THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Ms N O'Hare**
Ms Y Walsh

BETWEEN:

Mr J Bruno

Claimant

and

Envirotech Properties Limited

Respondent

ON: **5th & 6th November 2018**
5th December 2018 (In Chambers)

Appearances:
For the Claimant: Mr D Treleaven, Retired Solicitor
For the Respondent: Mr C McDevitt, Counsel

RESERVED JUDGMENT

1. By concession, the unfair dismissal claim, wrongful dismissal claim and claim for failure to provide written particulars of employment succeed.

2. The Claimant is entitled to a statutory redundancy payment in the sum of **£11,496**.

3. The Claimant is awarded **£2,507** compensation for unfair dismissal. The Basic Award is extinguished by the redundancy payment.

4. The Claimant is awarded **£4214** for wrongful dismissal.

5. The Respondent is ordered to pay the Claimant the total sum of **£18,217.**

REASONS

1. By a claim form presented on 3 February 2017, the claimant claimed unfair dismissal; wrongful dismissal; disability discrimination; a redundancy payment; failure to provide employment particulars and; failure to provide written reasons for dismissal. Unfair dismissal, wrongful dismissal, and failure to provide written statement of particulars of employment were conceded by the Respondent. The other matters remained in dispute.

2. We heard evidence from the Claimant and from David Treleaven, Retired Solicitor, on his behalf. The Respondent gave evidence through David Bean, Director, and Linda McGivern, Company Secretary. Unhelpfully, the parties had not agreed a joint bundle but instead provided 3 colour coded bundles between them. Reference in square brackets in the judgment are to pages in the bundles. Documents from the Red, Black and Blue bundles with be prefixed with "R" "B" and "Bl" respectively.

Issues

3. The remaining issues are as follows:

    a. Did the Respondent's dismissal of the claimant amount to:

        i. Direct discrimination because of his disability (bladder cancer)
        ii. Discrimination because of something arising in consequence of disability.

    b. Is the Claimant entitled to a redundancy payment
    c. How much is the Claimant entitled to by way of notice pay
    d. Did the Respondent fail to respond to a request for written reasons for dismissal

The Law

4. Section 13 of the Equality Act 2010 (EqA) provides that 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.

5. Section 23 EqA provides that on a comparison of cases for the purposes section 13, there must be no material difference between the circumstances relating to each case.

6. Section 15 of the Equality Act 2010 (EqA) provides that 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.

7. Section 136 EqA provides that if there are facts from which the court could decide, in the absence of any other explanations that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

8. The leading authority on the burden of proof in discrimination cases is Igen v Wong 2005 IRLR 258 That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the Claimant. Where such facts are proved the burden passes to the Respondent to prove that it did not discriminate.

Findings of Fact

9. The Respondent is a property investment company involved in the purchase and renovation of properties for re-sale or letting. David McBean (DMB) was the sole director. In 1999, DMB set up Hazemere Limited (Hazemere) and was its sole director. In 2005, Hazemere was sold to David Treleaven (DT), a former solicitor and legal consultant to the McBean family and their businesses over many decades. The Respondent and Hazemere had a business arrangement whereby the Respondent purchased buildings and Hazemere undertook their renovation. DT ran the day to day operations of the Respondent and Hazemere from 1999 to April 2015, when he retired and went to live in Thailand.

10. In 1999, after the Claimant had done a carpentry job for Hazemere, DT introduced him to DMB and recommended that he be taken on full time. At a preliminary hearing on 15.3.18, Employment Judge Fowell determined that the Claimant was an employee of Hazemere from 1 January 2000 and that he transferred to the Respondent under TUPE in 2015.

11. The Claimant described his role as effectively a foreman/project manager, supervising the team working on the Respondent's building projects. The regular team comprised 1 electrician, 2 plumbers, 1 plasterer and a painter. The Claimant was a skilled carpenter and also spent a large proportion of his time doing carpentry on the Respondent's projects. The Claimant was the only tradesman directly employed by the Respondent.

12. From 2014, it was common knowledge amongst the workforce that DMB intended to wind down the business by selling off the property portfolio in order to fund a move to Grenada with his wife, Linda McGivern (LM). DMB told us that due to the ongoing tribunal case, his ill health and the ill health of a close relative of LM, the plan to move had been significantly delayed. In 2016, DMB suffered a tumour behind the eye and a silent stroke. Though some properties within the portfolio were sold, subsequently, he purchased 2 further properties. When asked why he had bought more properties when he was supposed to be selling up, DMB said that he had done so because his changed personal circumstances meant that their plans were on hold as he had not been able to wind down the business yet. The company needed to earn income somehow and interest rates were not high enough to earn money on the funds available. We accept that evidence.

13. In March/April 2016, the Claimant was diagnosed with Bladder Cancer and was admitted to hospital. He had 2 operations followed by courses of cancer treatment. As a result of his illness, he was unable to attend work from July 2016 until his eventual termination. Throughout the period of his absence, the Claimant received his full weekly pay.

14. There is a dispute between the parties as to when the Claimant was dismissed and the circumstances leading to the dismissal. DMB told us that on 30 August 2016, he met

with the Claimant, having called him into the office, told him that the business was winding down altogether and that he would be paid until the end of September. He said he then gave the Claimant a pre-prepared cheque for £4,110 comprising 5 weeks' pay to cover from 25.8.16 - 30.9.16. The Claimant told us that he attended DMB's office on 1 September 16 and that when he arrived DMB, acting awkwardly, gave him a cheque with a handwritten note from LM which referred to a redundancy lunch. [62]. The Claimant denies that DMB mentioned anything about letting him go or any other words of dismissal. The only consistency in their accounts is that they both agree that DMB told the Claimant that he was giving him his salary in a lump sum to save him from attending the office each week to collect his cheques.

15. Having considered the conflicting accounts, we prefer the Claimant's. Nowhere in DMB's account does he use the term redundancy, termination, laid off or any phrases that would indicate that the employment relationship was coming to an end. The only written piece of evidence is the note from LM and even that document is ambiguous. It refers to the cheque as salary rather than notice pay or termination payment. Although there is a reference to a staff redundancy lunch, it has already been found in the preliminary judgment that this related to Brenda Green, the only other direct employee of the Respondent and therefore there was no reason for the Claimant to believe it was anything to do with him [Bl 62].

16. In his preliminary hearing judgment, Employment Judge Fowell, refers at paragraph 28 to the same meeting and found that after the meeting DMB and the Claimant went to lunch and had a game of pool together. Although it is referred in the judgment to a redundancy lunch, this is probably incorrect as the redundancy lunch took place much later – 29 September 2017. It is more likely to be a reference to the regular staff lunch that took place on the last Thursday of each month. The point is that whether it was a redundancy lunch or not, it is inconceivable that the Claimant's reaction to being let go after 16 years' continuous employment would be a pub lunch and a game of pool. The more likely explanation is that he did not understand that his employment was being terminated.

17. The Claimant was not at any point thereafter told directly by DMB that his employment was terminating. Instead, he told DT, on or around 27 September, that the Claimant was being let go from 30 September, no doubt knowing that DT would pass this information onto the Claimant. We are satisfied that by 27 September, or thereabouts, the Claimant knew about his impending dismissal as DT, who describes himself as "*a very close personal friend of the Claimant*" would have told him. Although the Claimant contended that his effective date of termination was 12 October, there is no basis for this. The Respondent ceased to pay the Claimant from the 30 September 2016 and nothing occurred between 30 September and 12 October that was consistent with the relationship still continuing. Also, within the documents before us is an employment reference for the Claimant dated 3 October 2016, signed by DT, so it must have been known on or before that date that the employment had terminated [bl -64].

18. Based on the above, we find that the Claimant's employment terminated on 30 September 2016.

Submissions

19. The Claimant's representative, DT provided written submissions, which he chose not to speak to. Unfortunately, instead of putting his client's case, he used them as a vehicle to air his very obvious personal feud with DMB and antipathy towards LM, about whom he made extremely objectionable comments in those submissions. We considered this to be very unprofessional, coming from someone who purported to be a member of the legal profession. Needless to say, we ignored most of what was set out.

20. The Respondent made oral submissions.

Conclusions

21. Having considered our findings of fact, the submissions, in so far as they were relevant, and the law, we have reached the following conclusions on the issues.

Direct Disability Discrimination

22. The Claimant alleges that he was dismissed because he has cancer. He told us that LM told his colleagues, Ben St Hellier and Johnny Vidall, that he was going to be got rid of because he was ill and he might sue the company. Neither individuals were called to give evidence for the Claimant and the Claimant was not present when the alleged conversation took place, so it is only hearsay. LM on the other hand was present and denied ever telling the said individuals that the Claimant was going to be dismissed because of his health. At paragraph 3 of her original statement, prepared for the preliminary hearing, LM refers to a conversation with the said individuals where she expressed concern about the Claimant's health and worry that if he worked or drove he might have an accident or make a mistake and end up in legal trouble. It is possible that, if there was a conversation between LM and the individuals, it may have been relayed incorrectly to the Claimant or misinterpreted by him. Either way, we prefer LM's evidence and find that she made no such statement.

23. This is the only basis upon which the direct discrimination claim is predicated. The Claimant has therefore not proved facts from which we could conclude that his dismissal was less favourable treatment because of his disability. Also, for the reasons set out below, we are satisfied that the Claimant's dismissal had nothing whatsoever to do with his disability.

Discrimination because of something arising in consequence of disability

The unfavourable treatment is said to be the dismissal and the something arising from disability is said to be the time the Claimant took off work to undergo treatment for bladder cancer. That is not supported by any evidence before the tribunal. The Respondent has not at any time cited the Claimant's sickness absence as a reason for dismissal either to him or to the Tribunal. We have found below that the Claimant was dismissed for redundancy and for the reasons set out below, that did not arise in consequence of the Claimant's disability. This claim is not made out and fails.

Reason for Dismissal

24. DMB told us that following the last of the major refurbishment of his properties in September 2016, he instructed managing agents for their on-going management and repair. This was a commercial decision based on cost – it was cheaper than doing it in-house and the agents could market the properties at the same time. DMB also told us that in September 2016, there were no major refurbishments in the pipeline and therefore no work for the Claimant or the other tradesman to do. We accept that evidence.

25. We are satisfied that from September 2016, there was a diminishing need for the services of the Claimant and other workers of the Respondent due to the decision to outsource property management and refurbishment and wind down the property portfolio. The Claimant makes much of the fact that a number of his colleagues were offered work on a renovation project on one of the Respondent's properties in New Road in November 2016 and he was not. This had been occupied by DT but had since been vacated following his move to Thailand. DMB told us that he initially thought that all the property required was a lick of paint. However, following a survey in October 2016, they discovered that the work required was more substantial. As a result, contractors were engaged for 12 weeks to carry out those works. We accept that evidence. DMB also told us that he did not invite the Claimant to work on the project as he understood that he was not well enough as he had turned down some private work on LM's personal property in October for that reason. However, the Claimant told us that he turned down LM's offer of work, not for health reasons, but because he found her terms unacceptable. Whatever the truth of the matter, these events arose post dismissal and we are satisfied that they could not have been foreseen at the time of dismissal. In any event, 12 weeks temporary work does not alter the reason for dismissal.

26. It is noteworthy that in the employment reference provided by DT for Brenda Green, the reason he gives for her dismissal was that the Respondent was selling up and going to live in the Caribbean. It is therefore surprising that he challenges that reason in the Claimant's case. We are satisfied that the Claimant's dismissal was by reason of redundancy. The fact that due to unfortunate circumstances, the Respondent's proposals have not gone quite to plan and have been put on hold temporarily does not affect the reason for dismissal. Notwithstanding the changes in plan, we are satisfied that, by the end of September 2016, the requirement for the Claimant's services had ceased or diminished or were expected to do so. We are therefore satisfied that the definition of redundancy pursuant to section 139(1)(b) of the Employment Rights Act 1996, is made out.

Redundancy Payment

27. Having been dismissed for redundancy, the Claimant is entitled to a statutory redundancy payment.

Failure to provide written reasons for dismissal

28. This was not referred to by either party and no evidence was led on this by the Claimant. There was therefore no evidence presented showing that the requirements of section 93(1) of the Employment Rights Act 1996 had been made out. This claim is dismissed.

Judgment

29. By concession, the claims for unfair dismissal, wrongful dismissal and failure to provide written particulars of employment succeed.

30. The claim for a statutory redundancy payment succeeds

31. The disability discrimination claims fail and are dismissed

32. The claim for failure to provide written reasons for dismissal fails.

Remedy

33. The Claimant's net weekly wage was £526.75 and his gross weekly wage, £685

Statutory Redundancy Pay

34. His statutory redundancy payment is calculated as follows:

24 weeks @ £479 per week = **£11496**

Unfair Dismissal

35. Basic Award – Nil – This is extinguished by the Statutory Redundancy Payment

36. Compensatory Award – This was an unfair dismissal in circumstances where there was a genuine redundancy but a failure to carry out any a proper redundancy process. In particular, there was a failure to consult with the Claimant on his impending redundancy. That said, we are satisfied that there was no suitable alternative employment available to the Claimant and that a proper redundancy process, even if started at the end of September, would have taken no more than 4 weeks. We therefore award the Claimant 4 weeks' net pay, amounting to £2107. We also award £400 for loss of statutory rights. No award is made for future loss of earnings.

37. The total award for unfair dismissal is **£2,507.**

Wrongful Dismissal

38. The Claimant was entitled to 12 weeks' notice. We believe that 4 weeks of that notice would have been concurrent with the period awarded for unfair dismissal. We therefore award the Claimant the balance of the period – 8 weeks' net pay = **£4214**

Failure to provide a statement of particulars of employment.

39. Section 38 Employment Act 2002, provides that where there has been a failure to provide written particulars of employment, the Tribunal must make an award of either 2 or 4 weeks' pay unless there are exceptional circumstances which would make an award unjust or inequitable. 38(5).

40. Notwithstanding the clarification of the Claimant's employment status at the preliminary hearing, we heard in evidence that the Claimant and DT made a joint and conscious decision that the Claimant would work on a self-employed basis. Further, DT advised

DMB that this was the Claimant's status and this remained DMB's understanding up to dismissal. Given DT's capacity as a retired solicitor, who had been legal adviser to DMB's father before him for 30 odd years, it was reasonable for him to rely on that advice. DT was not only the Claimant's employer up until 2015, he was also the legal consultant to the Respondent and in his role was responsible for all the regulatory matters associated with its business. It would therefore have been his responsibility, pre-TUPE, and for some time beyond, to ensure that all relevant employment contracts were in place. This was not done in the Claimant's case because of their agreement on his status. In our view, these amount to exceptional circumstances making an award under section 38 unjust. We therefore make no award.

41. The total award is **£18,217.**

Employment Judge Balogun
Date: 1 March 2019