Case number: 3313178/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr D Simpson

Respondent: XP Auto Ltd

Heard at: Watford (by CVP) **On:** 2 & 3 May 2024

Before: Employment Judge Emery

REPRESENTATION:

Claimant: In person
Respondent: Mr A Mellis (Counsel)

JUDGMENT

The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

The respondent shall pay the claimant the following sums:

(a)	A basic award of	**£1,335.00**
(b)	A compensatory award of	**£ 848.49**
	TOTAL	**£2,183.49**

The Issues

1. There was a dispute throughout the hearing as to the ambit of the claim. The claimant alleges he resigned in response to breaches of his contract of employment. The respondent accepts that there is a 'trust and confidence' claim but disputes the claimant has alleged within his claim or otherwise a breach of any other contractual provision.

2. The claimant argues that his claim is as follows: there was an agreement reached with his manager shortly after he started his employment that he could take time off as 'unpaid leave', as long as he made up his contractual hours in that pay period (the 'oral agreement'). He says that this agreement was contractual and was in place for 2.5 years. He alleges it was breached by the respondent when it withdrew from this agreement in August 2023 and refused him unpaid leave thereafter, that working for the respondent became "intolerable" because of "their attitude towards me and the way they were trying to change my work pattern without consultation." He says that the rejection constituted bullying, an attempt to coerce him to leave the company. He says that the delays to the grievance process were unreasonable; that there was a pre-determined outcome at the grievance. He argues breach of trust and confidence has occurred to the point "I felt forced to resign."

3. The respondent argues that the claim has been impermissibly widened by the addition of the allegation of an oral agreement which is not pleaded, the claimant had failed to address an Order asking him to confirm what his claim was.

4. The respondent denies there was any contractual arrangement to vary the claimant's working week or allow him to take unpaid leave; it says it was entitled to say to the claimant he had taken excessive days off, and he could not take more unpaid days.

5. The issue of the 'oral agreement' allegation formed the basis of an ongoing discussion during the hearing. On a reading of the claim form, I concluded and informed the parties that the claim form argues:

    1. The claimant accepts he had a contract with his employer that he was obliged to work 1800 hours a year, but this was varied to give him "flexibility" to take occasional days off to accommodate family life and to prevent excessive buildup of hours. He says he was told to submit "unpaid leave requests" in advance and these were always granted up to August 2023, after this date they were rejected (the 'oral agreement').

    2. There was a breach of trust and confidence in failing to address this "understanding of the contract" in a more timely manner; instead, the respondent did not give him time off, this constituted bullying, as did the treatment in the grievance meeting.

6. It follows that the claim form addresses both allegations: his contract was varied by oral agreement and was then breached; also, there was a breach of trust and confidence. While it was unhelpful that the claimant had not confirmed his claims as ordered, the respondent indicated that it was ready to address both arguments, no postponement was sought.

Witnesses and hearing bundle

7. I heard evidence from the claimant. For the respondent I heard from Mr Parsons, Operations Manager, who heard the claimant's grievance, and from Mr Darby, Regional General manager who heard the grievance appeal. All witnesses had prepared statements which I read in advance of their evidence. There was an agreed final hearing bundle of 203 pages.

8. This judgment does not recite all the evidence I heard; instead, I confine my findings to the evidence relevant to the issues. The judgment incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions

The relevant facts

9. The claimant's contract states the following: the respondent works an "annualised hours system". For the claimant these were 1800 hours a year, subsequently increased to 1834 hours.

10. The claimant's contract (which has unnumbered paragraphs) states that the "typical" working week is 5 days, but he may be required to work additional or reduced hours/days as required. It states that he may seek a "review" of his working hours "if you consider that they are likely to lead to a persistent material imbalance" in the hours worked compared to contracted hours.

11. The contract specifies that hours worked must be recorded in an "Hours Worked Pot"; it states that if there is a "negative balance" of over 10% of the annualised hours total, the employee may be offered additional hours to address, or salary may be deducted as an overpayment. If there is a positive balance of over 10%, the company may pay hours as overtime or the employee may take time off in lieu.

12. In fact, the respondent's evidence (Mr Darby) was that there was a practice either of paying overtime or allowing staff to take time off from banked hours well under this 10% limit.

13. The claimant's contract is supplemented by "Terms and Conditions of Employment", stated to be part of his employment contractual terms (60). This includes an Absence policy (page 71): "if you need time off for any reason you should request this as far in advance as possible … You will normally be expected to make up any working time … or if agreed … you may take the time off unpaid". The employee should seek "prior approval" before making an appointment, and time was expected to be booked during a time which would minimise the impact on work. The Absence policy also says that if looking after a family member during working time "you may be eligible for … authorised unpaid leave…".

14. The respondent's case is that the claimant sought unpaid leave under the Absence clause, and there was no change to his contract.

15. The claimant started working for the respondent in October 20220. He says that shortly after starting, he discussed his family circumstances with his then manager Steve Davidson. He said that he explained to Mr Davidson that he was already working over 40 hours a week, they were "building up and I had an excess within the Time Bank". He says that he "agreed" with Mr Davidson that he could have "flexibility … it was accepted that I could take unpaid days as long as plenty of notice was given, which it always was".

16. In saying that he reached this agreement, the claimant relies on the "persistent material imbalance" clause of the contract. He says that the agreement with Mr Davidson was such a review and that there was an agreement that he could take time off on the basis that he would make up that time.

17. The claimant says that he asked for time off as unpaid days thereafter, that he was on all bar one occasion given days off on his request; the reason why he did not get that one day was, he says, because of operational issues. He took over 20 'unpaid' days each year in 2021, 2022, and pro-rata in 2023.

18. The claimant's case was that it was usual to work more than his shift hours, it was often the case that the day would overrun, for example with traffic delays or if he was having to use public transport to/from the vehicle's destination. His evidence, which was not disputed, was that staff would often work 10 – 12 hours a shift, it was easy to accrue "banked" hours.

19. The claimant's evidence was that he would accrue so many hours that by the end of the month that, as well as the unpaid leave, he would often take banked hours as time off, or claim a "draw down" (i.e. pay) for the excess hours. Mr Parsons accepted this evidence. Mr Darby's evidence was that staff could ask for time off at short notice, saying that in theory a driver could on (say) Tuesday) ask for (say) Friday off because of an excessive buildup of hours. Mr Darby accepted that this built in "flexibility" into a contractual 5-day working week.

20. The claimant never had deductions in his pay when he took 'unpaid leave', because he invariably worked more than his contractual hours during the remainder of that pay period. He accepted that 'unpaid leave' is different from taking a bank day. I accept his evidence that at no time did he have a negative balance in the Time Bank during any pay period, "I was always pro-rata ahead in hours. …. frequently high 40s and early 50s per week… I was trying to manage my time and the time the company was giving me."

21. The respondent's position as put to the claimant was that the 1800 hours a year was meant to compensate for slack periods, that employees could therefore average their hours over the year without losing income. The claimant did not

dispute this but argued that there were very few quiet periods during his employment, apart from Christmas. Given the claimant invariably worked more than his contracted hours I accept his evidence that he never experienced quiet periods of the year when his hours were below the average. When he left, his hours were 11% up for the year to date.

22. The respondent's case is that the claimant was entitled to ask for time off for any reason under the "Absence" policy. Its position is that this is how the claimant sought unpaid leave, and there was no change to his contract.

23. Mr Parsons said the usual practice when drivers sought leave would be for Ops Admin or himself to consider how many drivers were off "… I would look at calendar to see if I could agree it".

24. The respondent's case is that because it was getting busier, and the "degree of flexibility" it initially had with the claimant was "supportive" to the claimant but that it had not changed his contract, the respondent was "trying to help" but there was "a limit" in how far it could continue to assist. Mr Darby's evidence was that in 2022 the respondent had 4 clients, by 2023 22 clients, it went from a pool of 60 drivers to over 200. This meant it was logistically more difficult to account for absences. He said that the respondent would "try to accommodate individuals' requests".

25. In August 2023, the claimant was informed that he was taking too much unpaid leave. He was told he could work a reduced hours contract – i.e. less hours for less salary – 28 hours over 4 days. As it was put to the claimant: "So you are working more hours than contracted, and the company approached you and said no to unpaid leave, but can we offer you a reduced hours contract. And we gave you a week to think about it …".

26. The claimant's view was that he was working more than his contractual hours, he did not understand the rationale behind this request. He did not accept he would have flexibility in practice, as he could be allocated to work any day of the week meaning he could not plan days off. The claimant refused this changed contract.

27. The claimant then submitted several more requests for unpaid leave. While two were accepted, several were not, including what the claimant said was time off for a school meeting submitted a week in advance "This was rejected. I rescheduled the meeting for a fortnight later – this again rejected along with an unpaid request for 6 weeks in advance for a dental appt." The reason for the refusals is set out by Mr Day in his email dated 25 September 2023: "You have taken 20 unpaid leave days this year this is double what anyone else had taken. I have given you an option to reduce your contract days with an option to work additional. Happy to discuss in more detail if you would like too." (123).

28. The respondent's case to the claimant was that there is no right to time off, that the respondent "can reject" requests. The claimant disputed this, accepting only that requests at short notice may not be easily accommodated.

29. In his evidence, Mr Parsons said he was not aware of Mr Day's reasons for rejecting the leave, that "I can't answer for Mr Day … if I felt the business was able, I would grant it." Later in his evidence he said any decision to refuse leave should be "dependent on the needs of the business."

30. Mr Darby's evidence was that drawing down bank hours to take as time off, or taking a payment in lieu was fine, but "… if take unpaid leave, it will have to be looked at. However, every single day off will be looked at to check bookings, volume and available resources. We are always accommodating, but may need to say no, e.g. locality, an event, leavers etc". Mr Darby said that if a driver's hours exceeded their contracted hours on a regular basis, it would be "his choice … it would be acceptable for him to say 'no work tomorrow' … So, he could communicate this and request time off work – it's all about communication." He said that he would have given the claimant the leave he requested, but he would have said take the days from the bank rather than reject the leave outright.

31. In a call with Mr Day on 25 September 2023 the claimant stated that he felt the decision to refuse his request for unpaid leave constituted bullying and harassment; in a follow-up email he said that he felt bullied regarding the respondent's "stance that you wish to change my contract." He mentioned annualised contracts and their flexibility. On 5 October 2023 he submitted a grievance stating that he had been "subjected to manipulative behaviour and bullying" that he was "being coerced: to accept a reduced hours contract, that three unpaid requests were denied "despite being 11% ahead of my pro rata contracted hours" (127).

32. In the grievance meeting, Mr Parsons position on annualised contracts is "there's not that flexibility" to take time off "what it means is you work Monday to Friday which is your contracted days…". Mr Parsons accepted that the claimant had always worked at least 35 hours a week, even when he took a day of unpaid leave. He told the claimant that when his hours were discussed, there was consideration of a "disciplinary" route, but instead a decision was made to change his contract to 4 days a week.

33. The following day the claimant resigned. He said that the outcome appeared "predetermined" and that Mr Parsons had "invalidated" his feelings of being bulled, that the employee had "no flexibility "within an annualised contract, that the flexibility is for the employer only. He said that "breach of trust and confidence has occurred to the point that I feel forced to resign." Mr Parsons does not accept the grievance outcome was pre-determined.

34. The claimant argues that the grievance meeting was not held for 3 weeks; the written grievance was on 25 September 2023, the grievance meeting was not until 13 October 2023, a further breach of policy and trust and confidence.

Closing submissions

35. The respondent submitted closing submissions and an addendum submission. Mr Mellis spoke to his submissions. The claimant made verbal submissions. I address their relevant arguments in the conclusions section below.

The law

36. Employment Rights Act 1996

s.95 Circumstances in which an employee is dismissed.

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

s.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.

37. Case Law: As well as the cases put forward by the respondent, I considered the following cases:

(1) *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27*: it is not enough for the employee to leave merely because the employer has acted unreasonably; its conduct must amount to a breach of the contract of employment. The issue to be determined is the terms of the contractual relationship and whether there has been a breach of any term, and not in accordance with a test of 'reasonable conduct by the employer'.

(2) *Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166, CA*: A tribunal that makes a finding of constructive dismissal will err in law if it assumes that the dismissal is unfair without making explicit findings on the reason for the dismissal and whether the employer has acted reasonably in all the circumstances. It is for the employer to identify the reason or principal reason for the dismissal.

(3) *Spafax Ltd v Harrison [1980] IRLR 442* CA: lawful conduct is not capable of constituting a repudiation even though it may be unwise or unreasonable in industrial relations terms.

Trust and confidence

(4) Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, [1997] ICR 606. The term (often referred to as 'the T & C term') is:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

(5) *Baldwin v Brighton and Hove City Council [2007] IRLR 232 EAT:* the relevant test is satisfied if either of the requirements is met i.e. it should be 'calculated or likely'. One important result of this is that, as 'likely' is sufficient on its own, it is not necessary in each case to show a subjective intention on the part of the employee to destroy or damage the relationship,

(6) *Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT:* "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

(7) *Braganza v BP Shipping Ltd [2015] UKSC 17:* If the issue is the exercise of a discretion under the contract), it is not enough for the employee to show the decision was unreasonable; he must show that it was irrational under the administrative law Wednesbury principles.

(8) *Sharfugeen v T J Morris Ltd UKEAT/0272/16:* Applying Malik, the test is whether the employer has destroyed trust and confidence 'without reasonable and proper cause'. In doing so, a Tribunal is applying an objective test inherent in the trust and confidence concept.

(9) *F C Gardner Ltd v Beresford [1978] IRLR 63:* Applying a clause "arbitrarily, capriciously and inequitably" may be conduct which has destroyed trust and confidence without reasonable cause.

(10) *W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516 EAT*: there is an implied term in the contract of employment 'that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'.

Conclusions on the evidence and the law.

38. It is agreed that the respondent did not give the claimant time off for appointments that he requested as 'unpaid leave' from September 2023. Did this breach a term of the contract?

39. The relevant contract clauses state:

    1. The claimant is required to work 1800 hours pa, 5 days, 35 hours per week (Although the hours and days may be varied)
    2. The claimant could seek a review if his hours were imbalanced
    3. He had the right to take time off or pay in lieu off for banked hours – the practice is that either could be requested at short notice
    4. He can seek unpaid leave for appointments or family reasons – this clause does not suggest that consent is discretionary, and in practice it was invariably given for all employees unless there was a business reason which prevented this.

40. The claimant relies on what he regards as a variation of the contract, as discussed with a manager shortly after his start date. The respondent says there was no variation, if there had been one it would have been recorded.

41. I agree that there was no variation of the claimant's contract. The respondent was, in effect, saying to the claimant that he could take time off as unpaid leave under the Absence policy. The respondent's witnesses said that absence requests would always be accommodated unless there was a good reason why not.

42. I conclude that while the claimant believed there had been a formal variation, what the claimant was told was that his requests would be accommodated unless not possible to do so – and this was what the Absence policy allowed for, and this was how the respondent operated. This was not a formal variation of the claimant's contract by the respondent.

43. There is nothing in the Absence policy which says that requests under it should be limited in time or number or that the respondent would refuse time-off based on the amount previously taken. At no time during his employment prior to August 2023 was the claimant informed that time-off would be withheld because of the prior days he had taken off. His hours off for 'unpaid' leave in 2022 and the first part of 2023 were no different to those in previous years.

44. The respondent's witnesses both agreed that they would have tried to accommodate the claimant's requests for time off which were refused by Mr Day, they would not have used the number of prior days off as a reason to deny this leave. Mr Darby said he may have asked the claimant to use his already banked hours. The respondent's argument at closing was that this was an exercise of a discretion under the Absence policy.

45. Based on the evidence, I conclude that the respondent's Absence policy as set out in the claimant's contract did not give discretion to refuse Absence requests made under this policy, unless there was a proper business reason for doing so. Both respondent's witnesses accepted that they would have granted the claimant's leave requests post-August 2023, they would not have used the reason given by Mr Day to refuse leave. They struggled to explain why leave was refused on these dates. It was accepted that the claimant had built up time, and he could have been allowed to take this leave from Banked hours, as Mr Darby suggested in his evidence. In the absence of any discretion within the policy, and in the absence of any good cause, I find that failing to grant the claimant's leave from August 2023 were acts in breach of the contractual Absence policy.

46. If I am wrong, and the Absence clause allows managerial discretion whether to grant it or not, I find that the exercise was operated in an irrational way: the reason – the claimant always had a positive balance in hours. In effect he was taking leave from hours he had already accrued, whatever he called the leave. The policy states that hours can be made up – but the claimant was already in credit. The respondent's evidence was that requests would be accommodated if

possible and the respondent's witnesses recognised that they would have granted these requests, they could not explain Mr Day's reasoning. The reason given by Mr Day for rejecting, too many days taken already, was therefore an irrational reason, one that no other manager within the respondent would have made: I find in these circumstances it is highly unlikely to have been made by a manager at any similar organisation. The decision made was a penalty to the claimant, irrationally exercised in breach of any contractual discretion this policy conferred.

47. I accept that a business is entitled to decide an arrangement is no longer feasible for operational reasons; and I accept that the respondent came to the view that the number of days the claimant was seeking to take was starting to impact on its operations. It is entitled to do so – it was expanding, and the drivers' hours required and the logistical complexities that arise, made the claimant's arrangement one which was starting to cause operational difficulties. It could not be replicated across the business. I accept that the business is entitled over time to say that this arrangement is not working. But, if it does so, it must consult with the employee(s) to negotiate a contractual change to the Absence policy, rather than apply different criteria to leave requests without prior consultation.

48. Did the action of refusing the claimant leave post-August 2021 breach trust and confidence? The respondent's witnesses agree that they would have granted this leave. The claimant is given an irrational reason for refusing leave, one which the claimant was upset and offended by. I conclude that this was a repudiatory breach of trust and confidence, as the way the Absence policy had worked was changed in the claimant's case for irrational reasons, ones which the claimant concluded were unfair. I accept that a change to a contractual policy without proper consultation and a refusal of leave for reasons which were irrational and without proper cause, where the reason should have been to grant that leave, were acts which were likely to seriously damage the relationship of trust and confidence, and that they did so.

49. The claimant's letter of resignation states that the grievance was predetermined. In his evidence Mr Parsons accepted he would have granted the leave requests. But at grievance Mr Parsons rejected this, saying that there was a business need and that the claimant's 'unpaid' hours were excessive. He said that there was no flexibility, that the claimant was obliged to work his contractual 5 days a week. He hinted at a disciplinary being the other option, despite the claimant complying with the Absence policy. I find that the statements made by Mr Parsons and his rationale for rejecting the grievance at the grievance meeting were not accurate. He accepted in this hearing he would have granted that leave. It is apparent that the grievance decision was doubling down on Mr Day's decision, along with a hint that the issue could be a disciplinary issue. It was suggested to the claimant at the grievance hearing he may want to remove his allegation of bullying. Mr Day's

stance was the claimant could not take any more time off, and this was accepted at the grievance hearing, but by the time of this hearing the position had changed as both witnesses said they could see no reason why this leave was not granted.

50. I conclude that the grievance was not properly considered by the respondent. I accept that the respondent genuinely did not understand that the Absence policy and its wording conferred a contractual right to time off – if requested in advance and there was no specific business reason for rejecting it. By not understanding this, inevitably the grievance would go against the claimant.

51. To this extent the result was predetermined as the contractual Absence policy and its implications were not properly understood by the business. This did not amount to a breach of contract by the respondent – a wrong decision in itself does not amount to a breach of contract – but the closed mind and lack of understanding of the meaning of the policy was, I found, a factor which led the claimant to conclude that there was no way back from the breaches to the Absence policy and the breach of trust in failing to give the claimant the leave he had requested from August 2023. The claimant was entitled to conclude that his concerns that his contract had been breached by the operation of the Absence policy were not being addressed and that it was likely the respondent would continue to refuse his requests for leave, contrary to the terms of the Absence policy.

52. The claimant complains about an excessive delay between his verbal complaint and the grievance meeting. I do not find this to be a breach of contract: even if the policy says a hearing should take place earlier, it is rarely a repudiatory breach of there is a delay, I do not accept that the delay was sufficient in this case to amount to a breach of contract.

53. I find that a substantial reason why the claimant resigned was as set out in his resignation letter – that the claimant did not accept the respondent's position that there was "no flexibility" in the Absence process, and there had been a failure to reach a mutually satisfactory solution in the grievance meeting; meaning there was a breach of trust and confidence. I do not accept that the claimant resigned for another reason – that he had another role – as suggested by the respondent. The respondent's refusal of the leave for its stated reasons was conduct which was likely to destroy trust and confidence and the respondent did not have reasonable cause to do so: a reasonable way of handling this would have been to agree the leave and then to enter into a consultation process with the claimant and other employees to amend the Absence policy, if that it was the business required.

54. The respondent has failed to prove its reason for the claimant's resignation - that he had another role: this makes the dismissal unfair. I find also that the respondent has not acted reasonably in the circumstances, within the range of

reasonable responses test. Had the respondent properly considered the claimant's grievance, the wording and the contractual nature of the Absence policy would have been apparent: the claimant had a contractual right to time off under the Absence policy as long as they were logistically possible, and it did not have the right to refuse leave because of too many prior days taken under the absence policy. It was unreasonable for the respondent to conclude that it had such a right. This precipitated the claimant's resignation.

55. The respondent does not seek to argue that his dismissal was otherwise fair (its argument is solely the reason for resignation was his finding another role). I find that there was no fair reason – for example for some other substantial reason. I find that the claimant's dismissal was because of the breach of the contractual Absence policy and the respondent's failure to recognise the breach; the respondent has not acted reasonably in concluding that there was no breach; the claimant's dismissal is unfair.

REMEDY

56. The claimant secured another role shortly after his resignation. He had two complete years of service and was aged 45 at date of dismissal. His weekly net pay was £406.53 per week, his employer pension contributions were £35.43 per week. He claims two weeks loss of earnings.

57. The basic award was agreed – 2 years' service x 1.5 x 3 x £445 = £1,335.00.

58. I awarded two weeks earnings and pension contributions, after tax (it is for the employer to account for and pay any tax due on these net sums): £848.49

Employment Judge Emery
12 July 2024

Judgment sent to the parties on:
22 July 2024
……
For the Tribunal:
J Moossavi
……

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