



EMPLOYMENT TRIBUNALS

Claimant: Mr K Walsh

Respondent: Hydrance Limited t/a TVF Promotions

HELD AT: Liverpool

ON: 17 February 2017

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: Written submissions

Respondent: Written submissions

JUDGMENT ON REMEDY

The judgment of the Tribunal is that –

1. The respondent is ordered to pay to the claimant damages for unfair dismissal in the sum of £5,892.03 consisting of a basic award in the sum of £2,874, a compensatory award in the sum of £3018.03 (loss of earnings £2,718.03 net plus £300 loss of statutory rights).
2. The respondent is ordered to pay to the claimant Tribunal fees in the sum of £1,200.

REASONS

1. This was a remedy hearing following a judgment orally given and promulgated on 19 January 2017 following written submissions and various documents relating to remedy. It has been agreed by the parties that completion of the remedy hearing should take place by written submissions only and without their attendance. The Tribunal was unable to complete the remedy hearing on 18 January 2017 due to the

lack of information from the claimant concerning his employment at Fiori t/a Circadian Imports Limited in which the Schedule of Loss at page 29(a) of the agreed bundle remained silent.

2. The claimant has helpfully provided a letter from Fiori dated 23 January 2017 confirming he started to work as a driver on 11 July 2016 on a trial basis before taking on a permanent position on a 40 hour a week contract from 1 August 2016. During the trial period the claimant worked five days with a total of 33 hours at £7.20 per hour. The claimant also provided wage slips from Circadian Imports Limited which revealed he had earned. In total, between July 2016 to January 2017 he had earned £6,427.15.

3. The Tribunal also has before it wage slips relating to the respondent. It is not disputed the claimant (whose date of birth is 19 August 1972) was aged 43 at the date of dismissal. He commenced employment with the respondent on 11 September 2014. The effective date of termination was 16 June 2016 whereupon he received two weeks' notice. The claimant's continuous employment with the respondent was 11 years and thus under statute he ought to have been paid 11 weeks notice pay, thus the payment was 9 weeks short. The claimant earned a gross weekly wage of £490.18, and a net wage of £376.80 as a sign fixer.

4. It is not disputed the basic award totals £5,748 (the claimant's salary being capped at £479) with 12 weeks being the applicable multiplier.

5. With reference to the compensatory award, in his Schedule of Loss the claimant claims loss of earnings from 17 June 2016 to 18 January 2017, the date of the liability hearing. However, that calculation cannot be entirely correct as the claimant was paid in full to 30 June 2016, effectively given two weeks' notice. The calculation for loss of earnings must therefore commence on 1 July 2016 as set out in the respondent's counter Schedule of Loss. It is undisputed the claimant was entitled to 11 weeks' notice pay. He received two weeks' notice at the time of his dismissal and his wrongful dismissal claim totalled £3,391.20 (£376.80 x 9).

6. On behalf of the respondent it is submitted that to award the claimant nine weeks' notice in addition to the loss of earnings element of the compensatory award would result in the principle of double recovery in favour of the claimant. It was submitted on behalf of the respondent that the amount of notice pay should be reduced accordingly. This argument has not been addressed on behalf of the claimant who is given the opportunity to respond, if so advised, within 14 days of promulgation of this Judgment, whereupon the Tribunal will make a final deliberation on the wrongful dismissal remedy. The Tribunal notes the Counter Schedule of Loss was lodged with it on 15 February 2017, one working day before the reconvened remedy hearing. Accordingly, it is just and equitable to give the claimant an opportunity to comment on why, when considering the just and equitable compensatory award of loss of earnings claimed by the claimant totalling £2718.03, this should not be extinguished by notice pay in the sum of £3,391.20 (9 weeks @ £376.80) to avoid double recovery leaving the sum of £3,391.20 to be awarded as damages for wrongful dismissal, or in the alternative, the compensatory award

remains as ordered and the Tribunal makes an award of £673.17 (3391.20-2718.03) damages for breach of contract in relation to unpaid notice pay.

7. With reference to the compensatory award the loss of earnings element, one of the issues before the Tribunal was the claimant's failure to mitigate. The burden is on the respondent to prove failure to mitigate on the balance of probabilities, which it has failed to do. It is notable that the claimant, under cross examination, was not entirely correct in the answers he gave as to when he started to work for Fiori and on what basis. When asked how many days he worked, his response was "two". The reality of the situation was he had worked on a trial basis for five days totalling 33 hours from 11 July 2016, with a permanent contract on 1 August 2016.

8. Given the economic climate, and the fact the claimant was dismissed on the grounds of misconduct, the Tribunal finds on the balance of probabilities he had mitigated his loss by accepting employment with Fiori, despite the differential of £78 per week. The Tribunal was satisfied that once the claimant took part in the trial period and accepted the position on a permanent basis, he stopped looking for alternative employment in the expectation that there would be none. The claimant confirmed he had "never looked" for a higher paid job, and it is the Tribunal's view that it was incumbent upon the claimant to do so. It is unsatisfactory for the claimant to sit back and expect the respondent to pay the differential indefinitely. It is also likely that on some date in the future the claimant may receive a wage increase and it would not be just and equitable to order a future loss of earnings in excess of three months from the date of the liability hearing. Any future loss of earnings has been calculated at 12 weeks at the differential of £78 which equates to £936 less the 50% deduction which is equal to £468. For the avoidance of doubt, the Tribunal is satisfied that up until 18 April 2017 the claimant mitigated his loss on the balance of probabilities.

9. Turning to loss of statutory rights, the Tribunal finds it is just and equitable to award loss of statutory rights in the sum of £600 to reflect the 11 year continuity of employment the claimant had with the respondent and his loss of employment protection.

10. As indicated to the parties, the Tribunal orders payment of the Tribunal fees incurred by the claimant in the sum of £1,200.

11. The Tribunal notes that the claimant has received the £300 for unlawful deduction of wages.

12. In accordance with the letter dated 15 February 2017 sent to the Tribunal on behalf of the respondent, it notes that the claimant received an additional payment for the month in June 2016 in respect of accrued holidays, thus the wage slip would not be an accurate reflection of the claimant's salary unlike the wage slips for March, April and May 2016. The Tribunal has taken this into account.

13. The Tribunal note the respondent is of the view the claimant undertook work for Aintree Racecourse prior to his commencement date with Circadian. There is no evidence to this effect before the Tribunal, and it is not a matter the Tribunal can take

into account at this stage of the process. However, it is open to the parties to request a reconsideration hearing should such evidence become available, and given the claimant's failure to declare his earnings with Fiori previously, the claimant is ordered to provide to the respondent details of any work which he undertook for Aintree Racecourse (or any other person/organisation/company) within seven days of promulgation of this Judgment.

Unfair dismissal

Basic award

12 x £479	£5784.00
Less 50% deduction:	£2874.00

Compensatory award

1.7.15 to 18.1.17

19 weeks @ £376.80	£10,972.20
Less total earnings during period: £6,427.15	
Total	£4,500.05
Less 50% deduction;	£2250.03
3 months future loss of earnings at	
Differential of £78 net per week	£936.00
Less 50% deduction:	£468.00
Loss of statutory rights	£600
Less 50% deduction	£300

Total compensatory award: £3018.03

Total award: £5892.03

Employment Judge Shotter

6 March 2017



JUDGMENT AND REASONS SENT TO THE PARTIES ON
10 March 2017

.....

.....

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2403053/2016

Name of Mr K Walsh v Hydrance Limited t/a TVF
case(s): Promotions

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 10 March 2017

"the calculation day" is: **11 March 2017**

"the stipulated rate of interest" is: 8%



MISS L HUNTER
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.justice.gov.uk/tribunals/employment/claims/booklets

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.