EMPLOYMENT TRIBUNALS

Claimant		Respondents
Mr C Gilbourne	**v**	**(R1) Ikea Limited**
		(R2) Vine Trust Group (P390)
		(a company limited by guarantee)

RECORD OF AN ATTENDED PRELIMINARY HEARING

Heard at: **Nottingham** **On: Tuesday 14 November 2017**

Before: **Employment Judge Britton (sitting alone)**

Appearances
For the Claimant: **Mrs M Gilbourne, Claimant's Mother**
For the Respondent: **(R1) Ms O Sharma, Solicitor**
(R2) Ms M Pekham, Employment Consultant

CASE MANAGEMENT SUMMARY

JUDGMENT

1. The claim of breach of contract is dismissed upon withdrawal as is that of failure to provide written particulars of the employment.

2. The claim relating to disability discrimination continues. Directions in relation to it are hereinafter set out.

Introduction

1. The claim (ET1) was presented to the Tribunal on 2 July 2017. It is ACAS early conciliation compliant and it is in time. It had been drafted for the Claimant by his mother who, although I accept is not legally knowledgeable, has a considerable grasp of her son's case as was evident from both that pleading, subsequent correspondence and the discussion today. The claim brought is first one of disability discrimination pursuant to the relevant provisions of the Equality Act 2010 (the EQA). The second claim is for breach of contract; finally there is a third claim which has to do with failure to provide written particulars of the employment.

2. In the run up to today and by reason of the agenda of the Claimant of 24 August 2017 there was interalia an application to amend the claim to include age discrimination.

3. As to the basic scenario of the claim, suffice it to say that as at 22 October 2016 the Claimant then aged 22 had been unemployed for about a year. Through the Jobcentre he was placed with a training provider basically involved in the provision of modern apprenticeships known as Performance for People; and it in turn uses a panel of facilitators, one of which is the second Respondent which is a charitable organisation, engaged for my purposes in the provision of training and with the laudable aim of securing thereby permanent employment for such as the Claimant.

4. Thus turning to the Responses (ET3), the second Respondent in turn was successful in placing the Claimant with the first Respondent, IKEA, to work in its warehouse. This was under the aegis of a modern apprenticeship contract which I have seen today between the first Respondent and the Claimant. Essentially of course the hope would be that the maximum duration of the apprenticeship, namely one year, would result in the Claimant being offered a permanent post with IKEA which has happened previously with some of those placed on apprenticeships. Indeed I have noticed that the Claimant was not the only modern apprentice placed by the first Respondent during this period with IKEA

5. The contract provided by the first Respondent to the Claimant, which I have read today, clearly had within it the provision whereby it could terminate the contract earlier than the end of one year, in other words it wasn't fixed term, and if it did terminate the contract it was obliged to give one week's notice or payment in lieu thereof. This it duly did. As to why it did so is because the Claimant very early on in terms of being placed working with IKEA began to develop problems with his feet; and from the documentation which I have been able to read today, particularly in the bundle that has been prepared by the first Respondent, the Claimant was increasingly in great pain trying to undertake his work on the nightshift in the warehouse at IKEA on the outskirts of Nottingham. In terms of the issues in this case the Claimant contends that he made clear his concerns on a regular basis. At present in its pleading IKEA disputes this, but suffice it to say that from some of the documentation I have read today it appears that IKEA was aware as the work assignment got underway, or certainly in its latter stages, that the Claimant was presenting with these problems to his feet; and he had to have time off work including an absence shortly before his employment was terminated; on the face of it this was due to the problems with his feet.

6. Matters came to a head whereby therefore IKEA informed the second Respondent that it no longer wished the Claimant to work at its premises. I have then read some e-mail traffic whereby the Claimant's liaison officer with IKEA at the second Respondent – Mr Watson – did try to see if IKEA could otherwise place the Claimant but was unsuccessful; IKEA was essentially saying that it had nowhere else to put the Claimant where he wouldn't be at risk because of his feet. The second Respondent then tried to see if Performance for People could provide somewhere else for the Claimant to continue in effect with a restart of the apprenticeship, but without success. And so the second Respondent had to terminate the contract and therefore paid the Claimant one week's wages in lieu of notice; this was on 21 April 2017.

7. As to IKEA it has pleaded that essentially it wasn't so much the foot issue which led to its requiring the Claimant be removed from working for it but because he was

"often rude, abusive, loud and arrogant". In that context three IKEA workers made statements complaining about his, and so he was ordered off the assignment because his attitude to work was "wholly and utterly unreasonable". And so it says even if the Claimant was disabled by reason of his feet and which is denied, that the reason the assignment was ended was as I have just cited it to be; and that furthermore it had no knowledge at all of issues relating to his feet or that the problem was being caused primarily, as alleged by the Claimant, by the safety footwear which IKEA required him to wear. So in that respect there is a stark conflict between the Claimant and IKEA in this case and also potentially one between IKEA and the second Respondent.

8. But a first fundamental is that both Respondents do not accept that the Claimant is a disabled person. Of course it is for the Claimant to prove to the Tribunal on a balance of probabilities that he was a disabled person at the material time having regard to the definition in particular at Schedule 1 of the EQA. I explained to Mrs Gilbourne what this entails, namely that the Tribunal will need to be satisfied that he had at the material time, ie by the dismissal on 21 April 2017, a physical and/or medical impairment (if engaged) which had a substantial impact on his ability to undertake normal day to day activities: That is to say more than minor or trivial. Mrs Gilbourne made plain to me today that her son changed during the course of work at IKEA, and she says because of the worsening problems with his feet, and so went from being an outgoing, sociable 22 year old to one who has considerable difficulty with mobility and rarely leaves the house: So a radically changed person. She explained to me that there have been various medical interventions but as yet the medical profession is unable to conclude what is causing the problems with his feet. There may also be a psychological functional overlay but at present her son is embarrassed to seek help from the doctors as he doesn't want to be on antidepressants.

9. I reminded the Respondents that causation is not the issue at this stage; it is whether or not the Claimant was disabled at the material time as defined, which meant that the condition or if more than one conditions had so impacted upon him as I have defined it as to mean that the condition had lasted or was likely to last for more than 12 months and constituted a disability. That is the first fundamental because of course if the Claimant isn't disabled, then his disability claim will fall. If on the other hand he is disabled, then for reasons I will come to evidence is going to be needed from the Respondents, and particularly IKEA, to justify the reasons for termination of the employment.

10. Thus it follows that I am going to make orders for directions on the disability front.

11. I discussed with Mrs Gilbourne the breach of contract claim which is for one year's wages based upon the proposition that this was a fixed modern apprenticeship. Having read the contract it self evidently isn't for the reasons I have given. Therefore the claim for losses for the intended duration of the contract cannot be sustained and the Claimant of course had his contractual entitlement in terms of wages in lieu of notice. In fact what is being claimed here, and I have read the schedule of loss, is what we would refer to in the law as consequential losses stemming from the discriminatory act; and therefore it can be claimed as part of the claim for discrimination but what it cannot be claimed as is breach of contract. Mrs Gilbourne accepts that position and therefore the claim for breach of contract is dismissed upon withdrawal. Finally there is a written particulars of employment. Thus that claim is also withdrawn.

12. The Claimant had wished to amend to bring an age discrimination claim. It of course is out of time, not that this would necessarily be fatal; and I explained to Mrs Gilbourne the guidance as per the well known case of **Selkent**. But when I read the documentation to which I have referred and particularly looked at the minutes of the meeting held with the Claimant on 5 April and which appears to me to be a transcript, it became clear to me that the Claimant is in the greatest possible difficulty seeking to argue that this was also a claim of age discrimination. Mrs Gilbourne accepted my observation and has decided not to proceed with the application to amend.

13. Thus what the Tribunal is left with is a case of disability discrimination. On the pleaded scenario and having discussed it with Mrs Gilbourne, it is self evident to me that the claims are as follows:-

13.1 Failure to make reasonable adjustment pursuant to Section 20-21 of the EQA. The PCP (provision criteria or practice) engaged would be that the Claimant should be able to be mobile in the context of walking around the large warehouse/storage area of IKEA. Thus the problems with his feet, if proven and a disability, would place him at a particular disadvantage. Thus if aware, IKEA in particular would be under a duty to make reasonable adjustment for him.

13.2 Second engaged is Section 15. That is to say the treatment of the Claimant by IKEA in particular is obviously unfavourable on the basis of requiring that the engagement with it be ended by the second Respondent. The question becomes is that unfavourable treatment because of something arising in consequence of the disability, and of course it is therefore back to whether or not the Claimant is disabled and if so knowledge. If both these elements are established, then IKEA in particular will need to show that its actions were proportionate and justified. In that respect of course we come back to the significance of its pleaded case in relation to the Claimant's behaviour. But of course there may also be from the documents I have read today an issue that also there was the concerns about his feet and his inability to carry on in the role as to which there is certainly at least one e-mail emanating from IKEA to the second Respondent.

13.3 As to the second Respondent I cannot see how, in the context of work at IKEA, on the face of it could be said to have failed to make reasonable adjustment as the frontline responsibility in that respect was with IKEA. So as to a failure to make reasonable adjustment it would surely be in relation to its obligations to try and get the Claimant a further apprenticeship elsewhere post the ending of the role at IKEA. On the face of it, and I say no more at this stage, it would appear that it did its best. Furthermore prior thereto the s15 claim would focus on whether it was sufficiently proactive in seeking to persuade IKEA to keep him on. Again all I would say at this stage is that from the e-mails which I have read Mr Watson of the second Respondent was doing his best in dialogue with IKEA; but ultimately of course as the facilitator so to speak he is at the behest of the end user. As to whether therefore the claims against it are one where the Tribunal should consider strike out them having no reasonable prospect of success or the ordering of a deposit payable by the Claimant as a condition precedent of continuing the claims having only little reasonable prospect of success, will be on the agenda once the disability or not issue has been dealt with. By then there will also have been discovery which will enable the Claimant in particular to focus on whether continued joinder of the second Respondent is legally sustainable.

14. What it means is that at present, subject to disability being established, I see this case as very much focussed on IKEA and which of course does not need to be the employer to be liable for discrimination and because of the provisions of Section 41 of the EQA.

15. Against that background I am going to make the following orders for directions.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. By **20 December 2017** the Claimant will supply to the Respondents, copying to the Tribunal, the following:-

1.1 A complete set of the medical notes which is to include all side letters from specialists and the prescription record. I have provided that date because it will be after the Claimant has seen a podiatrist on 4 December and thus a report will have been received by the General Practitioner and can be in the records by the 20th.

1.2 The Claimant will also supply an impact statement as to his disability and also one from his mother because she has of course closely observed him over the relevant period and indeed prior thereto and as to the change in him. I have explained to Mrs Gilbourne what is required.

1.3 There will also be obtained and served upon the parties and the Tribunal a report from the General Practitioner drawing together the information in the medical notes and giving an opinion as to whether or not he considers the Claimant to be disabled pursuant to the provisions of the EQA. To that end the Claimant has been provided with a copy of the Tribunal's proforma letter **SL35A** in order to give it to the doctor so he has the format to follow.

2. The Respondents having had all the above will reply by **19 January 2018** stating as to whether or not they concede that the Claimant is a disabled person and if not their reasons. I do not envisage they will be asking for any further medical evidence, but of course that can be revisited if they do.

3. In order to not only assist for the purposes of that Preliminary Hearing but to take the matter forward so that Mrs Gilbourne is more fully appraised of the documentary evidence and in order for her to advise her son and concentrate on the core issues there is going to be a core bundle. Thus the first Respondent will provide the second Respondent's with a list of the documents that it requires in a trial bundle by **24 November 2017**. Insofar as the second Respondent doesn't have any given listed document the first Respondent will ensure that it provides a copy. Then by **1 December 2017** the first Respondent will present to the Claimant the proposed trial index, double spaced and in chronological format.

4.By **8 December 2017** the Claimant will reply, adding at the appropriate place by brief description any other document he requires in the bundle; if he has the same sending a copy to the first Respondent, otherwise requesting that they place it in the bundle.

5. By not later than **22 December 2017** the first Respondent will produce a trial bundle. It 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 parties' 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. All other directions for the main hearing which remains listed for 8-10 May 2018 are otherwise stayed. From the discussion today it is obvious that Judicial Mediation would not be appropriate at the current time.

7. There is hereby listed an attended Preliminary Hearing **on 9 February 2018 at Nottingham Hearing Centre, Nottingham Justice Centre, 50 Carrington Street, Nottingham NG1 7FG, commencing at 10:00 am** with a **1 day** time estimate and before this Judge at present to first determine the issue of whether or not the Claimant was a disabled person at the material time. Second if the Claimant is disabled, to consider whether the claims against the first Respondent[1] should be struck out as having no reasonable prospect of success or a deposit up of up to £1000 per head of claim ordered payable by the Claimant as a condition precedent of continuing, the claims or either of them having only little reasonable prospect of success. The adjudication on the disability or not issue will be reached upon consideration of the documentation, the evidence of the Claimant and his mother and any cross examination and thence submissions. The strike out/ deposit issues will be determined on the face of the payments and submissions only.

[1] I have decided on reflection to deal with this at the same Hearing hence the extension to 1 day.

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

(v) 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 P Britton

Date:28 November 2017

Sent to the parties on:

30 November 2017

For the Tribunal: