainor did not ask to see any medical evidence and he did not wait for or seek any information regarding the consultation on 16 March 2023. He did not discuss with the claimant any alternatives to dismissal. While the tribunal accepts that Mr Trainor did speak to the claimant on 14 March 2023 to enquire about his progress and return date, it does not accept that this constitutes a sufficient consultation with an employee in ill health on which a decision to dismiss could reasonably be founded. Even where the respondent is a very small company with limited resources it is the tribunal's view that it would have been reasonable for the respondent to seek a medical prognosis, either directly or through the claimant, to have waited until after the medical consultation on 16 March before reaching any decision

and to have discussed with the claimant whether there were alternatives to his dismissal such as employing a temporary replacement.

39. In a situation such as this of long term ill-health the tribunal must consider whether the employer should be expected to wait any longer for the employee to return *(Spencer v Paragon Wallpapers Ltd 1977 ICR 301, EAT).* In this case the tribunal is satisfied that without any meaningful consultation with the claimant having taken place, the respondent could not reasonably have decided that it could not be expected to wait longer for his return.

40. For these reasons the tribunal finds that the claimant's dismissal was unfair.

Discrimination Arising from Disability

41. The respondent will have discriminated against the claimant if it treated him unfavourably due to something that arose because of his disability, and it cannot show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

42. The tribunal finds that the claimant was treated unfavourably in that he was dismissed from his employment with the respondent. The reason for his dismissal was that he was absent from work, and he was unable to say when or if he could return to the job of grit blaster. His absence arose in consequence of his disability. He had seriously injured his hand and was not able to carry out grit blasting work.

43. The tribunal must then go on to consider whether the respondent has shown that dismissing the claimant was a proportionate means of achieving a legitimate aim. The respondent's position is that the claimant was unable to carry out grit blasting work, he was unable to say if or when he would return and the respondent needed to employ someone to carry out the grit blasting work in his absence.

44. In the case of Burdett v Aviva Employment Services Limited HHJ Eady QC said (Para 78)

> *"The task of the ET was to scrutinise the means chosen by the Respondent as against such other alternatives that (on the evidence) might have been available to achieve the aim in question. In so doing, it was required to weigh in the balance the discriminatory impact of the measure chosen against such other alternatives open to the employer."*

45. As noted above in its reasons for finding that the claimant was unfairly dismissed, Mr Trainor had formed his own view that the claimant would never again be able to work as a grit blaster. This view was not supported by any contemporaneous medical evidence. Mr Trainor did not ask to see any medical evidence and he did not wait for or seek any information regarding the claimant's appointment for medical consultation on 16 March 2023. He did not discuss with the claimant any alternatives to dismissal.

46. Event though the respondent is a very small business with only two employees, these steps could have been taken with little cost to the

respondent so that proper consideration could have been given to the matter of whether there was no alternative, at this point, to dismissing an employee of six years standing. While the tribunal finds that it was unlikely that alternative work such as administration could have provided a solution in such a small company, it noted that no consideration had been given to employing a grit blaster on a temporary basis, pending the claimant's recovery. It was unconvinced by Mr Trainor's evidence that this was unaffordable or that it was not something done in this particular field of business, neither of which assertions were supported by evidence.

47. The claimant's claim that he was discriminated against due to something arising from his disability is upheld.

Direct Disability Discrimination

48. In direct discrimination it is for the claimant to establish, on the balance of probabilities, the factual basis of their claim including facts from which a tribunal could conclude, in the absence of any other explanation, that the employer has acted in breach of the Equality Act 2010. It is only once this is established that the burden of proof switches to the respondent, i.e., the respondent then has the responsibility of providing a reason for its act or omission which is not discriminatory.

49. The tests for direct discrimination were discussed in *Igen v Wong [2005] ICR 931* and it is clear that all evidence before the tribunal can be taken into account, not just that put forward by the claimant. The test is: is the tribunal satisfied, on the balance of probabilities that this respondent treated this claimant less favourably than they treated or would have treated a non-disabled employee.

50. If the tribunal is satisfied that the primary facts show less favourable treatment because of disability, the tribunal proceeds to the second stage. At this stage, the tribunal looks to the employer for a credible, non-discriminatory explanation or reason for such less favourable treatment as has been proved. In the absence of such an explanation, proved to the tribunal's satisfaction on the balance of probabilities, the tribunal will conclude that the less favourable or unfavourable treatment occurred because of disability discrimination.

51. The claimant's case is that he was dismissed because he was disabled. Mr Trainor confirmed during cross examination that he did not dismiss the claimant because he was disabled but because he could not say when he would be coming back to work, and he needed to employ someone to carry out the grit blasting work. The claimant relies on a hypothetical comparator and, as proposed by EJ Warren on 12 January 2024, this would be a person who would be unable to carry out the role of grit blaster in the same circumstances as Mr Woods but who was not disabled. Ms Bradbury suggests that this would also be a person who would have been able to return to work after 3 to 4 months. As the claimant and Mr Trainor did not know that he could return to work within 3 to 4 months at the time of his dismissal the tribunal does not accept this amendment to the description of the hypothetical comparator.

52. The tribunal finds that, without taking into account the written and oral evidence of Mr Trainor on the reasons for his actions the claimant has established a prima facie case that the respondent point was in breach of the Equality Act.

53. The burden is then on the respondent to show that there was a reason for its act that was not discriminatory. The tribunal has accepted Mr Trainor's evidence that he dismissed the claimant because he could not say when he was coming back to work, and not because he was disabled. He said that in correspondence in the early days of this claim and on oath at the hearing. He said at the time of the dismissal to the claimant that he needed to get someone in to cover the work. Other than the fact of the claimant's dismissal, there is no evidence of discrimination by the respondent. The tribunal finds that there is no evidence from which it could conclude that another employee carrying out the same job who was absent for a reason other than disability and could not say when they would return, would have been treated differently (i.e. more favourably) to the claimant.

54. For these reasons the claimant's claim of direct discrimination is dismissed.

Failure to Make a Reasonable Adjustment

55. To prove a failure to make a reasonable adjustment the claimant must show that the respondent applied a PCP which put him, as a disabled person, at a particular disadvantage. He must then identify, in broad terms at least, the nature of the adjustment he seeks that would remove the disadvantage. It is for the respondent to show that any adjustment was not reasonable or that it would not have ameliorated the disadvantage. The role of the tribunal is to form an objective view of whether the adjustment was reasonable on the facts.

56. The PCP relied upon by the claimant is the respondent's practice of dismissing employees who are unable to carry out their duties by reason of illness or injury without allowing for a period of recovery. The claimant says that a reasonable adjustment would have been for the claimant to allow until 29 May 2023 for recovery.

57. The tribunal does not accept that the respondent had the PCP relied upon. In cross examination Mr Trainor said that no similar circumstances of long term absence of an employee had arisen in the history of the business. The tribunal accepts that a one off act can, in some circumstances, constitute a PCP, but that the act of dismissing someone is unlikely to amount to such circumstances where there is no indication that such an act would be repeated *Fox v British Airways plc EAT 0315/14*. In this case the particular circumstances were that in a very small business employing two people in addition to the two directors, the director who was able to carry out the claimant's grit blasting job was also absent on long term sickness absence. The circumstances were very specific and unlikely to re-occur.

58. Additionally, the tribunal finds that the respondent did allow a period of recovery. The claimant had been absent from 29 January 2023 at the time of

his dismissal on 17 March 2023. It is therefore not correct to say that the respondent had a policy of not allowing for a period of recovery.

59. As the claimed PCP was not operated by the respondent, the duty to make reasonable adjustments did not arise in relation to it and therefore the claim of failure to make a reasonable adjustment is dismissed.

Failure to pay notice pay

60. The claimant's claim for notice pay under s86 Employment Rights Act 1996 is admitted by the respondent and is upheld by the tribunal.

61. The claimant was employed for more than six years but less than seven years. He is entitled to notice pay of six weeks. This will be payment of the full weekly wage, not the reduced payment for sick leave.

Statement of Employment Particulars.

62. Mr Trainor confirmed for the respondent, in oral examination, that the claimant had never been given an employment contract or statement of particulars.

63. Under s38 Employment Act 2002, where there has been a failure to provide a statement of employment particulars, and where the tribunal finds in the claimant's favour on his claims of unfair dismissal and disability discrimination, or makes an award in respect of such claims, it must make an award of two weeks' pay to the claimant and may make an award of four weeks. The respondent claims four weeks.

64. The tribunal makes an award of two weeks' pay. There was no indication that the claimant had ever raised with the respondent in six years of employment that he had no statement of particulars, or that he had requested one, or that this had been an issue between the claimant and respondent. While the onus is of course on the respondent to comply with the law and provide a statement of particulars, the tribunal does not find that it would be just and equitable to award the higher amount of four weeks' pay.

Injury to Feelings

65. The claim claims a sum of £10,000 in injury to feelings. The Vento band rates for the applicable year (2022 to 2023) are £990 to £9900 for the lower band and £9900 to £29,600 for the middle band. The claimant places his claim at the low end of the middle band. Ms Bradbury said that that in her view £12,000 was a more appropriate award because this was a serious event. It was a dismissal by phone while the claimant was absent through sickness and had worked in the family business for seven years. She said it was a brutal dismissal. She said the claimant was stoic and because of that he had just got on with things but did feel distress, upset and hurt. Ms Bradbury referred to the unreported case of *Christine Doddington v Paul Poppy (Norwich) (Case No 3314025/2019) (16 April 2021, unreported)* where an award of £10,000 was made. The claimant was dismissed due to the effects of her disability on her speed of work and suffered, amongst other things, the loss of the social and companionship side of her work.

66. The claimant said that family relationships had suffered, he had had high levels of stress around the dismissal but was now getting on with life. Mr Trainor denied that the claimant's feelings had been hurt and said that the claimant had hurt the respondent company more.

67. The tribunal makes an award of £8500 for injury to feelings. It noted there was no sustained campaign of discrimination or character assassination and, though undoubtedly discriminatory, this was a one off act. There is no evidence of a significant or long lasting impact on the claimant's life or wellbeing. He chose to change careers and quickly secured employment in a different field when he was well enough to return to work. Nevertheless, dismissal for discriminatory reasons from a job the claimant had held for six years is a serious matter and the tribunal accepts that this would have been a cause of stress where the future impact of the injury sustained was unclear. The tribunal also notes and accepts that there has been a negative impact on family relationships. For these reasons it finds that an award at the higher end of the lower Vento band is appropriate.

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Employment Judge W Anderson

Date: 29 October 2024

Sent to the parties on: 5/11/2024

N Gotecha

For the Tribunal Office