



## EMPLOYMENT TRIBUNALS

Claimant

**Mr R Body**

v

Respondent

**Brakes Bros Limited**

## PRELIMINARY HEARING

**Heard at: Reading**

**On: 2 March 2017**

**Before: Employment Judge Gumbiti-Zimuto**

**Appearance:**

**For the Claimant: In Person**

**Interpreter: Mrs Petra Hytten (Slovakian Language)**

**For the Respondent: Ms Michelle Clarke (Solicitor)**

## JUDGMENT

1. The claimant's complaint of unfair dismissal is struck out.
2. The claimant's complaint about unlawful deduction from wages is dismissed upon withdrawal by the claimant.
3. The claimant has permission to amend the claim form to include complaints about direct race discrimination as set out in the list of issues.

## REASONS

1. The claimant has had two periods of employment with the respondent. The first was between June 2012 and about August 2014. The claimant commenced his second period of employment with the respondent on 8 February 2015 which came to an end on the 30 June 2016. The claimant does not have two years of continuous employment with the respondent.
2. The claimant does not make any claim coming within the provisions contained in section 108 (3) of the Employment Rights Act 1996. The claimant does not have the right to claim unfair dismissal. The complaint of unfair dismissal is therefore struck out.

3. The claimant has withdrawn his complaint of unpaid wages arising from a failure to pay him sick pay. The claimant makes complaints about direct discrimination on the grounds of race and disability in respect of sick pay.

## CASE MANAGEMENT SUMMARY

### Listing the hearing and preliminary hearing

1. After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within three days. It has been listed at **Reading Employment Tribunal, 30-31 Friar Street (entrance in Merchants Place), Reading RG1 1DX** to start at 10.00am or so soon thereafter as possible on **29, 30 and 31 August 2017**. The parties are to attend by 9.30 am.
2. The parties may within seven days of today (2 March 2017), for good reason, apply to vary the date of the hearing. In the event that there is no application made within seven days the dates should be treated a fixture which will not be vacated unless there are exceptional circumstances.
3. There has also been listed a preliminary hearing with a time allocation of three hours. The purpose of the preliminary hearing is to determine whether the claimant is disabled within the meaning of the section 6 of the Equality Act 2010 as a result of his back condition. The preliminary hearing will take place at 10.00 am on the **31 July 2017**.
4. The preliminary hearing will not take place if the respondent conceded disability in accordance with the directions set out below or the respondent otherwise determines that a preliminary hearing to consider disability is not appropriate.

### The complaint(s)

5. By a claim form presented on 15 November 2016, the claimant brought complaints of unfair dismissal, unpaid wages and disability discrimination. The respondent defended the claims. Of the original claims only the disability discrimination claim remains to which has been added a complaints of direct race discrimination. In essence they arise out of the circumstances leading up to the termination of the claimant's employment with the respondent.

### The issues

6. I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:
7. **Disability**
  - 7.1. Did/does the claimant have a physical or mental impairment, namely back condition/back pain?
  - 7.2. If so, did/does the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?
  - 7.3. If so, is that effect long term? In particular, when did it start and:

7.3.1. has the impairment lasted for at least 12 months?

7.3.2. is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months?

*N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the definition of disability (2011) paragraph C4.*

7.4. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

7.5. The relevant time for assessing whether the claimant had/has a disability (namely, when the discrimination is alleged to have occurred) is 30 November 2015 to the 30 June 2016

## 8. Home visit

8.1. The claimant received a home visit from two of his managers during a period of sickness absence between 30 November and 9 December 2015. The respondent contends that during that meeting notes were taken of what the claimant said and also that the claimant was required to sign documents by his managers. The claimant was promised copies of the documents created as a result of this home visit. The respondent has failed to provide these documents to the claimant.

8.2. Did the events occur as alleged by the claimant?

8.3. If the events did occur has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act?

8.4. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant has not identified any actual comparators. What is the hypothetical comparator?

8.5. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? (race)

8.6. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

## 9. Return to work interview 9 December 2015

9.1. The claimant will contend that at return to work interview on the 9 December he informed his managers that he was fit to return to work but expressed reservations about being able to perform the full range of normal duties working in the freezer. The claimant will say that the way that the return to work meeting was conducted his manager resulted in the claimant being intimidated into overstating his fitness for work.

9.2. Did the events occur as alleged by the claimant?

**(Direct discrimination: section 13 Equality Act 2010)**

- 9.3. If the events did occur has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act?
- 9.4. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant has not identified any actual comparators. What is the hypothetical comparator?
- 9.5. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? (disability)
- 9.6. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

**(Discrimination arising from disability: section 15 Equality Act 2010)**

- 9.7. If the events occurred as alleged by the claimant, was it unfavourable treatment, "something arising in consequence of the claimant's disability" falling within section 39 Equality Act? No comparator is needed.
- 9.8. Does the claimant prove that the respondent treated the claimant as set out in paragraph 9.1 above?
- 9.9. Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability?
- 9.10. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?
- 9.11. 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?

**(Failure to make reasonable adjustments: section 20 and section 21 Equality Act 2010)**

- 9.12. Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely requiring the claimant to carry out his normal duties?
- 9.13. 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 the claimant was unable to carry out his normal duties without putting himself at risk of exacerbating his back condition/back pain?
- 9.14. Did the respondent take such steps as were reasonable to avoid the disadvantage?
- 9.15. 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?

**10. Occupational Health referral**

- 10.1. The claimant returned from sickness absence on the 29 December 2015 and was required to carry out his normal duties. The claimant was referred to IMASS occupational health by the respondent. When the IMASS report was made available to the respondent he respondent failed

to carry out the recommendations contained in the IMASS occupational health report.

10.2. Did events occur as alleged by the claimant?

**(Direct discrimination: section 13 Equality Act 2010)**

10.3. If the events did occur has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act?

10.4. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant has not identified any actual comparators. What is the hypothetical comparator?

10.5. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? (disability)

10.6. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

**(Discrimination arising from disability: section 15 Equality Act 2010)**

10.7. If the events occurred as alleged by the claimant, was it unfavourable treatment, "something arising in consequence of the claimant's disability" falling within section 39 Equality Act? No comparator is needed.

10.8. Does the claimant prove that the respondent treated the claimant as set out in paragraph 10.1 above?

10.9. Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability?

10.10. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

10.11. 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?

**(Failure to make reasonable adjustments: section 20 and section 21 Equality Act 2010)**

10.12. Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely requiring the claimant to carry out his normal duties?

10.13. 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 the claimant was unable to carry out his normal duties without putting himself at risk of exacerbating his back condition/back pain?

10.14. Did the respondent take such steps as were reasonable to avoid the disadvantage? The claimant will contend that the respondent failed to carry out the recommendation contained in the IMASS occupational health report.

10.15. 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?

11. **Return to work May 2016**

11.1. At a return to work interview in May 2016 the claimant asked that he be given lighter duties by the respondent. The claimant was then further referred to IMASS. The claimant was told by his managers that he was required to carry out his normal duties in the freezer and further told that if he failed to do so he could “go home”.

11.2. Did events occur as alleged by the claimant?

**(Direct discrimination: section 13 Equality Act 2010)**

11.3. If the events did occur has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act?

11.4. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant has not identified any actual comparators. What is the hypothetical comparator?

11.5. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? (disability)

11.6. If so, what is the respondent’s explanation? Does it prove a non-discriminatory reason for any proven treatment?

**(Discrimination arising from disability: section 15 Equality Act 2010)**

11.7. If the events occurred as alleged by the claimant, was it unfavourable treatment, “something arising in consequence of the claimant’s disability” falling within section 39 Equality Act? No comparator is needed.

11.8. Does the claimant prove that the respondent treated the claimant as set out in paragraph 11.1 above?

11.9. Did the respondent treat the claimant as aforesaid because of the “something arising” in consequence of the disability?

11.10. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

11.11. 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?

**(Failure to make reasonable adjustments: section 20 and section 21 Equality Act 2010)**

11.12. Did the respondent apply the following provision, criteria and/or practice (‘the provision’) generally, namely requiring the claimant to carry out his normal duties?

11.13. 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 the claimant was unable to carry out his normal duties without putting himself at risk of exacerbating his back condition/back pain?

11.14. Did the respondent take such steps as were reasonable to avoid the disadvantage?

11.15. 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?

12. **May - June 2016**

12.1. The claimant was accused of working too slow by manager in about May 2016. When the claimant explained that the reason he was unable to work any faster was because of his back condition/back pain the claimant was sent home. The claimant requested that his son, who was also employed by the respondent take him home as the claimant was unable to drive due to having taken medication for back pain. The respondent refused causing the claimant to have to wait for three and a half hours until his son finished work before he could go home. During this period the claimant was required to remain off the respondent's premises.

12.2. The claimant met with Dan Gee on or about 14 June and it was agreed that the claimant would be allowed to carry out light duties, namely marshalling. The claimant was not permitted to carry out any marshalling prior to the 16 June when the claimant went off sick due to his back condition/ back pain.

12.3. Did events occur as alleged by the claimant?

**(Direct discrimination: section 13 Equality Act 2010)**

12.4. If the events did occur has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act?

12.5. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant has not identified any actual comparators. What is the hypothetical comparator?

12.6. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? (disability)

12.7. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

**(Discrimination arising from disability: section 15 Equality Act 2010)**

12.8. If the events occurred as alleged by the claimant, was it unfavourable treatment, "something arising in consequence of the claimant's disability" falling within section 39 Equality Act? No comparator is needed.

12.9. Does the claimant prove that the respondent treated the claimant as set out in paragraph 12.1 and 12.2 above?

12.10. Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability?

12.11. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

12.12. 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?

**(Failure to make reasonable adjustments: section 20 and section 21 Equality Act 2010)**

- 12.13. Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely requiring the claimant to carry out his normal duties?
- 12.14. 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 the claimant was unable to carry out his normal duties without putting himself at risk of exacerbating his back condition/back pain?
- 12.15. Did the respondent take such steps as were reasonable to avoid the disadvantage?
- 12.16. 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?

**13. 30 June 2016 Return to work interview**

- 13.1. On the claimant's return to work on the 30 June 2016 the claimant was told that he was required to carry out his normal duties. This was in breach of the agreement that the claimant had reached with Dan Gee. The claimant was told that he was not permitted to carry out light duties of marshalling.
- 13.2. Did events occur as alleged by the claimant?  
**(Direct discrimination: section 13 Equality Act 2010)**
- 13.3. If the events did occur has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act?
- 13.4. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant has not identified any actual comparators. What is the hypothetical comparator?
- 13.5. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? (disability)
- 13.6. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?  
**(Discrimination arising from disability: section 15 Equality Act 2010)**
- 13.7. If the events occurred as alleged by the claimant, was it unfavourable treatment, "something arising in consequence of the claimant's disability" falling within section 39 Equality Act? No comparator is needed.
- 13.8. Does the claimant prove that the respondent treated the claimant as set out in paragraph 13.1 above?
- 13.9. Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability?
- 13.10. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?



13.11. 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?

**(Failure to make reasonable adjustments: section 20 and section 21 Equality Act 2010)**

13.12. Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely requiring the claimant to carry out his normal duties?

13.13. 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 the claimant was unable to carry out his normal duties without putting himself at risk of exacerbating his back condition/back pain?

13.14. Did the respondent take such steps as were reasonable to avoid the disadvantage?

13.15. 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?

**14. Refusal to allow the claimant to take leave**

14.1. The claimant contends that in about February 2016 he completed a leave request form and submitted it in accordance with the respondent's procedure. The request was to take leave in April 2016. Around the end of March 2016 the claimant asked if his leave had been approved and was informed that no leave request had been submitted.

14.2. Did events occur as alleged by the claimant?

**15. Sick pay direct discrimination claim**

15.1. The claimant contends that he was entitled to receive statutory sick pay and that he was paid this by the respondent.

15.2. The claimant contends that the respondent has a discretionary company sick pay which is paid by the respondent in line with the respondent's policy on sick pay. The claimant contends that in the circumstances of his case he should have been company sick pay. The claimant contends that by not paying the claimant sick pay the respondent failed to comply with its own policy.

15.3. The claimant contends that other employees have been paid company sick pay in comparable circumstances and refers specifically to martin Berdak and Reece Tyrer.

**(Direct discrimination: section 13 Equality Act 2010)**

15.4. If the events did occur has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act?

15.5. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators or hypothetical?

- 15.6. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? (disability and alternatively race)
- 15.7. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

**16. Constructive dismissal**

- 16.1. The claimant resigned on the 30 June 2016.
- 16.2. Do the matters set out above as are found to have occurred either individually or in any combination amount to a repudiatory breach of contract?
- 16.3. Did the claimant resign from his employment with the respondent in response to the such a breach?
- 16.4. Was the claimant constructively dismissed?

**17. Remedies**

- 17.1. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.
- 17.2. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, and/or the award of interest.

**Judicial mediation**

18. This case does not appear to me to be suitable for judicial mediation.
19. I made the following case management orders.

## **ORDERS**

### **Made pursuant to the Employment Tribunal Rules 2013**

**1. Further information and Amended response**

- 1.1. The claimant is to provide to the respondent so as to arrive no later than **16 March 2016** the following further information:
  - 1.1.1. The matters upon which the claimant will rely in support of the contention that the respondent was in breach of its own sick pay policy having regard to the way that the claimant was treated by the respondent.
  - 1.1.2. The claimant's current employment, stating the amount he is earning, the number of hours he is working, the type of work he is performing and the date from which this employment commenced.

- 1.2. The respondent is ordered to present a draft amended response, marked for my attention, so as to arrive with the Tribunal and the claimant on or before **30 March 2016**. The amended response will set out the respondent's factual assertions in connection with the claim as now understood and leave will be granted if it does this.

2. **Re disability**

- 2.1. The claimant is to send to the respondent so as to arrive by no later than **4.00 pm on 16 March 2016** the following:
  - 2.1.1. The medical or other evidence on which the claimant will rely in support of his contention that he is disabled by reason of his back condition/ back pain.
  - 2.1.2. A statement setting out the nature of the substantial and adverse effect that the claimant's back condition/ back pain has on his ability to carry out normal day to day activities.
- 2.2. The respondent is ordered by **4.00 pm on 30 March 2016** to notify the claimant and the Tribunal whether, having considered the information provided it concedes that the claimant is or was at the material time a disabled person, identifying the disability and the period and/or the extent of any remaining dispute on these issues.

3. **Disclosure of documents**

- 3.1. The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive on or before **13 April 2017**. This includes, from the claimant, documents relevant to all aspects of any remedy sought.
- 3.2. Documents relevant to remedy include evidence of all attempts to find alternative employment: for example a job centre record, all adverts applied to, all correspondence in writing or by e-mail with agencies or prospective employers, evidence of all attempts to set up in self-employment, all pay slips from work secured since the dismissal, the terms and conditions of any new employment.
- 3.3. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.
- 3.4. The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

4. **Bundle of documents**

- 4.1. It is ordered that the respondent has primary responsibility for the creation of the single joint bundle of documents required for the hearing.

- 4.2. To this end, the claimant is ordered to notify the respondent on or before **12 May 2017** of the documents to be included in the bundle at their request. These must be documents to which they intend to refer, either by evidence in chief or by cross-examining the respondent's witnesses, during the course of the hearing.
- 4.3. The respondent is ordered to provide to the claimant a full, indexed, page numbered bundle to arrive on or before **19 May 2017**.
- 4.4. The respondent is ordered to bring sufficient copies (at least five) to the Tribunal for use at the hearing, by 9.30 am on the morning of the hearing.

**5. Witness statements**

- 5.1. It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.
- 5.2. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.
- 5.3. The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
- 5.4. If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
- 5.5. It is ordered that witness statements are exchanged so as to arrive on or before **15 August 2017**.

**CONSEQUENCES OF NON-COMPLIANCE**

- 1. 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.
- 2. 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.
- 3. 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.

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**Employment Judge Gumbiti-Zimuto**

Sent to the parties on:

13/03/2017

For the Tribunal:

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