EMPLOYMENT TRIBUNALS

Claimant: Mr R Connor
Respondent: Boots Management Services Ltd

Heard at: Nottingham
On: 25, 26, 27, 28 January 2021 (By Cloud Video Platform)
Reserved: 17 February 2021 (In Chambers)
Before: Employment Judge Blackwell
Members: Ms J Hogarth
Ms K McLeod

Representation
Claimant: In person
Respondent: Ms S Clarke of Counsel

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic

RESERVED JUDGMENT

The unanimous decision of the tribunal is as follows:

1. Mr Connor's claim of disability discrimination pursuant to section 15 of the Equality Act 2010 (the 2010 Act) fails and is dismissed.

2. Mr Connor's claim of constructive unfair dismissal pursuant to section 95(1)(c) of the Employment Rights Act 1996 also fails and is dismissed.

RESERVED REASONS

1. Mr Connor represented himself and gave evidence on his own behalf. Ms Clarke of Counsel represented the Respondent and she called Mr A Hayward, an Assistant Manager, and Mr M Durham, an Operations Manager. There was an agreed bundle of documents and further supplementary bundles and references are to page numbers in those respective bundles.

2. **Agreed list of issues**

Time limits/limitation issues

(1) Was the Claimant's complaint of disability discrimination presented within the time limits set out in sections 123(1)(a) and (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures.

Constructive unfair dismissal and wrongful dismissal

(2) Was the Claimant dismissed, i.e. (a) was there a fundamental breach of the contract of employment, and/or did the Respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant? (b) if so, did the Claimant affirm the contract of employment before resigning? (c) if not, did the Claimant resign in response to the Respondent's conduct (to put it another way, was it a reason for the Claimant's resignation – it need not be the reason for the resignation)? If the Claimant was dismissed, they will necessarily have been wrongfully dismissed because he resigned without notice.

(3) The conduct the Claimant relies on as breaching the trust and confidence term is the matters set out in the statement of events sent by the Claimant to the Tribunal and the Respondent on 25 September 2019 [i.e. the "My statement" document], culminating in the events of 13 June 2018.

(4) if the Claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band' of reasonable responses'?

Disability

(5) Was the Claimant a disabled person in accordance with the EQA at all relevant times because of the following condition? (depression/severe anxiety and stress)

EQA, section 15: discrimination arising from disability

(6) Did the following thing(s) arise in consequence of the Claimant's disability:

a. The Claimant having time off work for a single period of approximately 4 weeks during the period April to June 2018?

(7) Did the Respondent treat the Claimant unfavourably as follows:

a. By unfairly increasing the Claimant's workload on his return to work following the period of absence referred to in paragraph (6)a above by changing the evening system so that the Claimant had to perform all the evening drops.

(8) If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The Respondent may set out their legitimate aim in an amended response.

(9) Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability.

Remedy – disability discrimination

(10) If the Claimant succeeds, in whole or in part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise include:

a. did the Claimant resign, wholly or partly, because of unfavourable treatment by the Respondent amounting to discrimination under section 15 of the EQA (such discrimination being as alleged above)?

b. if he did, and it is possible that the Claimant would still have resigned at some relevant stage even if there had been no discrimination what reduction, if any, should be made to any award as a result?

Introduction

3. We are very conscious that not only is Mr Connor a litigant in person but he also suffers from a mental impairment which constitutes a disability, a matter that is conceded by Boots. He was further disadvantaged by a series of events that occurred both shortly before and during the Hearing. We have to say that the conduct of Boots Solicitors hampered both the Hearing and our deliberations.

4. Firstly, there was on the last working day before the Hearing (though with the weekend between) a supplementary statement from Mr Durham. Although an electronic copy was supplied on the last working day before the Hearing, a physical copy was not supplied until the second day of the Hearing. That statement was in our view necessary and did deal with matters relevant to the issues we have to determine. However, it should have been provided much earlier.

5. The second matter was a supplementary bundle (the first supplementary bundle). This contained better copies of documents that had already been disclosed in the agreed bundle and it also contained Mr Connor's written

statement. Thus, there was nothing new in that first supplementary bundle. That, however, was followed by a second supplementary bundle which included all of the relevant emails as between Mr Connor and Boots Solicitors. This was provided at Mr Connor's request and, again, there was nothing new in these documents.

6. There followed a third supplementary bundle which included further route information and an exchange of emails explaining why that information had not been included in the bundle. Both the second and third supplementary bundles go to Mr Connor's belief that Boots and their Solicitors have failed to disclose relevant documents. This was an issue that was discussed at a Case Management Discussion held before Employment Judge Camp on 22 November 2020 with this Orders being sent to the parties on 2 December 2020.

> "6. *By **4 pm on 3 December 2020**, the respondent must provide to the claimant copies of the documents / print-outs described immediately below or, if they are unable to do so, the respondent must provide a detailed explanation of why, including:*
>
> *6.1 Do they accept that they, or anything like them, ever existed?*
>
> *6.2 If so, why do they no longer exist and when did they cease to be available?*
>
> *7. The documents / print-outs referred to immediately above are what the claimant describes as 'driver logs' for 13 June 2018 for himself and for the 3 other drivers doing the same shift as him.*
>
> *The claimant will say that all the respondent has so far provided is a print-out of what could be called an electronic 'front sheet'. What this shows is broad information about what drivers, including drivers who are not relevant, were doing on that day. However, the claimant says that at the time, it was possible to click on each driver on this front sheet and get detailed information on exactly what each driver was doing minute by minute. He says that on 14 June 2018, his own detailed information for 13 June 2018 was printed off and shown to him; and that he does not have a copy of it; and it has not been disclosed.*
>
> *The claimant thinks these documents / print-outs are relevant because they will support his allegation that he was being given more work to do than others in a comparable position.*
>
> *8. It will be for the Tribunal at the final hearing to decide whether what the respondent provides when complying with order 6 above is satisfactory and, if it isn't, how that affects the claimant's claim.*"

7. We accept that the records we do have in the first supplementary bundle and in the third supplementary bundle do fall short of what was available to Boots at

the beginning when Mr Connor did ask for specific disclosure. In particular, we do not have the records that show how emergencies were dealt with, further we do not have the Lightfoot information that shows when a particular van was stationary, which is relevant to Mr Connor's allegation that there were drivers sitting around doing nothing whilst he was working.

8. In dealing with paragraph 8 of Judge Camp's Orders, we conclude that Boots Solicitors' disclosure was not satisfactory. It fell short of the standard expected of solicitors having regard to their duty to the Tribunal and particularly so when dealing with a litigant in person. However, for reasons which we shall set out, we do not consider that that failure has prejudiced Mr Connor's case. In summary, we accept that Mr Connor did make more deliveries than his colleagues on the evening shift.

9. Whilst accepting that the information we have does not show how emergencies were dealt with, it is clear on the evidence that that was a matter which the drivers themselves organised. Indeed, Mr Connor at page 47 of his Proof of Evidence, says:

> "*… However, I basically run the evening shift as a driver for a few years so knew his deliberate attempt to punish me by loading routes would back fire the second there is any problems, or load of emergencies come off as you've not utilised all staff time. …*"

10. In conclusion, therefore, we are satisfied that despite the failings of Boots Solicitors, Mr Connor did have sufficient time to consider and deal with documents that were delivered late. We were careful throughout to give him sufficient time and, in relation to the preparation of cross-examination and the preparation of his final statement, extra time was given.

Findings of fact

11. Mr Connor was employed as a Pharmacy Delivery and Collection Service Driver delivering medicines and prescriptions to customers from 23 June 2016 (see his Contract of Employment at page 84 – 87). His contracted hours at page 85 were 15.25 per week. In fact, Mr Connor worked full-time, including callout shifts, at the start of his employment.

12. Mr Connor resigned by letter of 14 June 2018 (see page 145) giving one month's notice but on 15 June, he declined to work his notice and therefore his effective date of termination is 15 June 20218.

13. Boots need no introduction, save that they are a huge employer with a dedicated HR Department.

14. Mr Connor was a good and reliable employee. We accept that throughout his employment he did his best to assist by sometimes working beyond his shift times. Throughout his employment, he worked at the Bretton Store.

15. In early 2017, the way in which delivery routes were planned was changed to a

digital system with a computer formulating the most efficient routes. Each route would be allocated to a driver by a manager. For the first year of Mr Connor's employment, he got on well with his Manager and Assistant Manager, Mr Hayward.

16. In August 2017, Mr Durham became Area Manager and thus Mr Connor's line manager. Mr Hayward remained as Assistant Area Manager.

17. At all relevant times, there were two electronic systems in use. The first Descartes was the system that planned each individual route. It was transmitted to each driver by the use of a pod. Having signed in, the driver would see his allocated route, which included timings. The Descartes system would track the time that deliveries were made and when the route was concluded.

18. The other system in use was the Lightfoot system, which effectively tracked the vehicle by use of a sim card. The Lightfoot system would show whether the van in use was moving or stationary.

19. In addition to planned routes, there were always deliveries that came in too late to be included within the Descartes system and were generally known as "emergencies". Such deliveries were not tracked by the Descartes system for obvious reasons.

20. At the Bretton store there were at the relevant time ten drivers in total working morning, afternoon and evening shifts.

21. From a date, probably in December 2017, Mr Connor made it clear that he would only work his contracted evening shifts, namely 5:30 to 8:30 Monday to Friday.

22. Mr Connor was the only driver who regularly worked the 5:30 pm to 8:30 pm shift.

23. There was usually only one full route planned by the Descartes system and it was always given to Mr Connor. This was described as the early route. That was certainly the position when Mr Durham took over the manager's role and it was probably the case throughout Mr Connor's employment.

24. There would usually be at least one other driver working on the evening shift, sometimes two depending on the known workload for that shift.

25. After Mr Connor's return to work in April 2018 having been signed off from work with low mood between 13 March 2018 and 12 April 2018 (see page 140 and the return to work interview at 141) there were two changes, namely the splitting of the early route between drivers was no longer accepted practice. Mr Durham's evidence, which we accept, was that this was a national policy change brought about by the fact that splitting routes appeared not to assist areas in reaching their KPIs. Mr Connor states that he was told by Mr Durham that such was an edict from Neil Fletcher, who was Mr Durham's line manager.

26. Mr Connor alleges that after April 2018, the other driver or drivers would sit around with little to do until the late route, which would commence at 7 pm. We think that if that was so, it would have been of a consequence of the change in practice relating to drivers splitting routes between them.

27. The second change was that monthly deliveries to care homes were sometimes added to the evening route. Mr Durham told us, which we accept, that this was because Boots were not complying with their contractual obligations to care homes. He also asserted, and again which we accept, that the addition of the care home monthly deliveries would not lengthen the round or increase the workload because allowance would be made for the fact that a monthly delivery took much longer to deal with than a single prescription.

28. The allocation of emergency deliveries was not done by Mr Durham. It seems to have been the practice that those drivers who were present would divvy up the deliveries between themselves in consultation with the store management rather than Mr Durham.

29. There was a conflict of evidence between Mr Connor and Mr Durham as to whether there was an agreed cut off time of 8 pm for drivers who had returned to the Bretton store. Mr Connor's evidence was that it was an absolute cut off whereas Mr Durham said it was an agreed cut off time, subject to a driver being able between 8 pm and 8:30 pm (ie end of shift time) to carry out a local delivery within that half an hour period. That conflict of evidence does not seem to be material given that Mr Connor accepts that post April 2018 he did not work beyond the end of his contractual shift time, ie 8:30 pm. Indeed, the records that we have support that.

The issues

30. As to issue 1, no jurisdiction/time issues arise because Mr Connor's complaint is that from April to June 2018 his workload was increased and that persisted over the whole period.

Disability discrimination

> *"**15 Discrimination arising from disability***
>
> *(1) A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

31. It is common ground that Mr Connor is disabled within the meaning of the 2010 Act at all relevant times having a mental impairment, namely depression/severe anxiety and stress.

32. As to case law, Ms Clarke helpfully referred us to the case of ***Pnaiser -v- NHS England [2016] IRLR*** . Thus, the first task we have to determine is whether there was unfavourable treatment.

33. As we have recorded above, there were two changes to the way in which the evening shift operated post Mr Connor's return to work. The first was that drivers were no longer permitted to split the early evening route. In that regard, we accept that that is likely to have increased Mr Connor's workload because, as we have found above, he always did the early route.

34. The second change was that monthly deliveries to care homes were now to be carried out by the evening shift and in particular on the early route. We do not accept, however, that that would have increased Mr Connor's workload. We accept Mr Durham's evidence that the workload would remain the same; there would simply be less deliveries to allow for the extra time that it would take to make a monthly delivery to a care home where there would be a considerable number of items to deliver. Put another way, the length in time of the early evening route would remain broadly the same. However, there would be more time spent on a monthly delivery to a care home than the delivery of a single prescription so there would be less deliveries overall.

35. Do these changes amount to unfavourable treatment? There needs to be no comparator or comparison. In our view, Mr Connor was not being required to do anything outwith his contract, nor was he being required to work beyond his contractual hours. We cannot see, therefore, that there was unfavourable treatment within the meaning of section 15.

36. However, if we are wrong about that, we do accept, and indeed it is not in dispute, that the Claimant having time off work between March and April 2018 for a period of approximately 4 weeks did arise in consequence of Mr Connor's disability.

37. There remain two distinct causative issues. Firstly, did Boots treat Mr Connor unfavourably because of an identified something and secondly did that something arise in consequence of Mr Connor's disability, the something being the absence from work because of Mr Connor's disability. Thus, did the increase in workload arise by reason of Mr Durham's attitude to Mr Connor's absence from work? We are satisfied that it did not. We are satisfied that Mr Connor's absence from work had nothing whatsoever to do with the two changes described above. Neither of them, we are satisfied, were decisions of Mr Durham and therefore there could be no causal link between Mr Connor's absence and the two changes. The changes were carried out as a consequence of national instructions which were for operational reasons and had nothing at all to do with Mr Connor's absence from work.

38. Thus, Mr Connor's claim pursuant to section 15 must fail.

Constructive unfair dismissal and wrongful dismissal

39. In chronological order, the matters upon which Mr Connor relies are first a failure on Mr Durham's part to fulfil a promise to effect a change of contract of employment to reflect the fact that Mr Connor was working more than his contracted evening shifts. As was often the case, Mr Durham had no recollection of any discussions or reminders in that regard. Given that Mr Durham commenced employment in August 2017 and, at some point in December 2017, Mr Connor reverted to working only his contracted hours, there is a limited time during which such discussions could have taken place. We do, however, accept that Mr Connor did request a change in his contract of employment and we further accept that it did not happen.

40. At some time in December 2017, Mr Connor alleges that a driver (Shazad) was allocated to what Mr Connor described as a punishment route (ie a route allocated because of that driver's transgressions). We do not accept the use of the term "punishment route". What we find occurred was that Shazad did refuse to carry out a route which was regarded as a difficult route and Mr Hayward insisted that Mr Connor (a willing horse) should do the route instead, which Mr Connor duly did. We also accept that Mr Durham subsequently apologised to Mr Connor for Mr Hayward's behaviour.

41. The next matter is that Mr Connor alleges that in February/March 2018, despite him having informed Mr Durham of a change of bank account and reminded him daily of that change, his month's pay went into the wrong bank account. Again, Mr Durham's memory is vague. We do accept that Mr Connor informed Mr Durham of the change of bank details and Mr Durham failed to carry out that instruction, or have it carried out. We do also accept that once the error had occurred, Mr Durham did his best to rectify it.

42. Though it is not a matter complained of by Mr Connor, we accept that at some time between January and March 2018, a discussion took place between Mr Durham and Mr Connor at which Mr Durham informed Mr Connor of the availability of a free counselling service on learning of Mr Connor's mental health issue. We also accept that Mr Durham told Mr Connor that he too had mental health issues.

43. Mr Connor complains that in relation to a day on which he was absent from work (namely 5 March 2018), Mr Durham wrongly recorded that as unauthorised absence when it should have been sick leave. Again, Mr Durham's recollection is vague, though he indicated he would have proceeded on the basis of information provided to him. We think that this may well have been either a lack of communication or a misunderstanding. At worst, it was an error on Mr Durham's part.

44. The next matter complained of is the deletion of Mr Connor from Mr Durham's Facebook page, which probably took place during Mr Connor's absence from work in March/April. Mr Durham's initial statement was that he had deleted all Boots employees as friends. In cross-examination, Mr Durham changed his

evidence to indicate that he had deleted only drivers but not all colleagues because of an incident in which a driver complained about one of his posts. Notwithstanding that Mr Durham was an unconvincing witness, we do accept his evidence on that point.

45. The next complaint relates to the events of the evening shift of 13 June 2018. In summary, it appears that after his return from his early route at approximately 7:15 pm, Mr Connor was made aware that there were about 12 emergencies to be dealt with and he divvied those up equally between himself and two other drivers. Unbeknownst to Mr Connor, at some point a driver had broken down and one of the two drivers Mr Connor was relying upon to deliver the emergencies was despatched to assist the broken down driver and was thus unavailable to carry the deliveries allocated to him.

46. Mr Connor's evidence is that he returned from delivering his share of the emergencies at between 8:15 pm and 8:20 pm. The records we have show that he returned at 8:02 pm but Mr Connor's evidence, which we accept, is that it took him time to tidy his van and present himself to the store. He was then asked by store management to take out a further delivery, which he refused to do. Store management refused to permit him to leave until Mr Durham had been contacted. There followed an irate telephone conversation between Mr Durham and Mr Connor, during which Mr Connor refused to take out the further load and went home. It is common ground that Mr Connor during that conversation accused Mr Durham of unfairly allocating work.

47. As a consequence, Mr Durham tendered his resignation by letter dated 14 June at page 145.

48. On 15 June, Mr Connor on reporting for his evening shift found on Mr Durham's desk the Lightfoot records relating to his work on 13 June. Mr Connor took the view that Mr Durham's actions were spying on him with a view to concocting a disciplinary case against him.

49. Mr Durham's evidence is that he asked for the Lightfoot data because Mr Connor had complained on the night of 13 June of an unfair allocation of work. We are bound to say that Mr Durham's explanation is the more credible.

50. Again, although this was after his resignation, Mr Connor complains of the fact that his final wages were delayed by a month. We listened to a telephone conversation between Mr Hayward and Mr Connor, during which Mr Connor complained of the late payment of his wages. Mr Hayward's explanation, which we think is likely to be correct, was that payment was delayed so that Boots could be sure that all necessary deductions had been made before final payment.

51. Those then are the complaints made by Mr Connor in addition to the complaint dealt with above of unfair allocation of work in the context of Mr Connor's discrimination claim. In the context of the constructive unfair dismissal claim, the changes in work practice we accept did, at least in relation to the practice of no longer being able to split routes, increase Mr Connor's workload. However,

as we have indicated above, he was not required to do anything more than his contractual duties within his contractual hours at work.

52. Thus, was there a breach of the implied term of trust and confidence? Our function is to look at Boots conduct as a whole and to determine whether it is such that its effect judged reasonably and sensibly (ie objectively) is such that the employee cannot be expected to put up with it.

53. We accept that Mr Connor genuinely believes that Mr Durham's conduct towards him justified him in resigning. That, however, is a subjective view. We do accept that Mr Durham made errors as set out above. However, viewing his and Boots conduct generally, we do not accept that there has been a breach of the implied term of trust and confidence. Therefore, Mr Connor's claim of constructive unfair dismissal and wrongful dismissal must therefore fail.

54. It is therefore not necessary to determine whether there was a fair reason for dismissal.

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Employment Judge Blackwell

Date: 22 March 2021

JUDGMENT SENT TO THE PARTIES ON

22 March 2021

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FOR THE TRIBUNAL OFFICE

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