# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Ricky Cauldwell

**Respondent:** Defries Associates Ltd

**Heard at:** Watford ET; Via CVP **On:** 20 and 21 March 2023

**Before:** Employment Judge Tuck KC

**Appearances**
For the claimant: In person
For the respondent: Mr M. Islam-Choudhury, Counsel

## JUDGMENT

1. The claimant was unfairly dismissed.
2. The claimant would have been fairly dismissed within two weeks had a proper procedure been followed.
3. The claimant did not raise protected disclosures, and was not automatically unfairly dismissed.
4. The claims for notice and accrued holiday pay are dismissed.
5. It is just and equitable that the claimant receives no basic award, and is limited to two weeks net pay by way of compensatory award in the sum of **£1361.54.**

## REASONS

1. By a claim form presented on 23 November 2021, the Claimant brought claims of:
    (i) Unfair dismissal (section 98 of the Employment Rights Act 1996 ("ERA");
    (ii) Automatic unfair dismissal where the reason or principal reason for

the dismissal was because the Claimant made a protected disclosure (section 103A of the ERA);
(iii) Wrongful dismissal/notice pay;
(iv) Accrued but unpaid holiday pay

2. A Preliminary Hearing took place on 19 August 2022, following which an agreed list of issues was prepared.

3. I heard evidence from the Claimant and on behalf of the Respondent from Mr Paul Rubens and Mr Simon Shoker. Each prepared a statement and were cross examined. I had a bundle of documents consisting of 191 pages; the claimant said he had not received the respondent's statements or paginated bundle until Friday 17 March 2023; we took an extended lunch break on 20 March 2023 to ensure he had sufficient time to read all the documents, and he agreed to proceed on this basis.

**Facts.**

4. The Respondent is a small company with just 7 employees which manages residential leasehold property on behalf of the freeholders. The Claimant was employed from 1 March 2015 until his effective date of termination which was 29 October 2021. Mr Rubens is the managing director of the company and Mr Shoker is the Head of Property Insurance.

5. During the claimant's employment with the Respondent his salary was increased from £32,000 to £50,000 which Mr Rubens explained was on some occasions at the instigation of the Respondent, and on others when the claimant sought an increase. The claimant was responsible for the preparation of service charge accounts, purchase ledger duties, bank reconciliations and ground rent statements for freeholders.

6. In 2018 I understand that the respondent entered into a confidential settlement agreement with a former employee; the claimant at the time overheard conversations about the settlement sum. However he was not privy to the negotiation and was not asked to work on reconciling the accounts from which payment was made. Mr Rubens told me, and I accept, that he was entirely satisfied that the sums were accounted for appropriately. There is no evidence before me that this issue was raised again before November 2021.

7. In August 2019 an employee of the Respondent needed an external tap installed at her property. Simon Shoker arranged for a maintenance company which the Respondent frequently used, to do these works. His intention, having received permission from Mr Rubens, was for the employee to pay £45 and the remainder of around £129 to be paid by the Respondent – as a favour to the employee. Mr Shocker sent an email instructing the work on 29 July 2019; he said that in error he instructed £45 to be billed to the Respondent and £129 to a property holding company which is a client of the Respondent. This was the "Tap invoice".

8. The Claimant said that he discovered the "tap invoice" in March 2021 – it is not clear to me why he would have been dealing with an invoice which by then was 19 months old, at that time. Nevertheless, he says he told Mr Rubens that this was evidence of embezzlement on the part of Simon Shoker. Before this tribunal he said that Mr Shoker was manipulating client funds to carry favour with the employee whose property had the tap installed, because he was pursuing a young woman who was a friend of that employee. Mr Shoker denied this and said it was a simple error. Mr Rubens did not recall the tap invoice being raised with him in March 2021. The claimant said that he sent an email about the tap invoice in March 2021, but that his sent email was later deleted by the Respondent.

9. The claimant returned from annual leave on 1 September 2021. There is a dispute of fact as to whether the Claimant wanted another employee to be dismissed and Mr Rubens refused, but nothing turns on this dispute. What is agreed is that 0910hrs on 1 September 2021 the claimant emailed Mr Rubens and the other Respondent directors and tendered his resignation; he did not give any reason and thanked them for the opportunity to work for them over the previous 5.5 years. He said that his notice period was 3 months, but he would take annual leave after 10 December 2021.

10. Once he had handed in his notice, Mr Rubens thought the claimant was spending long periods of time printing, copying and shredding documents, but did not challenge him about this. Since these proceedings commenced (thought not, I understand, before) the respondent has discovered that the claimant was emailing copies of respondent / client bank statements to his home email address.

11. On 12 October 2021 the Claimant is agreed to have raised the tap invoice from August 2019 with Mr Rubens; both parties agree that the claimant alleged that the invoices were "proof of embezzlement". Mr Rubens said that it was important that the £129 incorrectly charged to a client account be repaid to them, and instructed this be done. Mr Ruben's attitude was that this had been the result of an error by Mr Shoker, which he explained verbally to the client. Mr Shoker said that Mr Rubens spoke to him about his error, and said in effect he received a verbal warning. It is apparent that the claimant was not satisfied with this as an explanation and it seems that a second meeting took place on 14 October 2021, though neither party was clear as to what the content of that meeting was.

12. On 25 October 2021 the Claimant sent an email to Mr Rubens and the other directors which stated:

> "I believe embezzlement as [sic] taken place within this property and I would like you to call in the authorities and act accordingly. I sent and email [sic] to Paul Rubens and to Richard Ashkin ACA and partner Ian Rubens when I discovered this. Having now had time to think about the 2 meetings we have had, I have decided to put together some information….."

The two meetings were said in that email to have been on 12 and 14 October 2021.The claimant listed at the bottom of this email the names, addresses and email details of 298 tenants associated with the Respondent's business. The claimant told me that he did this because he thought Mr Rubens needed to email all tenants to tell them of the incorrect charging of £129 against their funds some two years before.

13. The Respondent considered that the inclusion of almost 300 names and addresses to an unsecured email address for no good reason constituted a data breach. It made a report to the ICO accordingly.

14. Mr Rubens sought legal advice, and by letter dated 29 October 2021 terminated the employment of the Claimant on the basis that:
    1. "You have breached your contract and the trust between yourself and your employer which is a fundamental breach.
    2. You have committed a criminal offence while in the employ of Defries & Associates ltd thereby leaving Defries open to potential action by the Information Commissioners Office"

15. The claimant was asked to list documents and information he had removed within 48 hours. The claimant replied attaching the documents he had sent to his email address; he did not thereafter engage with correspondence seeking undertakings about the confidential information he had emailed to himself.

16. By letter dated 10 November 2021 the claimant appealed against the termination of his employment. In this letter he mentioned the sum paid in November 2018 under a settlement agreement; it is unclear whether he alleged wrongdoing in that regard. He also repeated his allegation that the invoice for the tap installation amounted to embezzlement.

17. The claimant did not in his witness statement set out any complaints about his holiday pay. He accepted in cross examination that he was entitled to accrued holiday pay at the time he presented his ET1, and accepted that he received a net payment of £1926.47 on 31 January 2022 which was described as being in satisfaction of his holiday pay. Orally the claimant said that he was owed two outstanding days; he did not ask Mr Rubens any questions about this or suggest any calculation as to why this was.

**Closing submissions.**

18. The respondent's submissions are:
    a. At the date of the ET1 being presented holiday pay was outstanding. This was however paid in January 2022 and is extinguished.
    b. It is accepted that the dismissal was unfair. The question is what remedy is due for that.
    c. The claimant was not dismissed for making a protected disclosure.

d. S43B ERA sets out what is a qualifying disclosure; what is alleged in relation to the tap appears to be an allegation of a criminal offence called “embezzlement”.
e. It is accepted that there was the disclosure of information as there was an invoice, and that any person in the claimant’s position raising issues of fraud /embezzlement is capable of being in the public interest. But – was it in his reasonable belief that there was fraud?
f. ***Korashi*** – McMullen QC set out the test for reasonable belief – when someone is skilled what is reasonable for them will be a higher threshold than an ordinary member of the public. The fact that Mr Cauldwell has identified an error in the transactions does not show he has a reasonable belief that it is a case of embezzlement. He has not identified a whole chain of invoices. One off incident several years old, about one transaction in the context of a business which uses these contractors regularly.
g. Could Mr Cauldwell reasonably believe there was embezzlement? No all he could show is an error.
h. As regards timing of the disclosure, it is common ground that he raised it on 12 October 2021, possibly on 14 October 2021 and certainly in his email of 25 October 2021. He says he raised this matter in March, but there is no contemporaneous evidence of this.
i. In relation to the second disclosure – the settlement payment – this is not mentioned until the appeal letter of 10 November 2021, after dismissal. It is submitted that was the first time it was raised. In any event it is not a protected disclosure. It is not clear what he said that is capable of amounting to information which in his reasonable belief shows breach of a legal obligation. It was a confidential payment as part of a settlement agreement.
j. As for reason for dismissal; the claimant attached the contact details of 298 leasees to his email of 25 October 2021. There is no real reason for his having done this. It was reported to the Information Commission Officer as it amounted to a serious data breach. This was the reason for dismissal. (pg 121). In addition to this he has been emailing client back statements to himself with no legitimate reason for so doing.
k. Was the principal reason for dismissal (***Fecitt v Manchester****)* a protected disclosure? Here it clearly was not – his dismissal was for the offence set out in the email of 25 October 2021.
l. Procedurally it was an unfair dismissal; albeit there was a potentially fair reason for dismissal, namely conduct.
m. What is the remedy? In relation to the basic award, s122(2) ERA; is it just and equitable to reduce the basic award, and s123(1), what is just and equitable to award by way of compensatory award?
n. The reason for the claimant’s dismissal was entirely due to his conduct in committing a data breach; in relation to which he did not engage with solicitors seeking undertakings from him. 100% deduction for contributory fault is entirely just and equitable. It is a wholly unmeritorious claim on spurious allegations of embezzlement with no foundation. So 100% reduction of basic, and 100% reduction of compensatory.

o. Wrongful dismissal – was not a wrongful dismissal as his actions of 25 October amounted to a repudiatory breach.

19. The Claimant made oral subissions:
    a. That he spoke to Paul Rubens in March 2021 and felt duty bound to report wrongdoing, specially when in a position of trust of other people's money. If that had been dealt with straightaway we would not be here today.
    b. He pointed out that he had never received any data protection handbook, and that he disclosed information because he felt his integrity was in issue. He said that the splitting of an invoice showed that it was clearly not a mistake, but was "embezzlement". The claimant said that it was clear the property in question could not have a water tap so he found the two invoices which Simon Shoker had instructed be split.
    c. With regards to the settlement payment, the claimant said he only came across this when he was going through the accounts for the property between March and September 2021, though he added "I did recall the meeting at which a sum had been agreed with the former employee."

**Law.**

20. Section 43B of the Employment Rights Act 1996 provides:

> "(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—
>
> (*a*) that a criminal offence has been committed, is being committed or is likely to be committed,"

21. In considering whether there has been a protected disclosure it is necessary to apply the test – for example set out in ***Williams v Michelle Brown AM*** *UKEAT/0044/19 (29 October 2019, unreported)*, namely :
    "First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'

22. Reasonable belief' is to be considered in the personal circumstances of the individual; while this could be seen as diluting the normally objective nature of the phrase, it may have the opposite effect in a case where the individual has special skill or professional knowledge of the matters being disclosed (eg in a medical context), which may raise the bar as to what it was reasonable to

believe**: *Korashi v Abertawe Bro Morgannwg University Local Health Board*** *[2012] IRLR 4, EAT*

23. Section 103A ERA provides:

> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

24. Where the employer simply denies that any disclosures had anything to do with the dismissal (which was for some totally independent reason), the normal rules will apply for determining the true reason, which will involve assessing what really motivated the employer at the time (***Abernethy v Mott Hay & Anderson*** *[1974] IRLR 213*.)

25. In relation to "ordinary" unfair dismissal, section 98(2) ERA requires an employer to demonstrate a potentially fair reason for dismissal, and section 98(4) requires a tribunal to consider whether the employer acted reasonably in treating that as a sufficient reason for dismissal in all the circumstances. The ACAS Disciplinary procedures set out a fair procedure which should generally be adopted before any dismissal. If a dismissal is procedurally unfair, the application of the well known dicta of Polkey requires examination of what difference a fair procedure would have made.

26. As to compensation for unfair dismissals, a tribunal may award a basic and compensatory award. Section 122(2) ERA provides:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

27. In similar terms, section 123(6) ERA provides:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

28. As to the order in which Tribunals should approach adjustments to awards of compensation, guidance is found in ***Digital Equipment Co Ltd v Clements*** [1998] ICR 258. This makes it clear that any Polkey deduction is to be considered prior to percentage reductions for contributory fault, and also makes clear that the percentage reduction to any basic award need not be the same as to a compensatory award.

**Conclusions on the issues.**

29. The claimant has led no evidence as to any outstanding holiday pay, and that claim is accordingly dismissed.

30. Whilst the claimant disclosed information to Mr Rubens in October 2021 about the incorrect invoicing for the installation of a tap, I am not satisfied that he had a reasonable belief this constituted "embezzlement", and so amounted to a criminal offence within s43B(1)(a) ERA. The claimant did not allege that Mr Shoker had benefited financially from the arrangement, and I am struck that over a period of working together of around 6 years, the claimant only identified one invoice which had been incorrectly allocated. It is very much more likely to have been an error than a deliberate act of wrongdoing. Furthermore, if the claimant had a reasonable belief in embezzlement in March 2021 as he says, he offers no explanation as to why he let the issue lapse until October 2021. I do not therefore accept that this amounted to a protected disclosure within s43B ERA.

31. The claimant's 'disclosure' about the settlement sum and how it was accounted for was not made until after his dismissal and could not have been causative of it. In any event I would not have been satisfied that this amounted to a protected disclosure. The transaction had taken place three years before the disclosure, and the claimant had known, he says, in 2018 of the agreement. While he may have disclosed information, if he genuinely suspected wrongdoing and some kind of theft from the property owners, I do not accept he would have turned a blind eye to the matter for so very long. I do not therefore accept that he had a reasonable belief that a criminal act had been committed within s43B(1)(a) ERA.

32. Even had either of these matters amounted to protected disclosures, I would not have accepted they were the sole or primary reason for the claimant's dismissal. The claimant was dismissed for the data breach he committed in his 25 October 2021 email when he included contact details of almost 300 people. The fact that the Respondent saw this as a serious matter is evidenced by their immediate self reporting to the ICO, and instructing of solicitors.

33. The claimant's dismissal on 29 October 2021 was because of his conduct which amounted to a breach of contract. I do not therefore find the dismissal was wrongful.

34. The dismissal was however, as properly conceded, unfair as there was no attempt whatsoever to follow the ACAS Code of Conduct on Disciplinaries. Whilst the Respondent is a small employer, they had sought advice from solicitors and should have been counselled to apply a proper procedure.

35. My conclusion is that a fair procedure would have taken two weeks to complete. An initial meeting with the claimant would have confirmed his conduct, but led to questions about what instruction and understanding he had of data protection issues, and further investigation about whether other materials had been sent to his home email account. I accept that dismissal would have been inevitable at that point.

36. I am satisfied that the claimant contributed to his dismissal by 100% such that he ought not to receive a basic award. I do however find that it is just and equitable to make an award of two weeks pay by way of compensatory award. I have considered whether an uplift should be applied to this for failure to comply with a relevant ACAS Code of Conduct, but decline to do so in circumstances where compensation is being awarded for the period of time which a fair procedure would have taken.

Employment Judge TUCK KC.

21 March 2023

Sent to the parties 23 April 2023