EMPLOYMENT TRIBUNALS

Claimant: **Mr D Allen**

Respondent: **Holdcroft Renault Limited**

Heard at: Birmingham, via CVP

On: 8 November 2023

Before: Employment Judge P Smith

Appearances

For the Claimant: In person

For the Respondent: Mrs J Ouzman, HR Director

JUDGMENT

1. The Claimant's claim of wrongful dismissal is dismissed.

2. The Claimant's claim in relation to a compensation payment for accrued but untaken annual leave at the termination of employment (holiday pay) succeeds.

3. The Respondent is ordered to pay to the Claimant the gross sum of **£161.05** (representing his accrued leave entitlement of 2.5 days multiplied by the gross daily rate of pay, of £64.42) in relation to his successful holiday pay claim.

REASONS

Introduction

1. By an ET1 claim form presented to the Tribunal office on 10 May 2023 the Claimant brought claims of wrongful dismissal (breach of contract, in respect of notice pay) and for a compensation payment in relation to accrued but untaken annual leave (holiday pay) to the Employment Tribunal.

2. At the commencement of the hearing an issue was raised by the Employment Judge. The Claimant had ostensibly been dismissed for allegations of misconduct which would likely be deemed criminal conduct, and there had apparently been

Police involvement. Upon inquiry by the Employment Judge the Claimant confirmed that he had not been arrested or charged with any offence relating to his employment with the Respondent, and that as far as he was aware he did not anticipate being so in future. Given the nature of this wrongful dismissal claim – as will be apparent from the List of Issues given below – I informed the Claimant at the outset of the hearing that he did not have to answer any question to which, if he did answer, his answer might result in him incriminating himself. I reminded him of this right against self-incrimination upon the commencement of his giving evidence. I also informed Mrs Ouzman that any question suggesting dishonesty or fraud on the Claimant's part would have to be put to him plainly, in order that he would have clarity and (if he wished) a full opportunity to answer.

3. Following a discussion with the parties at the outset of the hearing the following issues were agreed as being the questions the Tribunal had to decide in order to determine the Claimant's wrongful dismissal claim. These were:

3.1. Under his contract of employment, to what period of notice of the termination of his employment was the Claimant entitled to?

In principle, it was agreed between the parties that under clause 20.1 of his contract of employment the Claimant would be entitled to one week's notice of termination by the employer.

3.2. Was the Claimant dismissed with no, or short, notice?

It was an agreed fact that on 22 March 2023 the Respondent dismissed the Claimant without notice.

3.3. If the Claimant was dismissed without notice, has the Respondent proven that it was entitled to do so on account of a fundamental breach of contract on the Claimant's part?

This was the critical issue in the claim. As I understood the case, the term of the contract relied upon by the Respondent was the implied term of mutual trust and confidence. That term is implied into every contract of employment and provides that (in this case) the employee shall not, without reasonable and proper cause, conduct himself in a way calculated or likely to seriously damage or destroy the relationship of mutual trust and confidence between him and his employer. The two allegations of fundamental breach of contract relied upon by the Respondent were:

3.3.1. That the Claimant fraudulently provided his own personal bank details to a customer of the Respondent in order that the customer would deposit funds into his account; and,

3.3.2. That the Claimant, again fraudulently used customer credit card details to set up accounts on gambling websites.

If proven to the required standard (the balance of probabilities), these allegations were of such seriousness that I considered that they would – individually or together – undoubtedly satisfy the definition of a fundamental breach of contract. The Claimant agreed.

3.4. If the Respondent was not entitled to dismiss the Claimant without notice, to what award of damages is he entitled on account of the Respondent's breach of contract?

This was uncontroversial. The Claimant would be entitled to an award of damages representing one week's pay.

4. In relation to the holiday pay claim, following a discussion about entitlements at the start of the hearing and, having given them time to consider their position, the Respondent conceded that two days' pay was due to the Claimant as compensation for accrued but untaken annual leave. The Claimant did not agree with this and contended that six days' pay was due. On the basis that liability was conceded the only issue that fell to me to decide was the amount due.

5. The Claimant represented himself and gave evidence on his own behalf. The Respondent was represented by Mrs Ouzman, its HR Director. The witnesses for the Respondent were Mr Craig Rammell (Franchise Director), Mr Michael Stevenson (General Sales Manager) and Mrs Julie Lavender (Group Payroll Officer). The Respondent's witnesses had provided witness statements but the Claimant had not. Instead, he wished for the information provided in his ET1 claim form to stand as his evidence in chief. Prior to cross-examination he was asked if he wanted to say anything else in support of his case; he declined.

6. I was presented with a bundle of documents by the Respondent, amounting to some 90 pages. The Claimant also submitted some loose documents to the Tribunal but, when asked, he did not wish to show any of them to me. I was only able to take into account those documents to which the parties directed my attention either in their statements or during questioning.

7. The hearing had been listed for two hours. Thanks to the careful management of the hearing and the parties' co-operation, we were able to complete the evidence and submissions within three hours and ten minutes. There was not enough time for me to deliberate and deliver judgment and I therefore reserved judgment.

8. In these reasons I have referred to the submissions of the parties on disputes of fact only where it has been necessary to do so. As to their submissions on the legal questions to be decided, I have also referred to them in my analysis in the closing paragraphs of these reasons insofar as it has been necessary to do so. Neither party's submissions have been rehearsed in full.

Findings of fact

9. My findings of fact have been made according to the applicable standard in the Employment Tribunals: the balance of probabilities.

10. This was a short employment. The Claimant commenced employment with the Respondent as a Sales Executive on 4 January 2023. As is apparent from its title, the Respondent is a car dealership based in Solihull.

11. The main focus of the Claimant's role was to secure the sale of cars. In doing so he would have regular contact with customers and, as a natural consequence of being involved in the sale of cars to customers, needed to acquire customer bank and credit card details in order to process such sales.

12. The Claimant's claim form – which constituted his evidence in chief to the Tribunal – made no mention of how the Claimant carried out his role nor in fact any detail at all in relation to any events prior to him being taken home from work on 1 March 2023. He declined the opportunity to supplement his evidence with an oral account of the important events that took place within his employment, even though he gave evidence after the Respondent's witnesses and had therefore heard their versions of events.

13. I was not told of anything eventful that may have happened in the Claimant's employment up until 1 March 2023. On that day, however, Mr Rammell was approached by the Respondent's General Manager, Mr Declan O'Grady, in relation to a matter which a customer had raised with him.

14. It was an agreed fact that the customer in question had been present at the dealership on the morning of 1 March 2023 and that he had had dealings with the Claimant in relation to the purchase of a vehicle. It was further agreed that the Claimant had actioned an initial payment, by card, of a maximum sum of £1,000 in relation to the customer's purchase of a vehicle.

15. Nevertheless, the customer contacted Mr O'Grady on that day as he was having trouble transferring the sum of £4,000 to the Respondent's bank account, in relation to his purchase. The customer provided Mr O'Grady with the bank details he had been provided with in order to make payment, which did not appear to Mr O'Grady to be those of the Respondent. Mr O'Grady checked with the Respondent's payroll department to see if the bank details provided related to any of their employees, and the result of this inquiry was that the payroll department confirmed that they were those of the Claimant. Unfortunately, neither the customer complaint nor the investigative exercise carried out by Mr O'Grady were documented.

16. Although he had not mentioned anything about the originating customer complaint in his earlier evidence to the Tribunal, during cross-examination the Claimant accepted that he had dealt with this particular customer earlier that day, in the morning. He told me that he had actioned an initial card payment by the customer but denied that he had asked the customer to subsequently transfer money in any other way. The Claimant did, however, tell me that the customer had agreed to make regular payments going forward. He said that he had agreed to do so because the vehicle he was purchasing would not be delivered until September 2023, which at that point was six months away. I shall return to the Claimant's contentions in evidence later in these Reasons.

17. Mr O'Grady raised the customer complaint with Mr Rammell, who then convened a meeting on the afternoon of the same day. Although the Respondent has an HR department, Mr Rammell had never heard of the Acas Code of Practice. He contacted HR and the advice given to him by a Mr Gardner, of the HR department, was that the Claimant should be dismissed immediately. Despite the meeting having been convened for that purpose, upon Mr Rammell's own admission the Claimant was not afforded the opportunity to be accompanied at that meeting.

18. Whilst Mr Rammell could to some extent be criticised for adopting a knee-jerk approach to this matter, the fact that it was the Respondent's own HR department that both sanctioned and encouraged this course of events left the Tribunal extremely concerned about the competence of that department and its fitness for purpose. Nevertheless, any criticism of Mr Rammell in relation to the approach the Respondent adopted would in my judgment have to be tempered by the fact that he was merely acting upon the advice of those whose guidance he would naturally have trusted.

19. As a witness, I generally found Mr Rammell to be a truthful person who did his best to explain to me what had happened. Given that his oral answers generally corresponded to the version of events he had put forward in his witness statement, I considered him to be a witness whose evidence was both reliable and credible even if he could be criticised in relation to the decisions made at the time. He was willing to accept criticism where such criticism was justified.

20. On the other hand, the Claimant's evidential approach to the meeting on the afternoon of 1 March 2023 was highly unsatisfactory. In the early part of his cross-examination of Mr Rammell he put to the witness that he had not in fact been called to a meeting at all. In reply, Mr Rammell re-stated his written evidence which was that he had, and Mr Rammell reiterated exactly where it took place and who was present. The Claimant's contention to Mr Rammell could not be sustained, as the Claimant later admitted in his own evidence that not only had he been present at a "discussion" (as he described it), it had taken place in the very same location Mr Rammell had confirmed, and that the very same people had in fact been present. I formed the view that when the Claimant had earlier put that proposition to Mr Rammell that he knew what he was contending was false and that his use of the word "discussion" in place of "meeting" was deliberately chosen as a way of splitting hairs and, ultimately, in order to mislead the Tribunal.

21. The meeting of the afternoon of 1 March 2023 took place as Mr Rammell described, in Mr O'Grady's office. Those present were the Claimant, Mr Rammell, Mr O'Grady and Mr Stevenson.

22. The Claimant went on to agree, in very general and vague terms, that what was discussed at the meeting was a customer complaint and that the sum of £4,000 was mentioned. However, when asked about the detail of the discussion the Claimant was unwilling to be forthcoming in his answers and was only prepared to give any specific information pertaining to the discussion if he was very specifically asked. The Claimant's approach led me to conclude that his approach

to giving evidence was very much with the intention of being selective about the information he was willing to provide the Tribunal.

23. The Claimant accepted that the identity of the customer had been confirmed to him in the meeting. Mr Rammell contended in evidence that during the meeting the Claimant accepted he had provided that customer with his own bank details, but that he had done so "by accident" and as a "genuine mistake" (paragraphs 9 and 10). In his oral evidence the Claimant denied that he had done so. It was unsatisfactory that the Respondent did not document this meeting in any way, but I accepted Mr Rammell's version on the basis of his credibility and reliability in comparison to that of the Claimant.

24. Having had a discussion with the Claimant Mr Rammell adjourned the meeting and once again spoke to the Respondent's HR department. Once again, the advice forthcoming from HR was to dismiss the Claimant immediately.

25. The meeting was reconvened. Mr Rammell contended that at the conclusion of the meeting he informed the Claimant that he was dismissed with immediate effect. The Claimant denied this. In his ET1 claim form the Claimant contended that he was not dismissed and that he was simply sent home and told to await further instructions. In answer to one of my questions he stated that the purpose of this was in order that the Respondent could investigate what had happened. In his ET1 the Claimant contended that his date of termination was in fact 22 March 2023, which was the date he received a letter from Mrs Ouzman confirming that he had in fact been dismissed (page 35) on 1 March 2023.

26. Whilst I found Mr Rammell to be a credible and reliable witness and the Claimant the opposite, it was plain to me even on what the Claimant's own evidence that he had not remained in employment with the Respondent after 1 March 2023. He originally said in his ET1 that he had been given "numerous tasks" to do in the three-week period that followed 1 March 2023. Under cross-examination by Mrs Ouzman, this actually involved nothing other than answering three telephone calls from Mr Stevenson at the very start of the period. After that, there was nothing. Also under cross-examination the Claimant accepted that at all times in that period his access to the Respondent's systems was blocked.

27. Finally – and in my judgment, most significantly – the Claimant wrote an email to Mrs Ouzman on 21 March 2023 headed "Bank details for final payment", in which he requested a payslip for his "final" pay and mentioned copying in a Trade Union representative with a view to potentially enforce his "employment rights" (page 41). That email preceded Mrs Ouzman's letter of the following day, confirming that the Claimant had in fact been dismissed on 1 March 2023. It is inconceivable that the Claimant would write to the Respondent asking for his "final" payslip if there was a question mark in his own mind over whether he remained in its employment as at 21 March 2023.

28. In my judgment, the Claimant's assertion that he was not dismissed on 1 March 2023 and was merely sent home was transparently false and known by him to be so. There is no doubt in my mind that the evidence of Mr Rammell was to be

preferred on this matter: the Claimant was dismissed without notice at the end of the 1 March 2023 meeting.

29. Following the meeting Mr Stevenson took the Claimant home.

30. Given my observations and findings about the Claimant's honesty in this case, I had no hesitation in finding that he did indeed pass his own bank details to the customer in question instead of the Respondent's, and that he did so with the purpose of acquiring those funds for himself. It was not something that happened accidentally or indeed a case of a genuine mistake, as he had suggested to Mr Rammell at the time. That such a thing could happen accidentally or by mistake was to my mind fanciful in the extreme, and when asked, the Claimant put forward no explanation as to how it could have happened any other way.

31. I was reinforced in this finding by another very similar matter that had occurred a short time thereafter. Mr Rammell accepted that this referred to a different customer to the one who had cause to complain to Mr O'Grady on 1 March 2023, but he mentioned in evidence that this further customer had approached the Respondent after the Claimant's dismissal concerning a deposit payment they had made, of £500. Mr Rammell confirmed that the salesperson responsible for the transaction in question was the Claimant (paragraph 19), but that the bank details given to that customer were not those of the Respondent.

32. A letter appeared in the bundle, on Co-Operative Bank headed paper and dated 23 April 2023 (page 21). Mr Rammell confirmed that this document had been supplied by the customer in question, from their bank, to Mr O'Grady. This document stated that an attempt had been made by the Co-Operative Bank to recover a payment made by this customer to a Barclays Bank account holder. The letter supplied the Barclays Bank details and gave the name of the account holder – and thus the beneficiary of the payment – as David Michael Allen, and gave precisely the same address as the Claimant had supplied to the Tribunal in his ET1 claim form. There could be no sensible doubt that this was referring to the Claimant, and indeed he accepted that it was indeed his account.

33. When asked about how his bank details could end up in such a letter from an independent bank, the Claimant initially stated that he had "no idea" as this was an account that was, in his words, "no longer in use". However, when pressed further on the matter he conceded that this Barclays account was only closed in either late January or early February 2023, and was thus an open, active account of his during the first half of his employment with the Respondent. This information shattered the impression the Claimant had given, which was that he could not have been involved in this transaction because the account cited in the letter was closed at the time. It was, in my judgment, another quite cynical attempt on the Claimant's part to mislead the Tribunal.

34. I am satisfied, on the balance of probabilities, that on this second occasion the Claimant passed his bank details on to a customer of the Respondent, again with the purpose of acquiring that £500 for himself. I have reached this conclusion based on four principal reasons. The first is the fact that there were striking similarities between the facts of this occasion and the first occasion, which precipitated the Claimant's dismissal on 1 March 2023. Secondly, there was on

this occasion documentary evidence available which was independent of both parties and showed that the Claimant's bank details had been found through an inter-bank inquiry made at the behest of a customer. Thirdly, the fact that the Claimant's bank details should appear on such a letter would not easily be explained by mere accident or some other reason (indeed, no alternative explanation was put forward by the Claimant). Finally, my conclusion is based upon my assessment of the honesty of the Claimant as a witness in this case. If he has been prepared to be selective in his evidence (at best), and deliberately dishonest (at worst) to this Tribunal, that would be consistent with his having adopted a similar approach to customers of the Respondent.

35. Both Mr Rammell and Mr Stevenson gave evidence concerning the second allegation of fundamental breach, namely the use of customer credit card details to set up accounts on gambling websites. The sum and total of Mr Rammell's evidence on this issue was that since the Claimant's departure he had been informed that five customers had reported that this had happened. No particulars were provided in support of that assertion, nor did Mr Rammell state that to his knowledge the person who had done this was in fact the Claimant.

36. For his part, Mr Stevenson's evidence was decidedly vague. The thrust of his written evidence was that when driving the Claimant home on 1 March 2023, he overheard the Claimant having a telephone conversation in which he overheard the Claimant being shouted at by an unknown person that "I want my money now!". That, in my judgment, was not specific evidence that might have suggested the Claimant had done what the Respondent was alleging. Furthermore, whilst in his oral evidence Mr Stevenson confirmed that he had heard the same information as Mr Rammell and that he knew of at least one customer whose card details were used to set up a gambling site account, he did not go as far as to say that the customer in question had said that it had been the Claimant who had done this.

37. As was typical of the Respondent's approach to this case, there was no documentary evidence of a kind that might have suggested that the Claimant had committed this second fundamental breach of contract. That the Respondent should not keep any written records of a disciplinary meeting at which an employee is to be dismissed is serious enough, but that it should not keep any written records of complaints made to it by customers of such a serious nature is, in my view, astonishing.

38. The evidence put forward by the Respondent is, in my judgment, a wholly insufficient base upon which I could properly decide that it has satisfied the burden of proof in relation to this second allegation. For this reason, I therefore do not find that the Claimant fraudulently used customer credit card details to set up accounts on gambling websites.

39. As at 1 March 2023 the Claimant had been in employment for less than two months, and thus for only one complete calendar month. The leave year was accepted as following the calendar year. He did not take any annual leave during his short employment. It was agreed that the Claimant's gross weekly pay amounted to £450.91 and thus his daily gross rate of pay was £64.42.

40. The Claimant led no evidence on why he believed he was entitled to six days' accrued annual leave, save that he said that for four unspecified days during the employment he was absent through illness.

The law

Wrongful dismissal

41. Wrongful dismissal is a common-law contractual claim, normally pursued in respect of notice pay. The Employment Tribunal has jurisdiction to consider complaints of wrongful dismissal by virtue of **arts.3** and **4 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** as contractual claims arising or outstanding on the termination of employment.

42. If the claim is for notice pay it must first be proven that the employee had an entitlement to notice of the termination of their employment. The second stage concerns the dismissal itself: if the employee is dismissed without notice, a breach of contract is in principle established.

43. At the third stage it is for the employer to prove that it was entitled to dismiss the employee without notice. Such an entitlement is created if the employee had acted in fundamental breach of the contract of employment. This is typically (though not always) said to have occurred if the employee has engaged in conduct which would objectively be viewed as being so serious so as to repudiate the contract (**Hutton v Ras Steam Shipping Co Ltd [1907] 1 KB 834**, Court of Appeal). In this case the Respondent contends that it was contractually entitled to dismiss the Claimant without notice because of the seriousness of his conduct.

44. It is a long-established principle of law that even conduct which amounted to a fundamental breach of contract but was discovered after the event, and was not known to the employer as at the time of dismissal, would entitle the employer to dismiss an employee without notice as a matter of law (**Boston Deep Sea Fishing & Ice Co. Ltd v Ansell (1888) 39 ChD 339**, Court of Appeal).

45. If the Respondent was not so entitled, the Claimant would be entitled to an award of damages representing the pay she has been prevented from earning by the wrongful dismissal (**Eastwood v Magnox Electric plc; McCabe v Cornwall County Council [2005] 1 AC 503**, House of Lords). Typically, the amount of damages is assessed as reflecting the period of notice to which the employee was entitled to receive. In this case, notice pay of one week is all that is claimed.

Holiday pay

46. In a claim under **reg.30 Working Time Regulations 1998** for a compensation payment in relation to accrued but untaken annual leave upon the termination of employment, the first issue is to establish what the leave year was.

47. The second issue is to determine what the employee's entitlement to annual leave was. As statutory rights, workers are entitled to four weeks' annual leave under **reg.13** and a further 1.6 weeks' annual leave under **reg.13A**. The overall

statutory entitlement – and by which compensation payments are calculated – is to 28 days' annual leave in each leave year. However, in the case of a worker who has been employed for a period of less than one year, statutory annual leave accrues at a rate of one twelfth of the annual entitlement on the first day of each month of the leave year (r**eg.15A(2A)**). In the case of such a person, accrued periods are rounded up under **reg.15A(3)** from anything less than half a day to half a day, and from more than half a day to a whole day.

48. If, come the termination of employment, a worker has accrued more annual leave in the leave year than he has taken, he is entitled to a compensation payment in relation to the remainder (**reg.14**).

Analysis and conclusions

49. Applying the law to the facts I have found, my conclusions on all the matters to be decided are set out as follows. Where necessary, I have referred to the parties' submissions but it has not been necessary to fully rehearse them.

Wrongful dismissal

50. As stated in the opening paragraphs of these reasons, it was an agreed fact that the Claimant would in principle have been entitled to one week's contractual notice of the termination of this the termination of his employment by the Respondent. Furthermore, it was also agreed that the Claimant was dismissed without notice, albeit I have found that that occurred on 1 March 2023 and not 22 March 2023, as the Claimant had contended.

51. The critical issue in the Claimant's wrongful dismissal claim is whether the Respondent was entitled to dismiss him without notice on account of his being in fundamental breach of contract. My conclusion on this issue must necessarily be based on the facts I have found. I have found that on two occasions the Claimant passed his personal bank details to customers of the Respondent, instead of the Respondent's bank details, in order that he would acquire those funds for himself. What the Claimant did was plainly dishonest and very serious. It did not matter that the plight of the second customer was only discovered after the Claimant's employment had terminated; what matters is that the Claimant engaged in this conduct in relation to two separate, identifiable customers.

52. The Claimant's conduct did, as a matter of law, amount to a fundamental breach of the implied term of mutual trust and confidence as no employee would have reasonable or proper cause for doing such a thing and by definition it was something which was likely to destroy trust and confidence between him and his employer.

53. However, given my factual conclusion in relation to the second allegation, I am bound to conclude that the Claimant was not in fundamental breach of contract in that regard. There was simply not enough evidence provided by the Respondent to prove that the Claimant had sued customer credit card details in order to set up accounts on gambling sites.

54. If follows from my findings and this analysis that the Respondent was legally entitled to dismiss the Claimant without notice on 1 March 2023.

55. It further follows that the Claimant's claim of wrongful dismissal shall be dismissed.

Holiday pay

56. It was an agreed fact that the Claimant's employment began on 4 January 2023 and that the leave year followed the calendar year. It was also agreed that the Claimant took no annual leave for the duration of the employment. It was agreed that an amount was due from the Respondent as a compensation payment under **reg.14**: the only question was, how much.

57. As a worker in his first year of employment, the Claimant had completed one full calendar month of employment and thus he had, at the termination of his employment on 1 March 2023, accrued 2.33 days' leave as at that date. Applying the rounding-up principle set down by **reg.15A(3)**, his legal entitlement as at the date of termination was, however, to 2.5 days' annual leave and not simply two days as the Respondent contended.

58. The Claimant's contention that he was entitled to six days' annual leave as at the date of termination was unsupported by any evidence and, in any event, ran counter to the statutory calculation required under **regs.13**, **13A** and **15A**. For these reasons, I did not accept it.

59. Therefore, despite the fact that I have dismissed his claim of wrongful dismissal I consider that the Claimant's claim in respect of holiday pay should succeed. Given that 2.5 days' leave was accrued and untaken as at the date of termination, the Respondent is ordered to pay to the Claimant the sum of £161.05 (2.5 times £64.42).

Employment Judge P Smith

Date: 24 November 2023