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# EMPLOYMENT TRIBUNALS

**Claimant:** Iqbal Singh Bhurji  
**Respondents:** Lineside Logistics (Southern) Limited  
**Heard at:** East London Hearing Centre  
**On:** 19 and 20 September 2018  
**Before:** Employment Judge Allen

## Representation

**Claimant:** In person  
**Respondent:** Mr J Jupp (counsel)

# JUDGMENT

**The Judgment of the Tribunal is that:**

- 1 The Claimant's claim for unfair dismissal is dismissed.**
- 2 The claim for wrongful dismissal is dismissed.**

# REASONS

1. By claim form presented on 5 January 2018, the Claimant brought a claim for unfair dismissal, wrongful dismissal and disability discrimination against the Respondent, his former employer (part of the Hamton group of companies).
2. The claim for disability discrimination was dismissed following a preliminary hearing on 17 July 2018 in a judgment sent to the parties on 15 August 2018.
3. Mr Bhurji does understand a lot of English and is able to communicate in English to a reasonable extent. Ms A Naim, a

Punjabi interpreter, was used throughout the hearing. The Claimant confirmed that Ms Naim had read the Respondent's witness statements to him and that he had had his own witness statement read to him and that he understood the evidence.

4. The issues had been agreed and were revisited and agreed at the outset of the hearing as follows:

*Constructive unfair dismissal*

5. *Did the respondent repudiate the contract by breaching the implied duty of trust and confidence or an express term of the Claimant's employment contract, the alleged particulars being:*
  - a. *unilaterally altering the claimant's role;*
  - b. *its employees bullying and harassing the claimant in the following alleged ways:*
    - i. *harassed by "Jatinder Ghatura" ("Jay") in the "picking and packing" being called slow and urging the Claimant to be quicker;*
    - ii. *changing the claimant's role/function on a number of occasions; Whilst on the conveyor belts ("kitting loop") Jay telling the Claimant that "the older guy is working quicker" and threatening the Claimant with dismissal if he didn't work quicker;*
    - iii. *giving the Claimant an unreasonable amount of work;*
    - iv. *issuing the Claimant with an informal disciplinary warning whilst on the kitting loop;*
    - v. *upon being returned to the turbo stud work, leaving the line short staffed and quickening the pace of the work;*
    - vi. *being made the "butt" of jokes by employees and being treated like a laughing stock.*
6. *Did the Claimant resign due to the above particulars? Was the Claimant entitled to terminate his contract by reason of the Respondent's conduct?*
7. *Did the Claimant affirm his contract notwithstanding the breaches / did the Claimant wait too long before resigning?*

*Wrongful Dismissal*

8. *What was the Claimant's notice period?*
9. *Did the Respondent repudiate the contract thereby allowing the Claimant to resign without notice by reason of the Respondent's conduct and claim for failure to pay notice pay?*

*Remedy*

10. *If the tribunal considers that the Claimant was unfairly dismissed, the Respondent also relies upon:*
  - a. *the principle in the case of Polkey and s123(1) ERA 1996 - in that it is argued that only redundancy could have been an alternative and therefore the Claimant should be restricted to a Basic Award alone; and*
  - b. *s123(6) ERA 1996 - in that the tribunal should find that the dismissal was caused or contributed to by any action of the Claimant to such an extent that it should reduce the amount of the compensatory award to nil.*
11. In his Schedule of Loss, the Claimant invited the tribunal to make an award under s12A ETA 1996 if he was successful in his claim on the basis that there were aggravating features to the Respondent's conduct.

**The Hearing**

12. The tribunal was referred to an agreed bundle of documents running to page 140. On the 2<sup>nd</sup> day of the hearing, the Claimant produced 6 additional pages, which were labelled C1, pages 1-6. The Respondent did not object to their production. The Claimant explained to the tribunal what these pages contained. Those additional pages were not referred to again in the course of the hearing.
13. The tribunal received evidence by way of witness statements and oral evidence from: the Claimant; and on behalf of the Respondent, listed in decreasing order of seniority (although not necessarily in the order in which they gave evidence) - Gurminder Dhanjal, Senior Operations Manager; Michael Parker, Manager; Rob Child, Supervisor; Jatinder Ghataura, Team Leader. The tribunal heard oral submissions from both parties at the conclusion of the hearing and the decision was reserved.
14. A large part of the Claimant's witness statement covered historical matters, which pre-dated the period in 2017 leading up to his resignation. Given the clear statement in paragraph 11 of the professionally pleaded Particulars of Claim attached to the claim form that such matters did not form part of the Claimant's claim, the Respondent did not question the Claimant in relation to that part of his evidence contained in paragraph 6 to 47 of his witness statement, noting only that the assertions therein were not accepted by the Respondent.

**Findings of Fact**

15. The Claimant was employed by the Respondent from 30 August 2007 until his resignation with immediate effect on 14 November 2017.
16. It was agreed that if dismissed by the Respondent, he would have been entitled to 10 weeks of notice pay. His gross weekly pay £461.54. His net weekly pay was £378.86.

17. The Respondent runs assembly lines in the automotive industry and provides line-side logistics support within assembly plants. It provides such services to Ford at Dagenham, employing about 370 people at that location. The contract with Ford requires the Respondent to make year on year efficiency savings of 7% per annum.
18. The Claimant was employed as an 'Operative' and his terms and conditions of employment stated:

*Flexibility & Mobility*

*All Employees are expected to operate on any of the Company's activities when required to do so. This includes the requirement, at short notice, to a change of hours and / or duties to provide for full customer service.*

*All Employees must, in recognition of the diversity of activity and their location, be prepared at short notice, to undergo appropriate training and to accept temporary relocation anywhere within a reasonable distance to aid the Company to accommodate the peaks and troughs in the business.*

19. The Respondent also sought to rely on a job description for the role of LLL Operative which stated that "Within each Job, there is a range of skills and dependant on training; operators will be capable of performing several Jobs. Versatility charts will show operator skills for each job he / she is capable of performing. Written instructions or visual aids are available to operators." There was no evidence of this ever being brought to the Claimant's attention or of it forming part of his terms and conditions. In oral evidence, the Claimant accepted the proposition put to him that 'providing that you had training you could be required to do a number of different jobs'.
20. Many of the Respondent's employees remained in the same role for long periods (Mr Ghataura said that other workers on the kitting loop had been there for between 4 and 9 years). The Claimant had done some other work for the Respondent in the past including as a forklift driver but up to 19 June 2017, the Claimant had primarily been engaged as a 'checker' in the loading and receiving area which involved checking pallets as they came into the factory. The Claimant was given a checklist by a clerk in the office, he would then go to each pallet, take off the wrapping and check the label on each box to ensure that it was in accordance with the checklist. Upon the completion of the checker's task, the checklist was then returned to a clerk to whom the checker would report any problems. The role also involved 'back loading' which concerned the checking and documenting of packaging which had to be returned to the manufacturer. The Claimant regarded his role as an important one which carried some measure of responsibility. He had pride in his work from which he obtained some dignity. Mr Dhanjal gave oral evidence that the Claimant was 'a very good checker'. There were 2 checkers (one on each shift) and 3 clerks.

21. In June 2017, in pursuit of the cost efficiency goals mandated by its contract with Ford, the Respondent reviewed the roles of checker and clerk and it determined that it would remove the checker function and incorporate that function into the clerk's function – with some assistance from forklift drivers at peak times. This had followed a study, which showed that clerks were only active for just under 20% of their shifts and that checkers were active for 37% of their shifts.
22. Mr Dhanjal told the tribunal that there had been discussions with the union about this change. The Claimant was not a member of a union and was unaware of any potential change. On 19 June 2017, the Claimant was told of the Respondent's decision to remove the checker function – and therefore that his role would no longer be as a checker. The manner in which this was communicated to him was perfunctory. There was no individual consultation. In cross examination of the Claimant it was put to him that this was communicated at a 'meeting' which he denied – he said he and others were told as they were standing by a door. The tribunal accepted the Claimant's account, the Respondent's evidence from Mr Parker having been unclear on this point. The Claimant expressed his disagreement with this proposal but the plan came into effect on the next day, 20 June 2017. In his evidence to the tribunal, when asked whether with the benefit of hindsight there was anything that could have been done better, Mr Dhanjal said that communication could have been better. The tribunal agreed.
23. In its evidence to the tribunal, the Respondent presented this initial period after 20 June 2017 as a trial of the removal of the checker function. That may have been the Respondent's intention – but does not appear to have been the way that the Claimant understood what happened at the time. In any event if it was a trial, the trial was successful and the Claimant did not return to the checker function which was permanently removed. At some point after that date, the Claimant did indicate to Mr Child that he was dissatisfied with his new role and the Claimant asked to go back to his old checker role. Mr Child explained that this was no longer a possibility.
24. The other checker was transferred to forklift duties. That was not an option given to the Claimant. In the weeks that followed, the Claimant was tried out on the following areas (not necessarily in chronological order; the Claimant was moved back and forth between areas; there are different types of tasks within each area; and the terminology for each of these tasks differed from witness to witness):
  - a. Decanting
  - b. Picking and Packing / Kitting Loop
  - c. Fuel Injector Pump, Sequencing, Flywheel and Clutch
  - d. Turbo Assembly
25. The Claimant had some sickness absence in July 2017; and between 24 July and 11 August, the factory shut down for the annual holidays. The Claimant went to India and had further sickness absence, returning to work on 13 September 2017. After 13 September 2017 his team leader was Mr Ghataura and his supervisor was Mr Child. Mr Ghataura was an

experienced team leader, having been in that role for 7 or 8 years.

26. In relation to each of the new roles given to him, the Respondent said that the Claimant underwent 'training'. The Claimant denied that there was formal training but accepted that someone had showed him what to do. The tribunal again accepted the Claimant's evidence on this point but noted that there were training records showing that the Claimant had understood and could complete the individual tasks involved.
27. In each of these areas, the Claimant was criticised for not being fast enough. He felt that he was unfairly being compared to co-workers who had been doing these tasks for years and were inevitably more efficient.
28. Absences from work continued. On 26 September 2017 at a meeting with Mr Child about the Claimant's attendance both the Claimant and Mr Child referred to his 'new job'. The Claimant said that the main reason for his absences was that his job had changed.
29. In oral evidence to the tribunal the Claimant said that it would have been better for him to have been made redundant in June rather than have to do these new tasks which he considered had affected his health. Mr Dhanjal gave evidence that the Respondent tries to avoid redundancies – and that when they need to cut staff, they prefer to lose agency staff than those who have been employees for a long time.
30. The Claimant was also criticised for making mistakes. On one occasion in particular, on or about 25 September 2017, as a result of an error on his part, the conveyor belt had to be stopped. This resulted in Ford levying a fine of £500 on the Respondent. At a meeting with Mr Ghataura on 26 September 2017 the Claimant was told that he needed to improve his speed.
31. It was agreed that Mr Ghataura had made a reference to another employee being older but yet faster than the Claimant. There was a dispute of evidence as to whether this comment was made after the Claimant had told Mr Ghataura that he was too old for the jobs he was being asked to do. In his own oral evidence, the Claimant denied that he had referred to his own age before Mr Ghataura made that comment but when the Claimant was cross examining Mr Ghataura, he did not challenge this part of Mr Ghataura's evidence, although he did question Mr Ghataura in detail on other matters. The sequence described by Mr Ghataura appeared to the tribunal to be more likely and the tribunal accepted Mr Ghataura's evidence that the Claimant was the first one to mention his age and that Mr Ghataura's response was designed to be encouraging rather than critical.
32. On 12 October 2017 the Claimant was invited to a disciplinary meeting on 13 October 2017 in relation to his attendance. He was given a 6 month written warning. The Claimant appealed and on 2 November 2011, Mr Parker gave him a 12 month written warning at the outcome of the appeal.
33. The Claimant was told that he would be moved from the turbo stud work

to go back elsewhere on the conveyor belt. The Claimant, feeling that he had just mastered the turbo stud work, had had enough – he stopped working and went to the canteen. He spoke to Rob Child and told him that he felt that his situation was unfair and Mr Child told him that he had to work as directed but that he would arrange for the Claimant to go back to the turbo stud work. The Claimant returned to that task but was unable to work at the pace required. The Claimant's perception was that Mr Ghataura had deliberately either speeded up the line or gave him too much to do in order to catch him out. However the tribunal did not accept that this happened. It was denied by Mr Ghataura and the tribunal accepted the Respondent's unchallenged evidence that the speed of the line is controlled by Ford and not by the Respondent.

34. The Claimant then stopped working again. He felt that other employees were laughing at him. He spoke to Mr Child, told him that he was unhappy because he felt that some Ford employees were laughing at him and ultimately the Claimant went home, having told Mr Child that he was doing so. He did not return to work and resigned shortly afterwards. The tribunal accepted that the Claimant perceived that the Ford employees were laughing at him but the tribunal accepted the evidence of Mr Child that he did enquire as to what the Ford employees were laughing about and that it was not the Claimant.

35. The Claimant's resignation letter dated 14 November 2017 stated:

*I write to resign with immediate effect from my employment.  
I feel forced to resign because:*

- a) *You have unilaterally breached my contract by changing my conditions;*
- b) *I can no longer work for Hamton as I feel there is no trust or confidence left;*
- c) *I have suffered from disability discrimination by you and this is causing me injury both mentally and physically*

36. When asked at the tribunal hearing why he had resigned, the Claimant initially primarily referred back to matters that pre-dated those in the list of issues saying that: "They had been after me since 2012. The Team Leader insulted me. I was astonished at what was happening to me. There were some people who were after me in the office." He said that Mr Parker had tried to help him but that by that point the Claimant's reputation had been damaged. When specifically pressed on why in November 2017 he had resigned he referred to the pressure resulting in stress that arose from Mr Ghataura's supervision of his work and the criticism of his speed of work and what he felt was an unfair focus on him for failing to achieve the standards and speeds of workers who had been doing the same or similar task for a longer period of time.

37. The Respondent wrote to the Claimant on 17 November 2017 accepting his resignation and inviting him to an exit interview with Mr Dhanjal on 24

November 2017 to discuss the points he had raised, but he did not reply.

## The Law

38. The relevant law on unfair dismissal is set out in the following parts of the Employment Rights Act 1996.

### **94 The right**

- (1) *An employee has the right not to be unfairly dismissed by his employer.*  
(2) *Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).*

### **95 Circumstances in which an employee is dismissed**

- (1) *For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if) —*

...

- (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.*

### **98 General**

- (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

- (a) *the reason (or, if more than one, the principal reason) for the dismissal, and*  
(b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

- (2) *A reason falls within this subsection if it—*

- (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*  
(b) *relates to the conduct of the employee,*  
(c) *is that the employee was redundant, or*  
(d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

...

- (4) *[Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

- (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*  
(b) *shall be determined in accordance with equity and the substantial merits of the case.*

...

39. The Supreme Court decision in *Braganza v BP Shipping Ltd* [2015] ICR 449 is relevant to the degree to which a contractual flexibility clause is fettered by the obligation to maintain trust and confidence implied into every contract of employment. In deciding whether an employer's exercise of discretionary power breaches the implied duty of trust and confidence, a rationality approach equivalent to the *Wednesbury* test should be adopted, taking into account the employment context. What that means is that the tribunal should look at whether the exercise of power was unreasonable in the sense of being irrational, perverse or capricious or without reasonable or sufficient grounds. In looking at



whether a decision was 'irrational', the tribunal can consider the relevance of an employees' reasonable expectations – i.e. where the employer's previous actions have led employees to believe that the employer will or will not exercise its power in a particular way.

40. An employee seeking to rely upon constructive unfair dismissal must not delay his resignation too long, or do anything else which indicates acceptance of the changed basis of his employment.

## Conclusions

### Unfair Dismissal

*Did the respondent repudiate the contract by breaching the implied duty of trust and confidence or an express term of the Claimant's employment contract, the alleged particulars being:*

- a. *unilaterally altering the Claimant's role;*
- b. *its employees bullying and harassing the Claimant in the following alleged ways:*
  - i. *harassed by "Jatinder Ghatura" ("Jay") in the "picking and packing" being called slow and urging the Claimant to be quicker;*
  - ii. *changing the Claimant's role/function on a number of occasions; Whilst on the conveyor belts ("kitting loop") Jay telling the Claimant that "the older guy is working quicker" and threatening the claimant with dismissal if he didn't work quicker;*
  - iii. *giving the claimant an unreasonable amount of work;*
  - iv. *issuing the claimant with an informal disciplinary warning whilst on the kitting loop;*
  - v. *upon being returned to the turbo stud work, leaving the line short staffed and quickening the pace of the work;*
  - vi. *being made the "butt" of jokes by employees and being treated like a laughing stock.*

### *unilaterally altering the Claimant's role*

41. It was not in dispute that the Respondent did unilaterally alter the Claimant's role.
42. The Respondent was clearly under economic pressures to make savings and was entitled to make a business decision to re-organise its workforce by removing the role of checker. The Claimant's contract of employment contains a flexibility clause requiring him: "*to operate on any of the Company's activities when required to do so*". There was therefore no breach of any express term in requiring the Claimant to perform an alternative role but that wording is very wide and clearly there must be a point at which a decision to move the Claimant to a role would be unreasonable to the degree required to breach the implied term of trust and confidence.

43. The Respondent's witness statements emphasised the need for Operatives to be capable of a variety of roles – pointing towards the statement in the terms and conditions to this effect. However the evidence suggested that in fact most employees remained in the same role for long periods – sometimes many years.
44. The Claimant had largely been in the same checker role for a number of years. He worked at his own pace and enjoyed his job. It was a role which he perceived as important and which had a degree of autonomy and responsibility. As the Respondent's submissions suggested, he was able to regard himself to an extent as master of his own domain. He was moved with little warning to a series of roles which required an increase of close supervision and which although similar to one another were somewhat different in their nature to the checker role. Although more pressured, given that they did also fall within the definition of operative (the Claimant's existing role), those roles were of a nature, which would have needed to have been explored as potential suitable alternative employment if the Respondent had been contemplating making the Claimant redundant when it removed his checker function.
45. The tribunal gave serious consideration in particular to the question of whether the perfunctory manner in which the Claimant was moved from his checker job amounted to a breach of the implied term of trust and confidence, however the tribunal concluded that however clumsily it was handled, it did not indicate that the Respondent no longer wished to be bound by the contract of employment (in relation to some of the matters further addressed below, the tribunal also noted that this happened 5 months before resignation and had not been singled out as a special feature of any of the Claimant's expressions of his reasons for resigning).
46. On balance, the decision to alter the Claimant's role did not amount to a breach of any express or implied term of his contract of employment.

*bullying and harassing the claimant*

47. The tribunal find that Mr Ghataura did emphasise to the Claimant that he needed to speed up his work. That was part of Mr Ghataura's role – which was to ensure that the line kept moving. The tribunal accepted Mr Ghataura's evidence that he did not threaten the Claimant with dismissal and that given the Claimant's lack of familiarity with the new tasks that he was asked to perform, it was inevitable that Mr Ghataura was paying close attention from time to time to the Claimant. The comments about the age and speed of another employee was made to encourage the Claimant after the Claimant said that he was too old for the job. This did not amount to harassment and the behaviour of Mr Ghataura did not amount to a breach of the implied term of trust and confidence.
48. The Claimant was moved to a number of different role or functions. He was shown how to do each of those functions. The amount of work that he was given was not unreasonable – although it was different in nature and pace to the work that the Claimant had done as a checker. Mr Ghataura neither left the line short staffed nor did he quicken the pace of the work.

49. The Claimant was issued with a disciplinary warning in relation to his attendance. However his attendance had been poor and there was a reason for the warning which was issued after a process had been followed. He was also spoken to after the line had been stopped due to a failure on his part. This was a reasonable and proportionate thing for the Respondent to have done.
50. The Claimant perceived that he was the butt of jokes from Ford employees on the day that he was last in the workplace but that had not been the case.
51. None of those matters amounted to bullying or harassment or in any other way amounted to a breach of any express or implied term of the Claimant's contract.
52. It follows that there was no fundamental breach of contract and that the claims fail. However the tribunal has considered a number of other matters below in outline.

*Did the Claimant resign due to the above particulars? Was the Claimant entitled to terminate his contract by reason of the Respondent's conduct?*

53. The Claimant resigned for a number of reasons, one of which was the disciplinary penalty given to him for his poor attendance, however a large part of his reason for resigning was the enforced move from his checker role and his perception of the way that he had been treated by Mr Ghataura. Those matters were certainly effective causes of his resignation.

*Did the Claimant affirm his contract notwithstanding the breaches / did the Claimant wait too long before resigning?*

54. Mere delay by itself does not constitute an affirmation of the contract, but if the delay went on for too long it could be very persuasive evidence of an affirmation. The tribunal have found that the perfunctory manner in which the Claimant was moved did not amount to a breach of contract, but if it had amounted to the only breach of contract, the Claimant had affirmed his contract in relation to that matter alone given that he continued in employment for 5 months thereafter. In relation to the other matters, which the tribunal has also not found to be breaches of contract, had there been a breach or breaches of the contract of employment, the tribunal would not have considered that the Claimant had affirmed his contract, given that he protested throughout against both the move itself and the tasks that he was given.

*Wrongful Dismissal*

*What was the Claimant's notice period?*

55. The parties agree that the Claimant's notice period was 10 weeks – based on the statutory entitlement mirrored in the Claimant's contract of employment.

*Did the Respondent repudiate the contract thereby allowing the Claimant to resign without notice by reason of the Respondent's conduct and claim for failure to pay notice pay?*

56. The answer to this question is no. The reasoning is the same as that set out above in relation to the question of constructive dismissal.

Remedy

57. Given that there was no finding in the Claimant's favour, the tribunal does not need to make detailed findings on the remedy issues. If the tribunal had found that the Claimant has been constructively unfairly dismissed, it would not have made a compensatory award, given that the only viable alternative scenario is that the Claimant would have been dismissed for redundancy. Had there been a compensatory award, the tribunal would not have made any reduction to such an award because of contribution by the Claimant.

Employment Judge Allen

Date: 5 November 2018