

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100398/2018

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Held at Glasgow on 5 April 2018

Employment Judge: Ms M Robison

10 **Mr R Malcolm**

**Claimant
In Person**

15 **Helensburgh Tyre Service Ltd**

**Respondent
No appearance**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

(1) The claimant was unfairly constructively dismissed by the first respondent in terms of section 95(1)(c) and section 104 of the Employment Rights Act 1996; and;

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(2) The first respondent shall pay to the claimant the following sums:

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i. **NINE THOUSAND FIVE HUNDRED AND FORTY SIX POUNDS AND SEVENTY SIX PENCE (£9,546.76)** in respect of underpayment of the national minimum wage, under section 13 of the Employment Rights Act 1996;

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ii. **ONE THOUSAND SIX HUNDRED AND FORTY SEVEN POUNDS (£1,647)** in respect of unpaid holiday pay, under section 13 of the Employment Rights Act 1996; and

E.T. Z4 (WR)

- (3) **TWENTY THREE THOUSAND EIGHT HUNDRED AND NINETY POUNDS AND SIXTY FIVE PENCE (£23,890.65)** in respect of compensation for unfair dismissal, under section 123 of the Employment Rights Act 1996.

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- (4) The Employment Protection (Recoupment of Jobseekers' Allowance & Income Support) Regulations 1996 apply to this award. The prescribed element is £23,112.90 and relates to the period from 25 March 2015 to March 2016.

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REASONS

15 Introduction

1. The claimant lodged a claim in the Employment Tribunal on 1 July 2015, claiming unfair dismissal and underpayment of wages.

- 20 2. Prior to the termination of his employment on 24 March 2015, he had sought advice from his local CAB about underpayment of wages, and his belief that his employer was not paying him the national minimum wage. Three or four weeks after he was dismissed, he went to the CAB for further advice about pursuing a claim against the respondent.

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3. He attempted to complete the ET1 application form on line but he received an on-line response stating that his application could not be accepted without an early conciliation certificate. He subsequently contacted ACAS, who issued an early conciliation certificate dated 16 June 2015. He completed the claim ET1 form, including the EC reference number.

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4. He said after that he could not pursue the claim because he could not afford to pay the fee. He did not then know about remission and he had hoped to be in full-time employment so that he could pay the fee and pursue the claim.

5. His claim was therefore dismissed for want of paying the appropriate fee.
6. Following the decision in **R (Unison) v Lord Chancellor [2017] UK SC 51**,
5 the claimant made an application to have his claim reinstated. A notice of claim was sent to the respondent by letter dated 18 January 2018. No response to that claim was received by the deadline of 15 February 2018. This case therefore proceeds as undefended.
- 10 7. A final hearing was set down to take place on 9 April 2014. The respondent was advised of the date of the final hearing for information only. The claimant attended the final hearing in person. The respondent did not attend.
- 15 8. I heard evidence from the claimant. He lodged around 20 wage slips, although he had no further documentary evidence to lodge (he said that he had moved three times since his dismissal and these were the only documents he could locate).
- 20 9. I found the claimant to be a credible and, despite the passage of time since he lodged his claim, a reliable witness.

Findings in Fact

- 25 10. The Tribunal finds the following relevant facts proved:
 11. The claimant's date of birth is 16 June 1993. He therefore turned 18 three days after he had commenced employment with the respondent as an apprentice mechanic on 13 June 1993.
 - 30 12. Throughout his employment with the respondent, the claimant worked Monday to Friday 8 am to 6 pm; that is 10 hours each day with a half hour lunch break and two 15 minute breaks for which he was not paid. On Saturdays, he worked 8.30 am to 1 pm, with a half hour break.

13. He was always paid in cash.

14. Initially he was paid £100 per week. Initially, he did not receive wage slips.
5 He pressed his employer to give him wage slips because he needed proof of earnings at that time, because he was trying to secure accommodation through a housing association. Eventually, in December 2011, the respondent started to give the claimant wage slips. The claimant then received wage slips until he was dismissed in 2015

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15. In June 2012, after pressing his employer for the correct wages, his pay was put up by £50 per week. He was again paid this in cash, but it was not recorded on his pay slips, which continued to record £100. He believes that Mr Aranci was doing this to save money on tax.

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16. He had initially worked with another colleague, a Robert Curtis, who was a tyre fitter. Mr Curtis was sacked by the respondent in January 2013. The claimant recollected that he did not return after the new year holiday.

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17. The length of time it takes to train as an apprentice mechanic is flexible; it depends on how much time is spent at college. Although when he started the claimant did attend college on occasion, after Mr Curtis was sacked, he was then the only other employee, apart from the owner, Frank Aranci, who was working for the respondent. After that he did not attend college at all because
25 they were too busy, although he did go to sit all his exams in one day. He progressed to level two.

18. After that they got really busy, and around April/May 2013, Mr Aranci engaged his daughter to work part-time in the reception.

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19. After Mr Curtis was sacked, Mr Aranci stated that he would give the claimant a pay rise, as he was covering his work as well. He asked to be paid the minimum wage. However, it was not until June 2013 that he increased his wage by £20, so that he was getting £170 cash, but this was still recorded on

his wage slips as £100. He was always paid in cash, despite his requests for his wages to be put into his bank account because he wanted to build up a credit rating.

5 20. He continued to express concern about his wages however, because he knew that he was not getting paid the minimum wage. Eventually, in the first week of September 2013, his pay was increased to £260 per week (before tax) and he did not get another pay rise for all the time that he worked there. However, his wages slips recorded he was paid £100 per week, until after September
10 2014, when that was increased to £120.

21. He was very aggrieved about not being paid minimum wages because he thought that he was shouldering most of the work. Mr Aranci would often leave the garage through the day and visit friends in other garages and in the
15 neighbourhood, and the claimant and his daughter would be left to staff the business. The business was getting busier and busier at that point, such that Mr Aranci could afford to go on holidays and buy a new car. Still the claimant was struggling and he felt this was a “kick in the teeth”.

20 22. At one stage, after September 2013 when his wage was increased to £260, Mr Aranci would say to the claimant that he should work less hours, and that he should take longer breaks. He understood this was related to the belief that if he worked less hours, he would be getting the right pay. However, the garage was so busy that he was never able to do that. As it was, he would
25 usually have a working lunch otherwise there was too much to do when he got back to work.

30 **Holidays**

23. The claimant took virtually no holidays when he was working for the respondent. This was partly because they were so busy so he did not have

time, and partly because he knew that he would not get paid and he would not be able to afford it.

5 24. He calculates that he took around 25 days off while he was working there (up to the beginning of March 2015), which would consist of a day off now and then of planned days off when he went to visit his gran, but also including days when he was off sick.

10 25. In March 2015, the claimant had his house broken into by an acquaintance who tried to attack him and who stole his TV and other items from his house. The claimant was very upset by this incident. Mr Aranci told him that he should take two weeks off work to sort himself out. He gave him £600 in cash which the claimant understood to be holiday pay, although Mr Aranci did not classify it as holiday pay.

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Rent arrears

20 26. The claimant was renting a flat but had got into rent arrears. By March 2015, he owed £1,000 in rent arrears. He had been served with an eviction notice. He attended a meeting with the housing association, and he had reached an agreement with them to pay the arrears by Wednesday 25 March at 12 noon.

25 27. Because of this, it became all the more pressing that he should get his wages sorted, and get the arrears of pay that he was due. When he again pressed Mr Aranci to pay him the wages he was due, Mr Aranci said that he would pay the rent arrears for him.

30 **Dismissal/Resignation**

28. The claimant returned to work after this incident on 22 or 23 March. However, although he “tried really hard”, he just “didn’t have [his] head straight”. It was

very busy. He was aware that he was working slower than he normally did and that he was making mistakes, and having to re-do things. He was conscious that he “should have left [his] problems at home”.

5 29. Mr Arcani took issue with this, and started shouting at the claimant; he told him that he was not 100% focused on his work and he should try harder.

30. During this discussion, the claimant raised the issue of the arrears of pay that he was due; he raised the fact that Mr Arcani had said that he would pay his rent arrears but had not; he raised the fact that unless he paid his rent arrears that he would be evicted from his flat. He said that he was fed up and concerned about losing his flat and that he should at least pay him the minimum wage. Mr Arcani said that he would not be giving him any more money

15 31. Eventually Mr Arcani said “Get to fuck”. The claimant responded by saying “fuck it, I am leaving”. He said that he walked out because of the way that he was treated; because he was not getting paid what he was due; because he was not getting paid the minimum wage, which was all he was asking for and which he believed Mr Arcani could easily afford.

Mitigation

25 32. After the claimant’s employment was terminated, he received job seekers allowance. He sought further employment by undertaking searches on line and handing in CVs everywhere he thought he had a chance of a job. He completed the Job Centre requirements by advising them of all of the jobs which he had applied for.

30 33. He obtained employment on 28 June 2015. This was part-time seasonal work with two linked companies, the Helensburgh Community Advertiser and Night and Day Cleaning both owned by a Mr Stewart Maitland and his friend Ian.

He would work for either company as and when required, mainly covering for others' holidays. This job lasted two months and he was paid £500 per month.

5 34. He was out of work again from September 2015 to March 2016, when he obtained employment as a mechanic at Autopoint, which is a garage in Helensburgh. He was paid £250 per week, but he sometimes found himself working 5, 6 and 7 days a week. Again he had the same problem in that he was not getting the minimum wage. He therefore left after a year. He is now working at McDonalds where he does get paid the minimum wage.

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The Relevant Law

National minimum wage

15 35. The law relating to the national minimum wage (NMW) is set out in the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 2015.

20 36. A worker who is not paid the NMW will be deemed to be entitled under their contract of employment to the difference between what they are paid and the national minimum wage.

37. The following rates applied between 2011 and 2015:-

Year	21 and over	18-20	Under 18	Apprentice
2015	£6.70	£5.30	£3.87	£3.30
2014	£6.50	£5.13	£3.79	£2.73
2013	£6.31	£5.03	£3.72	£2.68
2012	£6.19	£4.98	£3.68	£2.65
2011	£6.08	£4.98	£3.68	£2.60
2010	£5.93	£4.92	£3.64	£2.50

38. The rate increased each year on 1 October.

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39. Apprentices who are under 19, and apprentices who are over 19 but in the first year of their apprenticeship, are entitled to the apprentice rate. Otherwise they are entitled to the minimum wage for their age.

5 40. A worker who believes that they have not been paid the national minimum wage may bring a claim alleging an unauthorised deduction of wages under Part II of the ERA, or make a claim for breach of contract, in connection with the termination of their employment.

10 **Breach of contract**

41. The provisions relating to breach of contract claims are contained in the Employment Tribunals (Extension of Jurisdiction (Scotland) Order 1994.

15 42. The National Minimum Wage Act incorporates through statute an implied term into every contract of employment that the worker will not be paid less than the minimum wage. Thus the failure of an employer to pay the national minimum wage as set out above is a breach of contract.

20 43. The 1994 Order states, at article 3, that proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum if the claim is one for damages for breach of a contract of employment and the claim arises or is outstanding on the termination of the employee's employment.

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Holiday Pay

30 44. The law relating to arrears of holiday pay is contained in the Working Time Regulations 1998. Regulation 13(1) states that all workers are entitled to four weeks' annual leave in each leave year. Regulation 13A states that a worker is entitled in each leave year to a period of additional leave of 1.6 in any leave year beginning on or after 1 April 2009.

45. Under Regulation 16, a worker is entitled to be paid in respect of any period of annual leave to which he is entitled at a rate of a week's pay in respect of each week of leave, based on a worker's normal working hours.

5 46. The Regulations state that leave to which a worker is entitled may not be replaced by payment in lieu except where the worker's employment is terminated.

10 47. Regulation 30(1)(b) states that a worker may present a complaint to an employment tribunal where his employer has failed to pay him the whole or any part of any amount due to him by way of payment in lieu of accrued but untaken leave upon termination of employment. In such circumstances, the tribunal is required to "order the employer to pay to the worker the amount which it finds to be due to him".

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Arrears of pay

20 48. Claims for underpaid holiday pay are pursued under the provisions of the Employment Rights Act 1996. Section 13(1) of the 1996 Act states that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is authorised by a statutory provision or a relevant provision of the worker's contract or he has the worker's consent.

25 49. "Deduction" is explained in section 13(3) as "where the total amount of wages...is less than the total amount of wages properly payable...the amount of the deficiency shall be treated....as a deduction".

30 50. Section 23 of the ERA states that a worker may present a complaint to an employment tribunal that his employer has made a deduction in contravention of section 13.

51. A claim for unlawful deduction of wages must be brought within three months of the date of the deduction (or where the deduction is part of a series, within three months of the last deduction) (section 23(2) and (3)).

52. The Deduction from Wages (Limitation) Regulations 2014 apply to complaints presented to an employment tribunal on or after 1 July 2015. Regulation 2 amends section 23 of the ERA to the effect that the Employment Tribunal can
5 only consider deductions from wages where the wages from which the deductions were made were paid within the previous two years before the worker brought their complaint to an employment tribunal (section 23(4A)).

53. In **Sash Window Workshop Ltd v King [2018] IRLR 142**, the Court of
10 Justice of the European Union, considering the Working Time Directive, which was implemented in the UK through these holiday pay provisions, held that article 7 precludes national provisions or practices that prevent a worker from carrying over, and where appropriate accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of
15 several consecutive reference periods because his employer refused to remunerate that leave. However, as there has been no domestic judicial authority regarding the implications of that decision, I consider I am bound to apply the 2014 Regulations to the holiday pay aspect of this claim.

20 **Unfair dismissal**

54. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (the 1996 Act). Section 94(1) states that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) states that an
25 employee is dismissed if 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. This is commonly known as "constructive dismissal".

55. In **Western Excavating Ltd v Sharp** 1978 IRLR 27, the Court of Appeal set
30 out the general principles in relation to constructive dismissal. Lord Denning stated that "An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract”.

56. The fundamental breach need not be the sole cause of the employee’s resignation. Where there is more than one reason why an employee left a job it is necessary to examine whether any of them was a response to the breach, and not necessarily the principal or main cause of the resignation (**Wright v North Ayrshire Council** 2014 IRLR 4).

57. A constructive dismissal is not necessarily an unfair dismissal. A tribunal in determining whether a constructive dismissal is fair or unfair must go on to apply the tests set down in section 98 of the 1996 Act.

58. Section 98(1) of the 1996 Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

59. Section 98(4) provides that 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, 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 dismissal and this is to

be determined in accordance with equity and the substantial merits of the case.

Remedies for unfair dismissal

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60. Under section 113 of the 1996 Act, if the tribunal finds that the claimant has been unfairly dismissed, it can order reinstatement or re-engagement, or where no award for reinstatement or re-engagement is made, it can award compensation under section 112(4) of the 1996 Act.

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61. Section 118 of the 1996 Act states that compensation is made up of a basic award and a compensatory award. A basic award is based on age, length of service and gross weekly wage (section 119). The amount is a half week's pay where the employee was below the age of 22.

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62. Section 123(1) of the 1996 Act states that the compensatory award is such amount as the tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. This generally includes loss of earnings up to the date of the hearing (after deducting any earnings from alternative employment), an assessment of future loss, if appropriate a figure representing loss of statutory rights, pension loss etc.

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Conclusions and decision

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63. This is a case which has been reinstated following the decision of the Supreme Court in the Unison case. The case raises a number of issues, as follows:

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- i) whether the claimant is entitled to arrears in respect of underpayment of the national minimum wage;
- ii) if so, the period for which the claimant is entitled to arrears of the national minimum wage

- iii) whether the claimant is entitled to arrears in respect of unpaid holiday pay
- iv) if so, the period over which arrears should be calculated;
- v) whether the claimant was constructively dismissed;
- 5 vi) if so, whether dismissal was unfair;
- vii) if so, what compensation is the claimant entitled to.

National Minimum Wage

10 64. With regard to the national minimum wage, the claimant commenced employment on 13 June 2011. His birthday is 16 June. The rate increased on 1 October each year. He was paid £100 per week until 15 June 2012; then £150 per week until 15 June 2013, then £170 per week to 31 September 2013; then from 1 October 2013 until he was dismissed, he was paid £260 per week. He was entitled to the apprentice rate only for the first year of his apprenticeship.

15 65. I have not deducted sums paid over the national minimum wage for the period from October 2013 to June 2014. That is because I considered for that period alone the claimant was paid more than the minimum required, and that the claimant was therefore entitled to that sum under his contract.

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National Minimum Wage Table

Dates	Age	Rate	Hrs	Actual	Due £	wks	Difference	Total £
13/6/11-1/10/11	18	£2.50	49	100	122.50	17	22.50	382.5
1/10/11-15/6/12	18	£2.60	49	100	127.4	32	27.40	876.80
16/6/12-31/9/12	19	£4.98	49	150	244.02	16	94.02	1504.32
1/10/12-15/6/13	19	£4.98	49	150	244.02	37	94.02	3478.74

16/6/13-31/9/13	20	£4.98	49	170	244.02	15	74.02	1110.30
1/10/13-15/6/14	20	£5.03	49	260	246.47	37	-13.53	(500.61)
16/6/14-31/9/14	21	£6.31	49	260	309.19	15	49.19	737.85
1/10/14-24/3/15	21	£6.50	49	260	318.50	25	58.25	1456.25
Total								9546.76

Holiday pay

66. The claimant's evidence was that for the first three years of his employment that he took a total of 25 days leave (some of which he said related to sick leave). He said that he took 10 days in the period leading up to his dismissal. The claimant therefore took an average of 8 days per year of employment. The claimant would however have been entitled to 28 days each year. The claimant worked 9 hours each day. On average, and using approximate figures, the sums that would be due are set out in the following table.

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Holiday pay table (totals)

Dates	Days taken	Days due	Total days	Total hours	Hourly rate	Total £
13/6/11-1/10/11	3	14	11x9	99	£2.50	247.5
1/10/11-15/6/12	5	14	9x9	81	£2.60	210.6
16/6/12-31/9/12	3	14	11x9	99	£4.98	493.02
1/10/12-15/6/13	5	14	9x9	81	£4.98	403.38
16/6/13-31/9/13	1	6	5x9	45	£4.98	224.1
1/10/13-15/6/14	7	20	13x9	171	£5.03	860.13
16/6/14-31/9/14	1	6	5x9	45	£6.31	283.95
1/10/14-24/3/15	10	14	4x9	36	£6.50	234
Total						2956.68

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67. However, as discussed above the Deductions from Wages (Limitations) Regulations on the face of things apply to this claim, because this claim was lodged on 1 July 2015, that is the very day that they came into effect.

68. Thus for the period from 13 June 2011 to 24 March 2013 (ie two years back from the date of dismissal), the claimant is not entitled to arrears of holiday

pay. Consequently, the sums due, based on the evidence heard and applying the limitation Regulations are set out in the following table.

Holiday pay table (limited)

Dates	Days taken	Days due	Total days	Total hours	Hourly rate	Total £
25/3/13-15/6/13	1	4	3x9	27	£4.98	134.46
16/6/13-31/9/13	1	4	3x9	27	£4.98	134.46
1/10/13-15/6/14	7	20	13x9	171	£5.03	860.13
16/6/14-31/9/14	1	6	5x9	45	£6.31	283.95
1/10/14-24/3/15	10	14	4x9	36	£6.50	234.00
Total						1,647

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69. Further, on the evidence I heard the claimant received the sum of £600 shortly prior to his dismissal, which he understood represented holiday pay, and in the circumstances I have deducted this sum from the total sums due.

10 **Constructive dismissal**

70. This is a case where it is not clear whether the claimant was dismissed or whether he resigned. In his evidence he said that after the altercation with Mr Aranci on the last day of his employment, Mr Aranci had told him to "Get to fuck", and in response he had said "Fuck it, I am leaving". I find in the
15 circumstances the claimant was dismissed, but if I am wrong about that I find that he resigned in circumstances in which he was entitled to, because of his employer's conduct, on the basis that the respondent breached the claimant's contract, by not paying him the national minimum wage,, or that the
20 respondent's refusal to pay his rent arrears as promised, was the final straw, and that breach was sufficiently serious to entitle him to resign and claim unfair dismissal. In all the circumstances of this case, no potentially fair reason having been advanced, I find that dismissal in the circumstances was not within the range of reasonable response, and therefore that dismissal was
25 unfair.

71. I therefore considered remedies. The claimant is entitled to a basic award, which is calculated at a rate of one half week's pay for each full year of employment. The claimant ought to have been in receipt of £318.50 per week as at March 2015, and thus in this respect the claimant is entitled to £159.25 x 3, that is £477.75.

72. I was aware that the claimant was originally engaged as an apprentice, but from the evidence I heard that arrangement was not honoured by the respondent, and I therefore took the view that the claimant was, following the first year of his engagement, employed on a standard contract of employment.

73. With regard to the compensatory award, the claimant's evidence was that although he got some seasonal work, he did not obtain full-time alternative employment until September 2016. I find on the evidence that the claimant has sought to mitigate his losses, and that he is entitled to a compensatory award until that date, as well as the usual award for loss of statutory rights. That sum must be reduced by £1000 in respect of sums earned in mitigation.

Recoupment

74. As the claimant has been in receipt of Job Seekers' Allowance, the relevant department will serve a notice on the respondent stating how much is due to be repaid to it in respect of JSA. Meantime, the respondent should only pay to the claimant the amount by which the monetary award exceeds the prescribed element, if any.

75. The prescribed amount consists of the loss of wages from the date of dismissal until those losses ceased, less sums earned. On the basis of the evidence I heard, past losses accumulated only until September 2016. The dismissal took effect on 24 March 2015 and losses ended in September 2016, that is 75 weeks. The prescribed amount is therefore £23,112.90. The

balance falls to be paid once the respondent has received the notice from the relevant department.

Compensation Table

Head of loss	Calculation	Sub-total	Totals
Underpayment of NMW		£9,546.76	
Holiday pay		£2,444.56	
Deduct paid to account		(£600)	£10,593.76
Basic award	3 x £159.25	£477.75	
Loss of statutory rights		£300	
Loss from termination (24/3/15) to March 2016 – 52 weeks at £6.50 per week plus 23 weeks at £6.70 to September 2016	(52 weeks x 49 hours x £6.50) = £16,562 + (23 weeks x 49 hours x £6.70) = £7,550.90	£24,112.90	
Less sums earned		(£1,000)	£23,890.65
Total award			£34,484.41

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10 Employment Judge: M Robison
 Date of Judgment: 30 April 2018
 Entered in register: 30 April 2018
 and copied to parties