



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Mr P Boron

v

XPO Supply Chain UK Limited

**Heard at:** Cambridge

**On:** 3 February 2021

**Before:** Employment Judge O Dobbie (sitting alone)

## Appearances

**For the Claimant:** Did not attend and was not represented

**For the Respondent:** Mr N Bidnell-Edwards, Counsel

**Interpreter:** Ms Monika Rauflajsz, Polish speaking

## COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

## JUDGMENT

1. The claim (for constructive unfair dismissal) is dismissed.

## REASONS

### Introduction

1. By a claim form presented on 14 August 2019, the Claimant brought a claim for constructive unfair dismissal.

### Background leading up to the Full Merits Hearing

2. The Full Merits Hearing had originally been listed for two days on 18 and 19 May 2020. As I understand it, those dates were vacated and converted into a Telephone Case Management Preliminary Hearing due to the Covid-19 pandemic and the closure of Tribunals during that time. By the time of the Case Management Preliminary Hearing, the date for exchange

of witness statements had already passed. The Respondent had duly complied, but the Claimant had not yet provided a statement to the Respondent, nor a Schedule of Loss. At the Hearing, the Claimant informed the Employment Judge that he had sent a statement to Acas and to the Tribunal but there was no statement on file.

#### Telephone Preliminary Hearing

3. The Claimant attended the Telephone Preliminary Hearing himself on 18 May 2020 and the issues were stated to be:
  - (1) *Did the Claimant terminate the contract under which he was employed in circumstances in which he was entitled to terminate it without notice by reason of the Respondent's conduct? This gives rise to the following sub-issues:*
    - 1.1 *Did the Respondent unreasonably prevent the Claimant from returning to work? In particular, by failing to investigate alternative duties for the Claimant.*
    - 1.2 *Was there a breach of the implied term of trust and confidence?*
    - 1.3 *Was the breach repudiatory in nature?*
    - 1.4 *Did the Claimant affirm the contract and / or waive the breach of contract?*
    - 1.5 *Did the Claimant terminate his employment in response to the alleged breach?*

#### Remedy

- (2) *Is it just and equitable to award compensation?*
- (3) *Was the Claimant guilty of contributory fault and, if so, to what extent should any compensation be reduced?*
- (4) *In the alternative, could the Respondent have fairly dismissed the Claimant at the time of his resignation on the grounds of capability? If so, to what extent should any compensation be reduced?*

#### Full Merits Hearing

4. The date for the Full Merits Hearing was set down at the Telephone Hearing on 18 May 2020 as being 3 and 4 February 2021. The Claimant was present and hence was made aware of these dates at the time, as well as the other Orders made that day. The Order made on 18 May 2020 required the Claimant to provide his witness statement and schedule of

loss by 1 September 2020. An interpreter was Ordered to attend the Full Merits Hearing.

5. On 22 October 2020, the Respondent wrote to the Tribunal (copying in the Claimant) seeking to strike out the Claimant's case for non compliance with Orders. By that date, the Respondent contended that the Claimant had still not provided his statement or schedule of loss. It would appear the Respondent received no reply to that Application and wrote to the Tribunal again on 22 January 2021 to reiterate its Application (still not having received either document from the Claimant).
6. At the outset of the Full Merits Hearing on 3 February 2021, the Claimant was not in attendance. His witness statement and schedule of loss were still outstanding. I enquired of the Respondent's Counsel as to when they had last heard from him and was informed he had been in contact by email on 22 January 2021 (in reply to an enquiry by the Respondent about his witness statement). In that reply, I was told he apologised for not having provided a statement and asserted that he would do so immediately. No statement was thereafter provided, nor was there any further correspondence.
7. I adjourned the proceedings for a short period to make enquiries of the Claimant and see what correspondence he may have had with the Tribunal. I asked the Tribunal Clerk to check the Tribunal email address for correspondence from the Claimant to see if he had sent his statement directly to the Tribunal only. None was found. The Clerk also attempted to call the Claimant using his mobile telephone number (from his ET1 claim form) but I was informed it rang with no answer.
8. At 10:47 hrs, the Tribunal Clerk sent an email to the Claimant informing him that the Hearing commenced that day and asking him why he was not in attendance. She also asked if he was having IT issues and directed him to the Tribunal IT department if so. He was informed that the Hearing had been postponed in an attempt to secure his attendance and would resume at 11:30 hrs.
9. At 10:53 hrs, the Claimant replied stating that he had received the Notice of Hearing and knew the Hearing was that day, but there was no start time listed on the Notice of Hearing. He apologised and said nothing further about whether he would, or could attend. The Tribunal Clerk replied at 10:55 hrs asking him to join the proceedings by 11:20 hrs.
10. At 11:00 hrs, the Claimant replied stating he was away from home and cannot use a laptop or other device. He stated,

*"I also cannot return before 1130".*

He gave no reason for why he had left home and not kept himself available for the Hearing which he knew commenced that day. The email seemed to suggest he would be available after 11:30 hrs that day.

11. At 11:12 hrs, the Clerk wrote to him yet again stating that in his first email he made no mention of being away from home and asking him to clarify if he would be attending the Hearing. There was no reply by 11:35 hrs by which time I reopened the Hearing and updated the Respondent. I informed them that whilst he had not yet logged in, his last email suggested he might be free from 11:30 hrs and that I would therefore postpone the Hearing one last time, to 12:00 hrs to allow him another chance to attend.
12. At 12:05 hrs, the Tribunal Clerk tried calling the Claimant on his mobile again, but there was no reply. I therefore decided to proceed to reopen the Hearing at 12:10 hrs. Upon doing so, I updated the Respondent on the latest situation. Counsel applied to strike the Claimant's claim out under Rule 37(1)(c) of the ET Rules of Procedure 2013 for non compliance with Orders. I noted also the power at Rule 37(1)(d) to strike out a claim that had not been actively pursued.
13. Whilst I deemed there to be adequate grounds for a strike out and I noted the power at Rule 47 to dismiss a claim where a party fails to attend, I exercised my discretion not to strike out the claim or dismiss it, but rather to proceed to hear it under the power afforded to me under Rule 47. Had the Claimant joined at any time, I would have permitted him to participate, even if it had meant recalling witnesses. I retained the Interpreter for this purpose. I decided to treat the Claimant's ET1 claim form and his resignation letter as his witness statement.
14. At around 12:20 hrs, the Respondent's first witness was sworn in. Each witness was then called in turn and I asked additional questions of each. Given that their statements had been read in advance, the live evidence was completed just before the lunch break at 13:00 hrs.
15. At 12:47 hrs, the Claimant replied to the Tribunal Clerk's email of 11:12 hrs (in which he was asked to clarify if he would attend) stating,

*"I did not write that I would not appear at the Hearing. I just wrote that at this moment I do not have access to a mobile device with a properly functioning webcam and microphone. I still haven't found out what time the mailing starts tomorrow February 4 so that I can be available for the Hearing"*.
16. During the lunch break, further attempts were made to contact the Claimant to see if he would attend and I asked the Clerk to email the Claimant to say that in absence of a good explanation for his non-attendance, the Hearing had commenced and would proceed that day and that he was encouraged to login at any time to participate in the Hearing. That email was sent to him around 13:58 hrs.
17. I delayed reconvening of the Hearing until 14:15 hrs to see if the Claimant might reply to the email or attempt to join the Hearing. He did neither.

Therefore at 14:16 hrs, I reopened the Hearing and invited submissions from Counsel. Submissions concluded by 14:50 hrs and I adjourned to reach my decision, which I gave orally on the day and is now recorded below.

## The Law

18. Section 95(1)(c) of the Employment Rights Act 1996 (“ERA”), provides

“(1) For the purposes of this Part an employee is dismissed by his employer if –

- (a) ...
- (b) ...
- (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

19. In Western Excavating (ECC) Limited v Sharp [1978] Q.B.761, Lord Denning stated:

*“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”*

20. In Malik and Anr v Bank of Credit & Commerce International SA (in compulsory liquidation) [1998] AC20, the duty of mutual trust and confidence was stated to be that:

*“The employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.”*

21. It has since been clarified that the duty on the employer is to,

“...not, without reasonable and proper cause, conduct itself in a manner calculated **or** likely to destroy or seriously damage the relationship of trust and confidence between employer and employee”

i.e. if the employer conducts itself in a manner which is likely to destroy or seriously damage trust and confidence, that is sufficient to amount to a breach, it need not be intended or “calculated”.

22. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] 4 All E.R.238, the Court of Appeal listed five questions that it should be sufficient to ask in order to determine whether an employee was constructively dismissed:
- (1) *What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
  - (2) *Has he or she affirmed the contract since that act?*
  - (3) *If not, was that act (or omission) by itself a repudiatory breach of contract?*
  - (4) *If not, was it nevertheless a part (applying the approach explained in Waltham Forest v Omilaju [2005] 1 All E.R.75) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?*
  - (5) *Did the employee resign in response (or partly in response) to that breach?*

### Findings of Fact

23. The Claimant commenced employment with the Respondent as a Warehouse Operative on 9 May 2017, per the Contract of Employment at page 27 of the Bundle.
24. The relevant events commenced from 22 November 2018 when the Claimant was unable to work due to back pain and called in sick accordingly. He was signed off as unfit to work from 27 November 2018 until 3 December 2018 for back pain and sciatica. On 5 December 2018, he was further signed off until 18 December 2018 for "low back pain". That fit note expired on 18 December 2018 and there was no further fit note at that time.
25. On 24 December 2018, the Claimant attended work and had a return to work meeting with Jonathan Godden. The self-certification form produced that day is signed by both the Claimant and Mr Godden. I note that in response to the question "Was the absence as a result of an accident at work?", the answer "no" had been circled and the claimant had signed this form, indicating his agreement with its contents.
26. The Return to Work Interview form recorded that the Claimant had a prolapsed disc, was taking medication and was still under active treatment (physiotherapy). It also recorded that he was unfit for normal duties and it was suggested that he have a staged return with no lifting for 2 weeks. The Claimant signed this form too. He was informed at this meeting that if

after 2 weeks he was unable to undertake his full duties, he would need to return to his doctor to be signed off.

27. Mr Godden stated in his witness statement that the Claimant had informed him that his [the Claimant's] Doctor had told him to return to work and "*just see how it goes*". This was recorded in an email at page 55 from Mr Godden to a colleague, dated 27 December 2018.
28. The Claimant worked a shift on 24 December 2018 and on 28 December 2018 told Mr Godden that he was fit to return to his normal duties. Mr Godden described the Claimant as having been adamant about this. Mr Godden agreed he could do so, provided he agreed that he [the Claimant] would immediately stop if he was feeling any discomfort. A Return to Work Interview note dated 28 December 2018 and stated to be at 23:00 hrs, records the Claimant as being fit to return to full duties and contains the comment,

*"Boron confirms that he is currently fit to commence his normal duties (order assembly)".*

This form was also signed and dated by the Claimant.

29. Shortly after resuming his full duties, around 23:45 hrs, the Claimant informed Mr Godden that he was suffering from discomfort in his back after picking up a few boxes. Mr Godden made a further record of this in a "Notification of Absence Form" which was at page 58 of the Bundle. This was not signed by the Claimant but I have no reason to doubt its authenticity or accuracy.
30. On 2 January 2019, the Claimant was signed off with "back pain" until 15 January 2019. Successive sick notes certified his absence until 8 April 2019. In early February 2019, following an Occupational Health referral, AXA (outsourced OH provider) informed the Respondent that it had made three attempts to contact the Claimant but he had not answered.
31. On 15 February 2019, the claimant attended a Personal Consultation meeting with Mr Clark regarding his absence. In the notes of that meeting, the Claimant informed Mr Clark that he remained unfit for work because his GP and Physiotherapist said he was unable to lift and needed more time. He did not in that meeting assert that he had been compelled or required by anyone at the Respondent to undertake full duties on 28 December 2018.
32. On 8 April 2019, the Claimant presented for work unexpectedly and informed Darren Chandler that he was unable to bend and lift but could do other duties. Mr Chandler informed him that he cannot be slotted into another role without the correct training and that he therefore could not work that evening. The Claimant informed Mr Chandler that he was seeing his GP again on the Wednesday and expected to be signed off sick again.

33. On 11 April 2019, the Claimant visited Ms Emmons and Mrs Horrex, HR Advisor, unannounced, to discuss his possible return. He presented a fit note dated 8 April 2019 which stated he was fit to work with adjustments, including light duties for two months. The Claimant informed Mrs Horrex that he believed he could do sweeping and cleaning duties.
34. Mrs Horrex pointed out that sweeping and cleaning involved significant manual handling, because to clean properly required pallets and objects to be moved and that it also required bending. She therefore considered it necessary to obtain advice from a medical practitioner as to what activities were suitable and which were prohibited. Mrs Horrex therefore asked Mr Boron to assist a swifter return to work by obtaining such information from his GP. He was also referred to Occupational Health (OH). There was a discussion about the Claimant's skills and whether he might be redeployed to another role. However, Mrs Horrex stated that there were no restricted duties available at that time that did not require lifting and bending.
35. The Claimant failed to respond to OH and provide the written consent that was needed to progress an assessment. There is also no evidence to suggest he sent anything further to the Respondent or OH from his GP in respect of his condition or his ability to undertake work.
36. On 10 June 2019, the Claimant attended work unannounced without having provided any further medical evidence and without having attended an OH assessment. The Claimant informed Darren Chandler, Shift Manager, that his back condition had not resolved but that he had to return to work and he believed he was "ok" to work. Mr Chandler informed him that he could not permit him to return to work without having undergone Refresher Training and assessment in Manual Handling and Manual Handling Equipment. I was informed by the Respondent's witnesses that this is a Health and Safety issue. The Respondent requires those absent from work for any significant period (thought to be about 6 weeks) to attend Refresher Training and be assessed before they are permitted to undertake manual handling work.
37. Mr Chandler suggested to the Claimant that he could attend such training during a day shift that week, but that he would be unable to attend training on a night shift that week because Mr Wall (who carried out such training) was doing different training that week during the night shifts. The Claimant refused to attend training during the day shift. The Claimant then asked for two weeks' leave and to attend the re-training upon his return. Mr Chandler booked that in the Work Planner.
38. Mr Chandler sent an email to Mrs Horrex and others on 11 June 2019, indicating that the Claimant would also have to be medically cleared. He stated,



*“He seems prepared to put his health at risk and this would also impact us greatly if we have no clear / qualified assessment of his health other his say so”.*

He asked to chase it up with “IMA” which I understood to mean an independent medical adviser [in context]. On the same date, Glen Horrex (Supply Chain Site Manager) replied to Mr Chandler’s email stating that based on what the Claimant had told Mr Chandler, he could not simply be allowed to return to work without advice from AXA or a doctor.

39. The Claimant was then on holiday from 10 – 21 June 2019.
40. On 24 June 2019, the Claimant attended work and met with Darren Chandler. On the same day, Mr Chandler sent an updated email to his colleagues. In that email, Mr Chandler reports that the Claimant said that his condition remained the same and he was thus unable to pick paint, bend, lift or carry out repetitive movements. When asked if he had been certified as fit to work by a Doctor, the Claimant informed Mr Chandler that he had not been and did not want to return to his GP because he expected his GP would sign him off as unfit. Mr Chandler informed the Claimant that if he was unable to carry out his job role, he would have to be signed off sick. The Claimant suggested to Mr Chandler that he should resign because he knew he was unable to carry out his role. He handed in his cards and locker key at that meeting.
41. On 25 June 2019, the Claimant sent a letter entitled “Constructive Dismissal” to the Respondent informing it that he resigned with immediate effect. He stated that the reason for resigning was that the Respondent had made his return to work,

*“...over problematic and by imposing your unreasonable demands, you forced me to resign”*

There was no mention of the incidents of December 2018 in his resignation letter.

42. Martin Clark wrote to the Claimant encouraging him to reconsider his resignation and attend an appointment with AXA on 9 July 2019. The Claimant replied in an undated letter stating the reasons he did not wish to withdraw his resignation and asserting a fundamental breach of contract by the Respondent. In that letter, he referred, for the first time, to the events of December 2018 alleging that he had been required to undertake full duties.

## **Conclusion**

43. In his claim form, the Claimant appears to rely on two matters as amounting to a repudiatory breach of contract. Whilst it was not pleaded in this way, and the Claimant was not present to elucidate the basis of his

claim, I understood his case as being a 'last straw' case; namely that there was a series of incidents (two) which culminated in a last straw that he says led to a breach of the implied term of mutual trust and confidence.

44. Page 8 of the Bundle, under box 9.2 of the claim form, the Claimant stated,

*"I was ready to return to work in December 2018 with note from my Doctor that I am not allowed to lift heavy objects. After three days I was made lifting heavy staff baby [stuff by] my employer and I further damaged my back."*

45. Page 7 of the Bundle, at box 8.2 of his claim form he stated that,

*"...my company made it very difficult to return to work even though I was ready and wanted to work finally, when I returned to work on my first shift I was sent home because there was nobody available to give me appropriate trying [training] on return to work. I was treated unwanted and pushed out. I feel that my company made to leave my job..."*

46. Extracted from the claim form, the two incidents are:

- (1) In December 2018, the Claimant being required / forced to lift heavy objects by his Manager, despite having a fit note saying he should not do so and this caused injury to his back; and
- (2) Upon his return to work in July 2019, he was not given training and the Respondent made it difficult for him to return to work, making him feel unwanted and pushed out.

47. On the first of these, the incident in December 2018, I can find no evidence to suggest that anyone required, encouraged or forced the Claimant to undertake full duties. The Respondent did allow him to undertake full duties, but this must be set in context. He had no medical certificate indicating any restrictions at that time. The most recent fit note had expired on 18 December 2018 and stated,

*"I will not need to assess your fitness for work again at the end of this period".*

In discussions with Management on 24 December 2018, the Claimant stated his Doctor had advised him to "see how it goes". It was agreed with management that he be placed on a phased return for two weeks.

48. It was the Claimant himself who, on 28 December 2018, stated he felt able to undertake full duties and Management permitted this. Whilst it might have been better for Management to have ensured he was fit to undertake such duties before allowing him to do so (either by referring him to OH or

seeking an amended certificate from the Claimant's GP during the two weeks of light duties) I remind myself that at this stage, his absence for back pain had not been terribly long and there was no medical advice available to the Respondent indicating that he was in any way unfit.

49. Management only had this expired certificate, the Claimant's own account of what his GP had said and the Claimant's own insistence that he was fit.
50. The Claimant signed the paperwork described above in which he appeared to agree with its contents and did not assert that he was being forced or pressured to undertake full duties. He did not complain of this subsequently either, even in his letter of resignation (not until a letter after his resignation in which he rejected the Respondent's invitation to withdraw his resignation).
51. As to the second incident, the attempted return to work in June 2019, I do not accept that the Respondent acted unreasonably in any way in requiring the Claimant to be assessed / cleared by OH or his GP and to undertake refresher training before he could return to work on full duties. By this time, the Claimant had a long period of sickness absence with back pain that did not appear to improve. Even in June 2019, he informed Managers it had not improved. The Respondent made various attempts to assist the Claimant return to work sooner, by making referrals to OH or asking him to get information from his GP, but he did not follow up on either option.
52. In all the circumstances, I find that the Respondent behaved entirely reasonably in July 2019. It had a duty of care to ensure it provided a safe working environment for the Claimant and his colleagues and allowing him to return to work without medical clearance in those circumstances might have amounted to a breach of its duty.
53. Therefore, I do not find that anything said or done by the Respondent was done without reasonable or proper cause and there is nothing which was calculated or likely to destroy or seriously undermine the trust and confidence between the parties, either looking at each incident individually or cumulatively.
54. I therefore find that there was no breach of contract, fundamental or otherwise and the claim fails.

4 March 2021

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Employment Judge O Dobbie  
24 March 2021

Sent to the parties on: .....

For the Tribunal Office