EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Letch	**v**	ATP Access Platforms Limited

Heard at: Cambridge **On:** 17 & 18 March 2025

Before: Employment Judge Taft

Appearances
For the Claimant: Mr Connor, Solicitor
For the Respondent: Mr Wheaton, Counsel

JUDGMENT

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

2. The Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. It is just and equitable to increase the compensatory award payable to the Claimant by 15% in accordance with s 207A Trade Union & Labour Relations (Consolidation) Act 1992.

3. The complaint of breach of contract in relation to notice pay is well-founded.

4. The complaint of unauthorised deductions from wages is well-founded. The Respondent made unauthorised deductions from the Claimant's wages on 28 February 2024 and 28 March 2024.

REASONS

Background

1. The Claimant was employed by the Respondent as a Hire Desk Controller from 1 July 2020 until he resigned on 3 April 2024 with immediate effect.

2. The Claimant’s written contract of employment dated 6 July 2020 provided that his normal hours of work were Monday to Friday from 7.30am to 5pm.

The salary recorded in the contract is £30,000. It was agreed that the Claimant received salary increases during his time with the Respondent so that by the summer of 2023 his salary was £40,000. The parties further agreed that the Claimant was contractually entitled to one month's notice.

3. It was the Claimant's case that his contract was orally varied by agreement with Mr Duxbury, the Respondent's Operations Director, with effect from 1 October 2023 such that he no longer worked on Mondays but received the same salary. It was the Respondent's case that there was no such variation and that deductions made in February and March 2024 reflect the fact that the Claimant refused to work on Mondays following a written warning given on 6 February 2024.

4. The Claimant asserts that he was constructively dismissed. He says that he resigned in response to fundamental breaches of his contract of employment. He relied on the deductions made from his pay in February and March 2024 and an alleged breach of the implied term of mutual trust and confidence he says arose from the Respondent's actions around that time.

5. Both parties agreed that an important preliminary issue to determine in respect of all three claims was whether or not the Claimant's contract of employment was indeed varied. There is a related issue as to whether or not Mr Duxbury had authority to bind the Respondent.

6. The Respondent agreed that if there had been a failure to pay the Claimant what he was contractually due, that would be a fundamental breach. The Respondent denied there was a breach of the implied term of mutual trust and confidence but again agreed that a breach of that implied term would be a fundamental breach.

7. The Respondent suggested that even if there was a breach, the Claimant affirmed the contract by continuing to work through February and March after the deductions began to be made.

8. The Respondent then said that if a constructive dismissal were established, the Claimant was fairly dismissed for "some other substantial reason", namely that the Respondent could not afford for him to continue to work only four days per week for the salary of £40,000. The Respondent had in its ET3 suggested that there was a fair reason of conduct, but this was withdrawn in submissions.

9. If the dismissal were held to be unfair procedurally, the Respondent suggested that the Claimant's compensation should be reduced because a fair procedure would have resulted in a fair dismissal.

The Law

10. Section 40 of the Companies Act 2006 provides that

(1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution.

(2) For this purpose—

(a) a person "deals with" a company if he is a party to any transaction or other act to which the company is a party,

(b) a person dealing with a company—

(i) is not bound to enquire as to any limitation on the powers of the directors to bind the company or authorise others to do so,

(ii) is presumed to have acted in good faith unless the contrary is proved, and

(iii) is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution.

11. Section 13 Employment Rights Act 1996 provides that

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

12. The law in respect of constructive dismissal is well settled. As put by Lord Denning in *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761

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

13. The implied term of mutual trust and confidence was identified in *Woods v W.M. Car Services (Peterborough) Ltd* [1982] I.C.R. 693 and approved by the House of Lords in *Malik and another v Bank Of Credit & Commerce International SA (in compulsory liquidation)* [1998] AC 20 when Lord Steyn confirmed that

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

14. It is common ground that a breach of the implied term of mutual trust and confidence must be a fundamental breach.

15. If a fundamental breach has been established, the employee must then accept the repudiation by resigning. As Lord Denning confirmed in *Western Excavating (ECC) Ltd v Sharp*

> *"the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged."*

16. If the Claimant establishes that there has been a constructive dismissal, we must then look to Section 98 Employment Rights Act, which provides that

> (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 the employee holding the position which the employee held.
>
> …
>
> (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.

17. In *Polkey v AE Dayton Services Ltd* [1987] UKHL 8, the House of Lords held that a dismissal is still unfair if a fair procedure would result in the same outcome, but that this can affect the compensation that should be awarded in such circumstances. This is often known as a *Polkey* deduction.

The Evidence

18. The Tribunal heard evidence from the Claimant, Simon Richards - the owner and Managing Director of the Respondent - and Matthew Duxbury - the Respondent's Operations Director. The Tribunal also considered documents from the Bundle to which it was referred.

19. The Claimant gave evidence openly and tended to be supported by documents. In contrast, Mr Richards and Mr Duxbury were sometimes inconsistent and not always supported by documents. An example is that in oral evidence Mr Richards suggested that his emails with Mr Duxbury about replacing the Claimant were contingency planning because he thought the Claimant would leave. That is not what the emails say, which is that

> "he needs to go."

20. The Respondent's witnesses gave oral evidence about the Claimant's alleged personal problems and suggested that in fact the Claimant was being given leave on Mondays to deal with them. That is not supported by any documentation and is not contained in either Mr Richards' or Mr Duxbury's Witness Statements.

21. Mr Duxbury was asked about a reference to Haley in an email of 30 October 2023. He suggested that it was intended that she would be a replacement for Sean Harker and not the Claimant, as was being put to him. Mr Richards' evidence was that Mr Richards met with Sean Harker when he came to the Respondent's premises in early 2024, some three months later. Both cannot be true.

22. Mr Duxbury referred to various letters in paragraph 35 of his Witness Statement but then accepted in oral evidence that they were not sent.

23. Overall, where there was a conflict of evidence, the Tribunal tends to prefer that of the Claimant, which was more credible than that of the Respondent's witnesses because of the factors identified above.

Findings of Fact

24. The Respondent is a small business owned by Simon Richards. Mr Richards recruited the Claimant, having known him for approximately twenty years. After that, the Claimant reported to Matthew Duxbury, the Operations Director. He was his Line Manager. Mr Duxbury is also a statutory Director.

25. Mr Richards had limited involvement in the day to day running of the business, which was delegated to Mr Duxbury. Mr Richards did not spend much time physically present in the Respondent's premises, though he was provided with financial information on a dashboard and remained in regular contact with Mr Duxbury.

26. Mr Duxbury communicated two annual pay rises to the Claimant, neither of which resulted in a new contract or were confirmed in writing.

27. It is agreed between the parties that the Claimant had expressed an interest in dropping his working hours in the years before his anticipated retirement. A conversation was had in the spring or summer of 2023 in which Mr Richards was present and where the Claimant said words to the effect of

> "Make it happen for me Simon".

28. Conversations were then held between the Claimant and Mr Duxbury in which the Claimant asked for a pay rise and was told that it could not be afforded. The Claimant thereafter proposed to Mr Duxbury that instead he would drop his hours to four days per week but receive the same salary. The context was that the Claimant's colleague had left for a better position with another company. The Claimant had picked up additional work, albeit

with some support from Mr Duxbury. As the Respondent has pointed out, the Claimant was an experienced and valuable staff member they could not afford to lose, especially at that time.

29. On 28 September 2023, in response to the Claimant chasing Mr Duxbury by text message for confirmation he had spoken to Mr Richards about this arrangement, Mr Duxbury replied

> "I didn't speak to him, no. However, take Monday off and I will get it sorted before you get back. As I said I have no issues with it and think it is fine so we will just tell him that this is what we have agreed."

30. The Claimant understood this as Mr Duxbury confirming that he had agreed the change and that he would communicate that to Mr Richards.

31. The Claimant started to take Mondays off from 1 October 2023. He worked four days per week throughout October 2023, November 2023, December 2023 and January 2024, but received the same pay he had when he was working five days. No one told him that he needed to work on Mondays to receive his full pay.

32. Mr Duxbury suggested that there were various meetings, or various conversations, in which he made clear to the Claimant that this was a temporary arrangement and that he was seeking agreement from Mr Richards and / or that Mr Richards had not approved this arrangement. Mr Duxbury claimed that he was trying to buy time.

33. Mr Duxbury's evidence on this was muddled. It was not consistent with the documents or the reality on the ground: both he and the Claimant acted on the arrangement of the Claimant working four days while being paid for five days for some four months.

34. The Tribunal finds as a fact that Mr Duxbury did reach an agreement with the Claimant to change his working hours but receive the same pay. He may not have effectively communicated that agreement to Mr Richards, but the agreement was binding on the company. Mr Duxbury was a statutory Director. The Claimant acted in good faith in relying on his agreement. Mr Duxbury accepted in evidence that he had the authority to vary the employees' contracts.

35. The Respondent suggested that the Claimant had "targeted" Mr Duxbury and then took advantage of his inexperience, rather than negotiating with directly with Mr Richards. The Claimant gave evidence that he had spoken to Mr Duxbury because he was his Line Manager and because he had all dealings with Mr Duxbury once employed. The Tribunal accepts that explanation. The Claimant had thought he had reached an agreement with Mr Duxbury. Mr Duxbury told him that he would just tell Mr Richards that was what they had agreed. There was no need to contact Mr Richards about it. There was no "targeting".

36. When he learned of the arrangement, in an email of 30 October 2023, Mr Richards told Mr Duxbury that,

> "…I won't accept the change, but equally can't intervene."

37. He instructed Mr Duxbury to write to the Claimant to say that no change was agreed. Mr Richards was concerned that doing nothing was accepting the Claimant's demands. Mr Duxbury did not write to the Claimant. When asked about what he did communicate about Mr Richards' email, Mr Duxbury said,

> "Not the specifics."

38. The Claimant was not aware that there was any issue. As far as he was concerned, his proposal had been agreed. The Respondent's actions, in continuing to pay him and not challenging him when he did not work Mondays, supported that assumption.

39. The first the Claimant knew there was a problem was when he received a warning letter on 6 February 2024. This claimed that the Respondent had not agreed to vary his contract and suggested that his contractual obligation was to work five days per week. The letter said that "unauthorised absence" would result in deductions from the Claimant's salary and further disciplinary action, which could ultimately result in dismissal.

40. The Claimant raised an Appeal and Grievance on 13 February 2024 by hand delivering a letter to Mr Duxbury. Mr Duxbury did not pass that letter on to Mr Richards. A version of the letter was then sent to Mr Richards by email on 22 February 2024. There was no acknowledgment of this letter and no invite to a meeting to discuss it.

41. The Respondent made a deduction from the Claimant's pay on 28 February 2024. He received £2871.75 gross, in comparison to the previous month when he received £3333.33.

42. A meeting of some sort was arranged for 13 March 2024, but the Claimant did not understand this to be in response to his Grievance. In fact, the Claimant was not able to attend that meeting due to work related stress.

43. Mr Richards wrote to the Claimant by email of 13 March 2024. That email says that the meeting was

> "to present you with the outcome of the Month End Review and conclusion of the disciplinary procedure."

44. There is nothing in the email to suggest that this was intended to be a Grievance Meeting. This is another occasion where Mr Richards' evidence was not consistent with the documents.

45. The Claimant was unable to work due to work related stress from 13 March 2024. He initially self-certified and then provided a "fit note" on 20 March 2024.

46. On or around 28 March 2024, the Claimant received the outcome of a Data Subject Access Request (DSAR). It contained the email of 30 October 2023 which explicitly says,

> "We need to replace Jeff…",

that the Claimant's actions were unforgivable, that Mr Richards would not let the Claimant exercise his share options and finally that the Claimant had to go.

47. This irreparably damaged the trust and confidence the Claimant had in his employer. It is not surprising. His employer is explicitly stating an intention to replace him. The spin put on that email by Mr Richards and Mr Duxbury - that they were merely future proofing the business if the Claimant decided to leave - is not sustainable.

48. The Claimant then had a further deduction from his wages in his March pay. He knew by then that the Respondent did not intend to honour the previous agreement. He resigned on 3 April 2024. That resignation on its face says that it is in response to the deductions and the failure to address the Grievance.

49. The Respondent says the Claimant's resignation letter confirmed that he was resigning in response to the deductions but his oral evidence was that he did not intend to resign for this reason - he resigned because he had received the results of the DSAR.

50. The Claimant in fact gave evidence that he did not want to resign in February and early March, but that the DSAR made the difference. The Tribunal finds as a fact that there were three operative causes to the resignation: the deductions, the failure to deal properly with the Grievance and the content of the response to the DSAR.

Conclusions

51. Although the Claimant's recruitment conversations were with Mr Richards, all his dealings during his employment were with Mr Duxbury. Mr Duxbury was described as Operations Director and was a statutory Director. As a statutory Director, the Claimant could assume that Mr Duxbury had authority to bind the company provided that the Claimant was acting in good faith. He is presumed to be acting in good faith unless the contrary is shown. The Tribunal finds that he was.

52. Mr Duxbury had communicated two pay rises to the Claimant, neither of which resulted in a new written contract, nor were confirmed in writing. After discussion about the Claimant's proposal to work four days per week but keep the same salary, Mr Duxbury told the Claimant by text message

that he "thinks it is fine" and that he will tell Mr Richards. The Claimant was entitled to rely upon that.

53. He did rely upon that and stopped working on Mondays. The Respondent continued to pay him at the same rate for four months. No one told him that Mr Richards had not approved the change, or that Mr Richards did need to approve the change. The contract was therefore varied with effect from 1 October 2023 to the effect that the Claimant worked Tuesdays to Fridays but received the same pay he had before.

54. The Claimant resigned because it became clear the Respondent was not going to pay him in full. He had had two deductions purportedly to cover his not working Mondays. The Respondent had given him a written warning regarding not working on Mondays and had followed that with an email setting out two options: return to five days or face a twenty per cent drop in pay.

55. The Claimant had not affirmed the contract by working through February and March. The first deduction was made at the end of February. The Claimant had already raised an Appeal and Grievance that made it abundantly clear that he did not accept the situation. He worked only a few further weeks before going off sick and resigned shortly after the second deduction.

56. The response to the DSAR included emails passing between the owner of the business and the Claimant's Line Manager in which Mr Richards had said, amongst other things, that the Claimant had to go. The Respondent's actions breached the implied term of trust and confidence, making it clear that they did not intend to be bound by the Claimant's contract. The Claimant resigned soon after he became aware of that.

57. The Claimant resigned in response to fundamental breaches of contract – the failure to pay him in full and the breach of the implied term of mutual trust and confidence - and was therefore constructively dismissed.

58. In submissions, the Respondent accepted that the Claimant did not commit misconduct. It follows from the findings regarding the variation of the contract that the Claimant did not commit misconduct by failing to attend work on Mondays. The Claimant had sought to negotiate his position using the bargaining position open to him: the Respondent wanted his skills, experience and contacts. Mr Richards referred to that variously as blackmail, duress and coercion. It is none of those things.

59. The Respondent suggested for the first time in submissions that the Claimant would have been dismissed fairly for some other substantial reason in that the position of paying for five days but working for four days was not financially sustainable. This was not pleaded and there was no evidence on this point. The evidence given that Mr Duxbury was concerned that other employees would demand this, or that Mr Richards did not think it was a good bargain, is not evidence that the Claimant

would ultimately have been dismissed because the Respondent could not afford this arrangement.

60. Therefore, the Respondent did not show that there was a fair reason for the Claimant's dismissal.

61. In any event, for there to be a fair dismissal for the reason asserted by the Respondent, they would have needed to consult with the Claimant about a variation back to the original salary and then to lawfully terminate employment if the Claimant had not accepted the proposed change. There is no evidence presented that this was the Respondent's intention. It was not put to the Claimant that he would not have agreed a variation when faced with the termination of his employment. Accordingly, there should be no *Polkey* reduction because there is insufficient evidence to show that the Claimant would have been dismissed after a fair procedure, even if a fair reason can be established.

62. It follows from the Tribunal's findings that there was no blameworthy conduct on the Claimant's part. In fact, the Respondent withdrew its suggestion that there should be a reduction for contribution.

63. Paragraph 33 of the ACAS Code of Practice on Disciplinary and Grievance Procedures requires the Respondent to hold a Grievance Meeting without unreasonable delay. They did not. A meeting was arranged for 13 March 2024, a month after the Grievance was raised, but the email sent when the Claimant did not attend confirms that this was not to discuss his Grievance. The Claimant did not understand it to be a Grievance meeting. The Respondent's failure to arrange a Grievance meeting, or indeed any meeting whatsoever for a month after the Claimant's Grievance was first raised, was unreasonable.

64. Nevertheless, the Tribunal takes account of the size and the administrative resources available to the Respondent. A full 25% uplift is not appropriate in the circumstances. There should, however, be a 15% uplift on any compensation to be awarded.

Approved by:

Employment Judge Taft

Date: 3 April 2025

Sent to the parties on: 15 April 2025

For the Tribunal Office.

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