EMPLOYMENT TRIBUNALS

Claimant: **Mr A Grisins**

Respondent: **Filtrex Global Ltd**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **22 January 2021**

Before: **Employment Judge Jones**

Representation
Claimant: In person
Respondent: Mr Lomas (Advocate)

JUDGMENT

The complaint of unfair dismissal

The claimant was not dismissed.

The claimant resigned on 6 August 2020.

The claim fails and is dismissed.

The counterclaim

The claimant owes the respondent the sum of £1,302.65.

The claimant is ordered to pay the respondent the sum of £1,302.65.

REASONS

1. This has been a remote hearing on the papers which is not been objected to by the parties. The form of remote hearing was V: CVP (Cloud Video Platform). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to were in the bundle of documents and described to below.

Claims and issues

2. This was a complaint of unfair dismissal which the respondent defended. The respondent brought a counterclaim against the claimant. The respondent lent the claimant the sum of £2,040 on 5 November 2019. The claimant has repaid some of the loan but it was agreed at the preliminary hearing that there was an outstanding amount. At the start of this hearing, the claimant agreed that the figure of £1,302.65 was likely to be correct. The respondent's counterclaim is for the sum of £1,302.65.

3. The issues to be determined at this hearing were agreed between the parties and set out by Regional Employment Judge Taylor at a preliminary hearing on 16 November 2020. The issues will be referred to below, in the decision part of these reasons.

4. At the start of the hearing, the respondent applied to strike out the claimant's case under rule 37 of the Employment Tribunal's Rules of Procedure 2013 as the claimant had failed to comply with court orders. It was also the respondent's submission that the claim had not been actively pursued. After hearing the claimant's submissions and considering the documents, it was this tribunal's judgment that the claimant had failed to comply with court orders, including the provision of a witness statement but that he was still pursuing his claim and it was still possible to have a fair hearing. The respondent's application was refused.

5. In breach of tribunal orders, the claimant also failed to produce a witness statement for this hearing. The claimant was restricted to the contents of his ET1 complaint form and the way in which he explained his complaints to REJ Taylor at the preliminary hearing on 16 November. His explanations were set out at paragraphs 5 – 9 of the minutes of the preliminary hearing sent to the parties on 17 November 2020.

Evidence

6. In the hearing the claimant gave evidence on his own behalf. The tribunal also heard from Dave Fox, finance and marketing director for the respondent. The tribunal had witness statements from Mr Fox and also from Alex Grigorie, warehouse assistant.

7. The tribunal made the following findings of fact from the evidence in the hearing. The tribunal has only made findings of fact on those matters in dispute, which relate to issues in the case.

Findings of fact

8. The claimant was employed by the respondent as a warehouse manager. He began his employment on 2 July 2018. The claimant's hours of work were 7:30 AM to 4:30 PM, Monday to Friday. The claimant managed one person who was Mr Alex Grigorie, the warehouse assistant. The claimant's contract of employment was in the bundle of documents. The contract set out the terms and conditions of his employment including the existence of a disciplinary procedure, grievance procedure, sickness absence reporting procedure, the requirement to

give notice of termination to the employer as well as his entitlement to holidays and holiday pay. The claimant confirmed his signature on the last page of the contract. He also confirmed his signature acknowledging receipt of the company handbook.

9. The respondent is a small, family run business which employs approximately 16 people. Dave Fox, who gave evidence, was the finance and marketing director. The company also employs an office manager, warehouse manager and a service contracts manager. There were approximately 5 people in the office and the claimant and Mr Grigorie in the warehouse. The respondent did not have an in-house HR function. The other director to whom the claimant reported was Peter Fox.

10. The claimant has had two loans from the respondent during his employment. In January 2019, the claimant was given a loan of £1500 to be paid back at the rate of £150 per month. The loan documentation was in the bundle of documents and was signed by the claimant. The loan agreement stated that it would be repaid over a 10-month period, between January 2019 and October 2019, inclusive, by deductions from the claimant's salary. The agreement stated that if any bonuses were awarded to the claimant during that period, then the net amount of those bonuses can be deducted from the claimant's pay, to offset against the loan. It was agreed between the parties that this loan has been repaid.

11. The claimant had a second load from the respondent of £2,040. A copy of that loan agreement was in the bundle of documents. The loan agreement was signed on 5 November 2019 and the agreement was that the claimant would repay it by deductions from his salary at the rate of £170 per month. The intention was that it will be repaid over a 12-month period, between December 2019 and December 20. The agreement stated that the claimant understood that it was a relevant provision of his contract and that if any bonuses are awarded either for personal or companywide performance during that period, the net amount of these can be deducted from his monthly pay to offset against the loan. Also, the agreement stated that if the claimant received a cash windfall during the loan period, the loan would be discharged in full immediately. It was agreed that at the time that his employment came to an end, only part of this loan had been repaid. At the preliminary hearing, the claimant agreed that there was an amount outstanding on the loan and at the time, he conceded that he owed £1,190 to the respondent. It was the respondent case at the preliminary hearing that the sum of £1,302.50 was outstanding.

12. In his witness statement, Mr Fox outlined how the respondent arrived at that amount. The claimant accepted in evidence, that the sum of £1302.65 was likely to be correct and he did not challenge Mr Fox's calculations.

13. In April 2020, over the Easter weekend, Mr Fox personally lent the claimant the sum of £150 to cover any expenses that he might have had over the weekend before the claimant's salary was credited to his account in the following week. The claimant disputed that this amount was paid out of Mr Fox's pocket. However, the transcript of the WhatsApp messages between them show that claimant had been expecting his wages to credit to his account on Good Friday and had not made arrangements to cover expenses for the long weekend. He

asked whether it was possible for the respondent to do something to help him and Mr Fox offered to bring cash into the office so that he could have some cash to cover his expenses until the following Tuesday. The claimant accepted the offer. That is what happened. The Tribunal finds it likely that on Good Friday, Mr Fox lent him £150 in cash out of his personal money. The Claimant repaid it, as agreed, when he received his wages, during the following week.

14. The claimant was allowed to use the respondent's company cars for personal use.

15. During the claimant's employment there were various issues with his performance such as the claimant's failure to attend work on several occasions without good reason and lack of order in the warehouse. There were informal meetings between the claimant and the respondent's management but no formal action was taken. The claimant sometimes failed to follow sickness reporting procedures or sometimes failed to turn up for work. He agreed in evidence that the respondent had been generous to him during his employment.

16. At a meeting in November 2019 between the claimant, the office manager and the and operations staff, the claimant indicated that he wanted to dispose of stock items. The office manager told him that he could not do so and did not have the authority to do so. The claimant stated that he could because he was the warehouse manager. It was reported to the respondent that the claimant became aggressive at this meeting and that the women who were present felt intimidated. In his statement, Mr Gregorie confirmed that in that meeting the claimant was verbally abusive towards the two female members of staff and that he asked the claimant to apologise to them but the claimant declined to do so. The directors heard about what happened at the meeting and on 12 November, both Dave Fox and Peter Fox met with the claimant to register their concern about his behaviour.

17. The respondent's directors felt satisfied that they had addressed their concerns with the claimant at this meeting and no further disciplinary action was taken. It was the respondent's evidence that they usually tried to solve situations informally, if possible.

18. The claimant's live evidence to the hearing was that after this meeting, he felt that he was being ignored by colleagues and that his requests for equipment such as a cordless phone were deliberately delayed. However, he provided no evidence of this. He stated that he had made notes about what happened and that he kept a record of his treatment by managers and colleagues but that he did not want to provide those notes to anyone. He refused to produce those notes to the respondent or to the hearing. The tribunal is doubtful that those notes exist.

19. On a couple of occasions in 2020 the claimant informed Mr Dave Fox that he was depressed and that this was likely due to the breakdown of his marriage and difficulties with access to his son. Mr Fox offered to help him financially to get professional help but the claimant declined the offer of assistance.

20. There was an agreed transcript of WhatsApp messages between the claimant and Dave Fox in the bundle of documents. The transcriber of the messages noted on the transcript that some of the times given may be erroneous

as the WhatsApp messaging service regularly loses time and muddles up days and times. However, the Tribunal was not told that any of the following dates or times were incorrect.

21. In May 2020, there were messages between the claimant and Dave Fox in which the claimant reported that he was too sick to attend work and the respondent indicated that he should ensure that he was well enough to return, before doing so. On 17 May at 15.14, the claimant stated: '*I am planning to come to work if you happy to see me'*. Mr Fox replied *'of course! As long as you are feeling well'*. On 23rd May, the claimant messaged Mr Fox to ask whether he could use one of the Corsa cars in the yard for the following three days, over the weekend. Mr Fox readily agreed.

22. On 29 May, the office manager raised with the Directors, further issues regarding the claimant's conduct. The Tribunal had a copy of an email from the company financial controller in which she raised various issues about the claimant's management of the warehouse, his way of speaking to women in the office and his work performance. Because of the concerns expressed, Mr Dave Fox and Mr Peter Fox met with the claimant that day to discuss the issues that had been raised. They began the meeting by asking him whether he had any personal issues or matters that were bothering him which may have affected his conduct at work. They were keen to find out what his issues were, whether at work or personal, so that they could support him and assist him in improving his performance. He was having bouts of aggression with colleagues and they wanted to support him compassionately to address those issues. Mr Fox asked the claimant what would help him. The claimant stated that he was having issues at work. He was asked whether he thought that a fresh start at a new job would help. He answered '*maybe*, *maybe'*. The discussion continued. The claimant confirmed that he had problems with access to his son. He said that he wanted time off to go and see him. Mr Dave Fox asked him when and he said '*now'*. The respondent agreed that he could leave immediately to see his son. The claimant accepted that. Before he left, they also discussed a number of options to address the concerns that had been raised. The respondent expressed concern for the claimant's welfare. The respondent again offered to assist him financially to access professional help, should he need it. The meeting ended. The claimant went to the warehouse, collected his belongings from the warehouse office and left work early to see his son.

23. The claimant attended work on 1 June 2020. After working for approximately half an hour, he requested time off to go and look for jobs and to research the market. The respondent agreed that he could do so and he left.

24. On 2 June, at 6:41 AM, the claimant sent the following message to Dave Fox:

> *'Hello Dave, after my careful research I see only way you can not enforced me to leave but only if you will pay me compensation so I will be happy looks that jobs market is dead as I expected, next year at least I will be unemployed or working from occasion to occasion. Question how much do you think to pay?'*

25. It is unlikely that Mr Fox saw this message as he did not respond to it.

26. At the same time, the claimant having taken legal advice, cut and pasted the solicitor's advice to him, into the respondent's group WhatsApp chat. The respondent had a group WhatsApp chat that could be accessed by all its employees. The purpose of that chat was to have a space in which all its employees could discuss matters relating to the running of the business, make comment and could read what others had said. The claimant would have been aware that this was not a private conversation between him and Dave Fox.

27. The message which the claimant pasted into the staff WhatsApp group chat was long and detailed. It stated 'A*ccording to the Employment Rights Act 1996 there were five separate reasons that an employer could rely on to show that the dismissal was fair: conduct, capability, redundancy, illegality or some other substantial reason'.* It went on to state that the employer will not only need to show that the dismissal was for one of those reasons, but also justify that it was appropriate and reasonable to *use* in the circumstances. It stated that the employer would need to show that they had followed a fair dismissal procedure and that the outcome was one that a reasonable employer would have come to in the circumstances. It stated that an employee who is forced to resign would be able to claim constructive dismissal and that he could make a similar claim for '*being pushed out'*. It stated that a possible alternative solution was, where the employer is approached on a '*without prejudice'* basis to try and discuss the possibility of leaving under a settlement agreement. It went on to state that *'Under such an agreement, the employee gets compensated for leaving the company with no fuss and in return promises not to make any claims against the employer in the future. It is essentially a clean break, both parties move on without the need for going to tribunal'*

28. The claimant ended the message with this statement *'or maybe I didn't understand you correct??'*

29. The claimant accepted in the hearing that what he meant by this message was that if the respondent paid him money, he would leave his employment. He accepted that all the respondent's employees could see the message that he put in the group WhatsApp chat.

30. The respondent considered that this was totally unacceptable conduct by the claimant. Dave Fox became angry with the Claimant. He considered that the message would upset other members of staff and was potentially detrimental to the company. He messaged the claimant privately to ask him to delete the message from the group WhatsApp conversation. The claimant agreed to do so and apologised.

31. The claimant was removed from the staff group WhatsApp conversation.

32. Mr Dave Fox decided that rather than risk an uncomfortable situation on the following day, he would instruct the claimant to stay at home until he discussed it with his fellow Directors.

33. Later that day, Dave Fox messaged the claimant as follows:

> *'Aleks. Please don't come into work tomorrow. Consider yourself on garden leave, on pay, until we decide what to do next. To be honest, I'm very upset that you are talking like this, having given you so much, helped you out on so many occasions, and put up with so much, far more than most employers would. I feel very let down.'*

34. The claimant responded to ask if they could meet. He also asked whether the respondent was '*pushing'* him out in the middle of coronavirus. He told Mr Fox that he had taken legal advice. Mr Fox did not answer the claimant's questions. He asked the claimant to return the Corsa car. The claimant asked whether Mr Fox could prepare a letter confirming his status. Mr Fox agreed and promised to prepare such a letter as soon as he had the opportunity to do so. The claimant agreed to return the Corsa, asked whether he could collect his cactus and to whom should he give the keys. He was told to give the keys to Mr Grigorie.

35. In the hearing the claimant stated that English was not his first language and that he understood Mr Fox's message on 2 June as terminating his employment.

36. The Directors discussed the matter and decided to have the claimant return to work. On the following day, 3 June at 8:47am, Dave Fox messaged the claimant to thank him for dropping the car back. He stated that that the respondent would be glad to see him back at work from the following day. He also stated that Alex (Mr Gregorie) was making good progress with the stock-take but that he could '*do with a hand'*. He stated that the respondent would do what was best for the claimant to see him through his issues.

37. The claimant replied to ask whether the message was a joke. Mr Fox stated that it was not a joke and that he was not sure what the claimant meant by that.

38. On the following day, 4 June, the claimant attended work and took part in a production meeting from 7:30am, which Mr Dave Fox also attended. That was a video meeting by Zoom. There was an opportunity to talk to Mr Fox. Mr Fox also physically came in to work at about 8.30am to talk to the claimant but by then the claimant had gone home stating that he was unwell. On 5 June, Mr Fox messaged the claimant to ask him how he was feeling and whether he expected to be at work that day. The claimant responded and said that he was unwell with a high temperature. Mr Fox replied that he was sorry to hear that. In the hearing, the claimant confirmed that he had not had a high temperature on 5 June and that he had lied when he said so. He stated that he was in 'deep depression' about his employment situation. There were further messages to the claimant on 8 June and 11 June from Mr Fox enquiring whether he was still unwell and to advise him that he should be reporting in sick if he was unable to come to work otherwise, in accordance with this contract, he would be expected at work.

39. On 12 June, the respondent wrote to the claimant. There was a copy of the letter in the bundle of documents. The letter stated as follows:

> *'I am writing to you with regards to your current period of sickness absence.*
>
> *I am concerned that you have failed to contact me to provide an update on your sickness absence. Without a valid medical certificate, your absence is currently unauthorised and unpaid.*
>
> *As indicated in your Employee Handbook, I would like to remind you that you are required to contact the company once a week to provide an update on your progress to date and whether you are able to return to work. Also, you must ensure that you certify your sickness absence with an appropriate medical certificate.*
>
> *This may be an oversight on your part, however, it is essential that you contact me by Wednesday 17 June to provide me with an update on your sickness absence and to advise when your medical certificate will be delivered to the company.*
>
> *It is essential that you respond to my letter.*
>
> *I have to warn you that failure to contact me by the above date may result in the company having no other option but to treat the matter as a disciplinary issue which is something we wish to avoid.*
>
> *I strongly urge you to make contact as requested.*'

40. The claimant did not respond to the respondent or notify the respondent of any continuing ill-health on the 12, 15, 16 or 17 June 2020. There was no reply to the respondent's letter. The claimant's evidence was that he did not believe that he needed to report in sick. However, on 18 June, the claimant sent Mr Fox by WhatsApp message, a GP fit note stating that he was unable to attend work due to depression. The claimant was asked to send it by email, which he did not do until 24 June. The fit note spanned the period 9 June to 29 June 2020.

41. On 25th June, the claimant emailed Mr Fox and said that he had not received his wages. The respondent had in place sickness absence reporting procedures. The sickness absence policy was contained in the respondent's employee Handbook which the claimant had received 2019. The policy stated that

> *'if you are absent from work without prior authorisation, you or someone on your behalf should notify a Director by phone before 8:30 AM on the first day of absence. Any unauthorised absence must be properly explained in that first contact and, if the absence continues, you must keep us fully informed. This applies to both short and long-term situations and you will be expected to contact us on a daily basis during the first week and weekly thereafter…. If your sickness is for more than seven calendar days then you must provide the company with a doctor's medical certificate. You must continue to provide medical certificates to cover the*

whole of the absence.

The company is responsible for paying SSP to you if you are eligible.

42. On 26 June, Mr Fox replied to the claimant and informed him that his wages were being processed and that he would receive a payslip at the end of the month detailing how his pay had been worked out. He stated that the claimant had already received significantly more than he was entitled to for that month as he had already been paid £300 for three weeks of the month.

43. The claimant confirmed that his wages were paid up until the respondent received his GP fit note. After the fit note expired on 29 June, the claimant failed to contact the respondent with any more GP fit notes or in response to the respondent's letters. On 20 July, Mr Fox wrote to the claimant to remind him again of the sickness reporting procedures set out in the employee Handbook. The claimant was asked to contact the respondent by 23rd July to provide an update on his sickness and to advise when the company would receive the next medical certificate. The claimant confirmed in the hearing that he had received it but he did not reply to it. The letter also advised the claimant that a failure to reply would leave the respondent with no choice but to treat this matter as a disciplinary issue.

44. As the respondent received no reply, Mr Fox wrote to the claimant again on 24 July 2020. That letter was sent as an email attachment. In it, the claimant was advised that he was now on unauthorised absence, which would be unpaid. He was warned that failure to respond to the letter and to contact the company to advise of the reasons for his continued absence, could result in formal disciplinary action and that to continue to be on unauthorised absence, without reasonable explanation would be considered an allegation of gross misconduct, in particular; as an alleged failure to follow a reasonable management instruction to attend work. The claimant was instructed to contact Mr Fox either by email or telephone to explain his absence and to arrange a return to work interview.

45. As there was no response to that letter either, Mr Fox wrote the claimant on 4 August 2020 to invite him to a disciplinary hearing on 7 August to consider the allegation of gross misconduct, in particular, his alleged failure to comply with a reasonable instruction to attend work, issued to you in writing, in letters dated 20 and 24 July 2020. The allegation of misconduct was that the claimant had been on unauthorised absence from work on 30 June to the present and had allegedly repeatedly failed to follow the company absence reporting procedures. The claimant was advised of his right to be accompanied and that a possible sanction at the end of disciplinary hearing could include a summary dismissal. The respondent enclosed copies of the recent letters dated 20th and 24th of June.

46. The claimant responded to this letter on 6 August. He emailed Mr Fox and referred to Mr Fox's WhatsApp message to him on 2 June when he asked the claimant not to come into work on the following day, after the claimant posted his message on the group WhatsApp chat. The claimant stated that he did not consider himself to be a Filtrex employee anymore and since he had claimed his employment rights in the tribunal, he did not see any reason why he should attend the disciplinary hearing. He stated that it would now be the decision of the

employment tribunal. He complained that the respondent had sent letters to his former marital home even though it knew of his new address.

47. Mr Fox responded to that email on 14 August. He stated that the claimant was still one of the respondent's employees and that he had not been dismissed. This was why the respondent was following a process due to the claimant being on unauthorised absence following the expiration of his sick note as he had not been in contact. The claimant was informed that he was expected back at work and that failure to return, would leave the respondent with no alternative but to continue with the process as he was on unauthorised absence.

48. The claimant issued his employment tribunal claim on 28 July 2020, having conducted early conciliation between 2 June and 2 July 2020.

49. The claimant confirmed in the hearing that he was aware of the respondent's grievance procedure but did not believe that he could complain to the other directors. He did not give a reason for that belief. He did not agree that he had failed to comply with the respondent's sickness absence procedures as he considered that he had been dismissed on 2 June 2020.

50. The claimant began employment with Sainsburys as a Trading Assistant (Nightshift) in or around November 2020.

Law

51. The first question for the Tribunal was whether the claimant had been dismissed or had he resigned. If he had resigned, the next question would be whether this was in response to a fundamental breach of contract by the respondent.

52. The claimant's case was that he had been constructively dismissed either from a fundamental breach of contract that occurred on 2 June 2020 or at a later date. He does not give a date on which he says he resigned in response to the breach.

53. At the hearing he changed his case and stated that it was now his belief that he had been dismissed on 2 June 2020.

54. Section 95(1)(c) of the Employment Rights Act 1996 states as follows: -

> "*The employee terminates a 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 employers' conduct".*

55. The circumstances in which an employee would be entitled to terminate his contract would be where the employers' conduct amounted to a repudiatory breach of contract.

56. The claimant's complaint is that the respondent breached the implied term of trust and confidence which is in each employment contract. The tribunal would need to conclude that the employer had acted without reasonable cause in such a way that was calculated or likely to destroy or seriously damage the

relationship of trust and confidence between it and the employee. Also, the tribunal needs to be certain that the employee had not affirmed the contract under which he was employed after such a breach and before he resigned, or that if he had affirmed the contract there was subsequently a "*final straw"* capable of contributing to a series of earlier acts which cumulatively amounted to a repudiatory breach of contract and that he had resigned in response to the repudiatory breach.

57. The leading case of constructive dismissal remains the case of *Western Excavating Ltd v Sharp* [1978] ICR 221 (CA*)* where, as Lord Denning stated: -

> "*If the employer is guilty of conduct which is a significant breach going to the root of employment, 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 terminated the contract by reason of the employer's conduct. He is constructively dismissed"*.

58. The test that must be applied in determining whether or not this has occurred, is an objective test and this is summarised above and set out in the case of *Mahmud v BCCI* [1997] IRLR 462 in which Lord Nicholls stated that: -

> "*The conduct must…impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances"*.

59. In the Court of Appeal decision in *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445 the test to be applied in a constructive dismissal case was set out as follows:

1. in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applies

    a. What was the employer's conduct that was complained of?

    b. Was the conduct complained of calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties;

    c. Did the employer have reasonable and proper cause for that conduct?

2. If acceptance of that breach entitled the employee to leave, he has been constructively dismissed;

3. It is open to the employer to show that such dismissal was for a potentially fair reason;

4. If he does so, it will then be for the employment tribunal to decide

whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses, and was fair.

60. As already stated the effect of such conduct by an employer would be to break the contract and an employee would have difficulty in succeeding with a claim of constructive unfair dismissal if he has affirmed the contract and waived the breach. An employee will be held to have affirmed a contract where (with knowledge of the breach) he acts in a manner inconsistent with treating the contract as at an end. In *Bashir v Brillo Manufacturing Co* [1979] IRLR 295 it was held that delay in itself is not sufficient to be considered as affirmation of a breach of contract. The employee needs to actually do the job for a period of time without leaving, or some other act which can be said to affirm the contract as varied. Whether or not he has affirmed the breach would depend on the circumstances in each case.

Applying law to facts

61. The Tribunal will now refer to the list of issues which is at pages 35 and 36 of the bundle of documents. I will set out each issue and then follow it with the Tribunal's judgment.

Was the claimant dismissed?

Did the respondent do the following things:

On 2 June 2020 inform the claimant to go home and consider myself on garden leave until the respondent had decided what to do.

62. In this Tribunal's judgment, on 2 June 2020, the claimant posted a highly inappropriate message in the respondent's staff group WhatsApp conversation which he agreed was a threat. In posting that message he threatened the respondent that unless it paid him some money, he would take the company to the employment tribunal. This was inappropriate as that forum was not the correct forum for discussing personal employment matters or for raising a grievance with management. The claimant had a copy of the respondent's handbook and would have seen within it that there was a grievance process. During his employment he had many meetings with his managers about his conduct and performance and knew them to be reasonable as the history of his employment set out above demonstrates. If he had a grievance, he knew that he could approach them to discuss it. it was unreasonable and inappropriate for him to put such a message into the respondent's staff group WhatsApp chat.

63. It was in response to the claimant's threat that Mr Dave Fox instructed him not to attend work on the following day. He did not tell the claimant to go home and he did not tell him that he had been dismissed.

64. He used the term '*garden leave'* which could indicate that the respondent was thinking of termination as a possible outcome but at the same time he also stated that the claimant should stay home *tomorrow* which indicated that it was likely only for a day or until the respondent decided what to do next. That was a clear indication to the claimant that the respondent had not made a final decision on the matter. The claimant was told that he would be paid while on leave.

Judgment

65. It is this Tribunal's judgment that on 2 June 2020 the respondent informed the claimant that he should not come in on the following day and should stay at home until the respondent decided what to do next.

Did that breach the implied term of trust and confidence?

The Tribunal will need to decide whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and whether it had reasonable and proper cause for doing so?

66. It is this Tribunal's judgment that the respondent's statement to the claimant did not breach the implied term of trust and confidence.

67. Mr Fox was angered by the claimant's actions. He had proper cause to be upset. it is likely that the claimant's threatening message in the group WhatsApp chat upset the claimant's colleagues or caused them to be worried about what was happening at work. They may have been concerned whether there would be disturbance at work on the following day. Also, this was putting internal company business into a public forum.

68. In this Tribunal's judgment, the instruction to the claimant that he should not come to work on the following day did not terminate the claimant's employment contract. Mr Fox told him that he was to stay home on the following day. When he read Mr Fox's message, the claimant would likely have thought that it was only for that day. It also stated that it was until the respondent decided what to do next. He was told that he would be paid and he was told that he was on garden leave.

69. There was no clear decision on the claimant's employment. The claimant would have understood that this was not the end of the matter as Mr Fox stated that he would let him know what they had decided to do next.

70. The claimant himself appreciated that it was inappropriate to send the message as when he was challenged about it, he immediately apologised. In the hearing he agreed that it was a threatening message.

Judgment

71. It is this Tribunal's judgment that Mr Fox's WhatsApp message on 2 June was not calculated to destroy the trust and confidence between the claimant and the respondent. In this Tribunal's judgment, Mr Fox's intention in asking the claimant not to attend work was to buy some time until he could speak to the other Directors and decide what to do. He asked the claimant not to return to work on the following day.

72. Even though Mr Fox used the term '*garden leave'* it is this Tribunal's judgment that there was no intention to terminate the claimant's employment. If there had been such an intention, there would have been no need to specify that he was being asked to stay at home '*tomorrow'*.

73. The claimant referred in the hearing to the fact that English is not his first language and that was the reason he understood that message as terminating his employment. The Tribunal's judgment is that although English is not his first language the claimant understood Mr Fox. His conduct immediately after he received this message shows that he did not believe that he had been dismissed. In particular, he attended work on 4 June and reported sick on 5 June.

74. It is also this Tribunal's judgment that the respondent's message on 2 June was not likely to destroy or seriously damage the trust and confidence between the parties. In this Tribunal's judgment, the claimant was suspended in a direct response to him posting a threatening message in the company WhatsApp chat. It was a reasonable response to the public threat that the claimant had made.

75. It is therefore this Tribunal's judgment that the respondent had reasonable and proper cause for asking the claimant to remain at home on the following day while the Directors decided what to do next. He was assured that he would be paid and he had agreed that what he had done in sending the message was inappropriate and something for which he should apologise.

76. In all those circumstances, it is this Tribunal's judgment that the respondent did not breach the implied term of trust and confidence in the claimant's employment contract.

77. There was no fundamental or other breach of contract. For that reason, the Tribunal will not address paragraph 1.1.3. The claimant was not dismissed.

78. As promised, Mr Fox messaged the claimant on the following day and asked him to return to work on 4 June.

i. Did the claimant resign in response to the breach?

ii. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

79. It is this Tribunal's judgment that the claimant was not dismissed. The claimant was not dismissed on 29 May and there was no indication from their conversation that day that the respondent wanted to terminate his contract. The claimant asked for time off to search for work and for time off to see his son. That request was granted. The claimant indicated that he may be interested in looking for another job. On the following day he took some time off to look for another job. Nothing further was said about it. There was no evidence that anyone treated the claimant differently after that discussion.

80. On 2 June, the claimant threatened the respondent in an open WhatsApp chat that all employees could access. In response, he was asked to stay at home while the respondent decided what to do next. He was in effect,

suspended. He was not dismissed and he was not '*pushed out*' from his employment with the respondent.

81. At the time, the claimant did not consider that he had been dismissed as he attended work on 4 June and attended a production meeting. On 5 June, he notified the respondent that he was unwell and could not come to work due to a high temperature. The claimant did not go to work or contact the respondent until 18 June when he sent in a sick certificate. These are not the actions of someone who considers himself to be dismissed. He did not resign.

82. The respondent contacted the claimant on 5, 8 and 11 June to find out why he was not at work and whether he was still unwell. The claimant told the respondent on 5 June that he had a high temperature. It was not unreasonable for the respondent to assume that he was still sick, to give him some time to recover from his illhealth and to return to work.

83. The claimant failed to comply with the sickness absence reporting procedures set out in the company handbook and which he was reminded of by the respondent in the letter dated 12 June. It was not until 18 June that the claimant sent the respondent a sick certificate. The sick certificate was to cover the period until 29 June. The claimant was paid statutory sick pay and chased up his pay at the end of the month. Although he had not acted in total compliance with his contract as he had not complied with the sickness absence reporting procedure; these were not the actions of an employee who believed that his employer fundamentally breached his contract on 2 June or who believed that he had already resigned.

84. The claimant contacted ACAS to start the early conciliation process on 2 June. The claimant issued his employment tribunal complaint form on 28 July. On 6 August he refused to come to the disciplinary hearing and indicated that he considered his contract terminated. In this Tribunal's judgment, it is not clear when the claimant resigned but 6 August was when the respondent was told that he no longer considered himself to be an employee. That was when the respondent was notified that the claimant considered that the employment contract was at an end and he was no longer bound by it.

Judgment

85. In this Tribunal's judgment, the claimant was not dismissed.

86. The claimant resigned on 6 August 2020.

87. The complaint of unfair dismissal fails and is dismissed.

88. The claim fails.

<u>The counterclaim</u>

The respondent loaned the claimant money during his employment. It is this tribunal's judgment that the latest loan was on 5 November 2014 for the sum of £2040. The claimant repaid some of that loan before his resignation but the sum of £1,302.65 is still outstanding.

The claimant accepted that he owed this amount to the respondent and he did not challenge Mr Fox's evidence on his calculations.

The claimant is ordered to repay the respondent the sum of £1,302.65.

Employment Judge Jones
Date: 26 March 2021