Case Number: 2300419/2017

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr W Augustine		**Data Cars Limited**

Held at Croydon **On 17 February 2020**

BEFORE: Employment Judge Siddall (Sitting Alone)

Representation

For the Claimant: **In person**

For the Respondent: **Mr G Bansal**

JUDGMENT ON PRELIMINARY HEARING

The decision of the tribunal is:-

1. The claim for wrongful dismissal succeeds and the Respondent shall pay the Claimant a week's notice pay amounting to £465 by way of damages for breach of contract;
2. The Respondent shall pay the Claimant two week's pay amounting to £932 in accordance with section 38 of the Employment Act 2002 as the Respondent did not issue him with written particulars of employment pursuant to section 1 of the Employment Rights Act 1996;
3. The Respondent shall pay the Claimant £656.80 for failure to allow him access to national minimum wage records pursuant to section 11 of the National Minimum Wage Act 1998;
4. It is declared that the Respondent failed to pay the Claimant the National Minimum Wage and he is awarded the sum of £19.04.
5. The total award made to the Claimant is £2072.84.
6. The claims for detriment under 23A of the National Minimum Wage Act, under regulation 7 of the Part Time Worker Regulations and under section 45A or

44(1)(c) of the Employment Rights Act are struck out as the Claimant has failed to pay the deposit ordered on 9 July 2019.

7. The striking out of the claim under regulation 5 of the Part Time Worker regulations due to failure to pay the deposit has been reconsidered and will proceed to a full merits hearing.

REASONS

1. The Claimant brings a number of claims relating to his period working as a driver for the Respondent. He claims that he was both a worker and an employee, and that as such he was entitled to payment of the national minimum wage, holiday pay, notice pay and written particulars of employment. At a hearing in July 2019 I agreed that the Claimant was both a worker and an employee. The claim for holiday pay was dealt with by consent at a hearing before Judge Wright in November 2019. The Claimant brought claims that he had been subjected to detriments and to less favourable treatment which were the subject of a deposit order that I made on 9 July 2019. The Claimant failed to pay the deposit and so those claims are currently struck out (although I will deal with one aspect of the deposit order below). This hearing was listed in order to decide upon the appropriate remedy for the remaining claims. I heard from Mr Gee Bansal, Driver Liaison manager of the Respondent. I also heard evidence from the Claimant.

2. The facts I found and the conclusions I have drawn from them are as follows.

3. In February 2016 the Claimant applied to join the Respondent as a mini-cab driver. The Respondent had produced evidence showing jobs that were accepted by the Claimant from 23 February 2016 onwards. At an earlier hearing it was stated that they were not able to produce any records from earlier than that date. They calculated that the Claimant had worked for them for 1043 hours from 23 February to 13 September 2016. The Claimant says and I accept that he carried out his first job on or around 19 February 2016. He estimates that he worked around 21 hours up to 23 February, making a total of 1064 over the period of his contract. Mr Bansal can offer no explanation for the

lack of records prior to 23 February and I accept the Claimant's evidence on this point. Both parties agree the last day he worked for them was on 13 September 2016.

4. There is dispute over what the Claimant earned over the period of his contract. At the hearing in July I ordered the Respondent to produce details of what they said the Claimant had been paid, and details of any charges or fees incurred by him as part of the driver agreement. The Respondent produced records from its 'icabbie' software system which recorded that he had been paid a total of £14,670.15. The Claimant disputed this figure. He said it made no allowance for customer 'no shows', cancellations or underpayments. On the schedule that he produced in response to the Respondent's schedule and dated 25 October 2019 he asserted that he had only been paid £11,582.

5. The Claimant produced a detailed statement setting out what he said he had been paid each week and the charges he had incurred. However he was not able to produce evidence in support of his statement. He said that he did not keep record of the jobs he did or what he earned each day. As a mini cab driver he could be paid both by card or in cash. He told me he had completed a tax return for the tax year to 5 April 2016 but that this showed he owed no tax after the deduction of all his expenses.

6. In response the Claimant's concerns about the 'icabbie' records produced, Mr Bansal replied that if a customer cancelled or did not turn up, the driver could press a button on the app that was used in the vehicle and the system would be adjusted to show that the driver had earned nothing. Where the customer underpaid the arrangement was less certain. The driver would have to notify the office and he would be expected to try and recover the shortfall from the customer. I asked about the rate of cancellation and 'no shows'. Mr Bansal estimated that out of a thousand bookings, there might be 50 or 60 'no shows' and maybe 3 or 4 cancellations of booked jobs.

7. The state of the evidence presented by both parties as to the correct level of earnings was unsatisfactory. I have noted the reversal of the burden of proof required by section 28 of the National Minimum Wage Act 1998 under which

where an employee asserts that he was paid less than the NMW it will be presumed that he is correct unless the contrary can be established. The onus therefore falls upon the Respondent to satisfy the tribunal that they have met their legal obligations to pay the right amount.

8. The Respondent's evidence had been obtained from their electronic records of the hours for which the Claimant had been logged into the app as available for work, the jobs dispatched and the jobs accepted by him, and their record of the price for each job. On the basis of this evidence they assert that the Claimant was paid over £14 per hour, well above the NMW.

9. That figure made no allowance for any deductions in respect of charges and expenses. The Claimant argued, as noted above, that it also made no allowance for 'no shows' cancellations and underpayments. In relation to no shows and cancellations, I accept Mr Bansal's evidence that a driver could communicate these through the app and that the job would then not show upon the records (meaning that the potential earnings for the job would not be taken into account). However I accept the Claimant's evidence that the level of payments claimed by the Respondent would not necessarily take into account the situation where a customer had underpaid and that the icabbi system would record the full price for the journey.

10. That said, I was concerned that the Claimant's assertions about his earnings were unsupported by evidence and had potentially been underestimated, given that he kept no records of jobs done and cash payments received. He asserted that his figure must be right as it was the basis of calculation of his holiday pay claim, the total of which had been conceded by the Respondent. However the Respondent had not conceded the total for national minimum wage purposes.

11. I conclude that the Respondent's evidence based on its software records should be accepted as evidence of hours during which the Claimant was at work and jobs that he carried out and received payment for, and that no shows and cancellations have been accounted for. However I consider that the Claimant should be given the benefit of the doubt in terms of customer

underpayments, no details of which are provided in the evidence supplied by the Respondent.

12. I have therefore taken the Respondent's total earnings figure of £14,670 and applied to it a discount of 6.35% to represent a notional overall rate of shortfall on the basis of Mr Bansal's evidence, leaving an earnings figure of £13,738 for 1064 hours worked.

13. The question then arose as to whether the total earnings figure should be reduced to reflect payments made by the Claimant. The Respondent argued that it should not. The Claimant referred me to the provisions of the National Minimum Wage Regulations 2015 and I have paid particular attention to regulations 12 and 13.

14. It is not in dispute that the Claimant was required to pay fees totalling £160 a week to the Respondent: a 'circuit fee' of £148 and a fee for renting equipment of £12 a week. This gave him the equipment to be fitted in his car and access to the Data Cars circuit, or booking dispatch system. He communicated with the office and accepted jobs via an app. He paid a £200 deposit to rent the equipment. He was required to have a vehicle to be a mini cab driver. Initially he provided his own leased vehicle, but after a few weeks he started renting a vehicle from a company associated with the Respondent. It was a requirement of TFL that he had a particular level of insurance to operate as a mini cab driver. In the Claimant's counter schedule he records that he paid £2035 by way of insurance costs and deposit. Whilst working for the Respondent he incurred fuel costs of £960.

15. The Claimant was required to keep his vehicle clean and tidy and he incurred valet costs of £310 whilst working for the Respondent. (The Respondent now provides this service to its drivers for free). He could elect to take more valuable jobs by providing a particular type of vehicle and by wearing a uniform which he purchased from the Respondent.

16. I have considered whether any of these sums operated to reduce the Claimant's earnings when considering whether he was paid the NMW.

17. The circuit fee, equipment rental fee and equipment deposit fee had to be paid before the Claimant was able to access the Respondent's booking system. I am satisfied that the equipment, app and access to the system amounted to services that he was required to purchase from the Respondent and as such those payments fall within regulation 12(e).

18. There is little guidance in the case law at present as to what constitutes an 'expense', payable to the employer or to a third party, in connection with employment, under regulation 13. HMRC note NMWM11100 offers some guidance and directs the employer to consider expenses incurred that are 'a requirement of the work, rather than by choice'.

19. Applying this guidance, it was a requirement of the job that the Claimant filled his vehicle with fuel and that he had the correct type of insurance to operate as a mini cab driver. I am satisfied therefore that those sums should be deducted for NMW purposes – they were not reimbursed by the Respondent. Likewise I am satisfied that the Claimant had to incur cleaning charges as it was a requirement that he kept his vehicle clean.

20. The Claimant was not required to rent a vehicle from the Respondent or its associated company. He could have provided his own vehicle provided it was less than five years old and he could be offered various levels of work on this basis. Recruitment adverts for the Respondent which were in the bundle clearly showed that it would engage 'owner drivers' as an alternative to 'company car drivers'.

21. Likewise the Claimant was not obliged to purchase a uniform: he only needed a uniform if he wanted to do a certain level of work, described as 'silver', 'gold' or 'business class' on the advertising material. This was entirely optional.

22. I conclude that the fuel costs, insurance costs, circuit fees, equipment rental fees, fuel costs and cleaning are all costs that should be deducted from total earnings when deciding whether the Claimant was paid the national minimum

wage. Rental payments for the vehicle and uniform costs fall outside regulation 12 and regulation 13.

23. The Claimant's relationship with the Respondent ended when he failed to pay the circuit fee for two weeks and his access to the app was suspended on or around 13 September 2016, the last day the Claimant worked. Mr Bansal says and I accept that they tried to contact the Claimant without success. On 15 September he instructed the vehicle rental company to retrieve their car. I accept that the Respondent was within its contractual rights to suspend access to the app when the circuit fee had not been paid. However I have not been shown any documentation demonstrating that the Respondent therefore had the right to require the rental company to retrieve the car with immediate effect. The instruction to retrieve the car, just two days later, effectively brought the employment relationship to an end as the Claimant was no longer able to carry out driving jobs. I find this amounted to a repudiatory breach of contract and the Claimant was constructively and wrongfully dismissed.

Decision on Remedy

24. I have calculated the Claimant's weekly basis pay as £465 on the basis that he earned a sum of £13,738 over 29.5 weeks.

25. I find that the Claimant was wrongfully dismissed. He was entitled to a statutory minimum notice period of one week and I award him a week's pay amounting to £465.

26. Second the Respondent did not issue the Claimant with written particulars of his employment which satisfied section 1 of the Employment Right Act 1996. They did however issue him with a comprehensive Private Hire Operator and Driver Agreement setting out the arrangements that would apply between them. As a result I award him the minimum amount under section 38 of the Employment Act 2002 of two week's pay amounting to £932.

27. The Claimant sent a request for access to his national minimum wage records to the Respondent's registered office. The Respondent has produced no

evidence to show that this was never answered and Mr Bansal could not assist. The 1998 Act specifies that in this situation the Claimant must be awarded 80 times the NMW rate in force at the date of award, which is £8.21 (not £8.72 as I said at the hearing). I therefore award the Claimant the sum of £656.80.

28. Finally I address the question of whether there has been a shortfall in the payment of the NMW. The following sums need to be deducted from the total earnings of £13,738:

£2639 (circuit fees)

£200 (equipment deposit)

£1925 (insurance fees)

£110 (insurance deposit)

£960 (fuel costs)

£703 (mobile phone charges)

£310 (cleaning fees)

Total Deductions under regs 12 and 13: £6847

29. £13,738 less £6847 is £6891. If I divide that figure by 1064 hours I get an average hourly rate of pay for the Claimant of £6.47. That means there was a shortfall of 23p for five weeks from 23 February to 31 March 2016, a total of £1.15 (NMW rate was £6.70); and a shortfall of 73p for 24.5 weeks from 1 April to 13 September 2016, a total of £17.88 (NMW rate was £7.20). The total shortfall is £19.04.

30. The total sum awarded to the Claimant is £2113.64.

31. The Claimant pleads his case as both a claim under the National Minimum Wage legislation and as a claim for unlawful deductions from salary. In relation to the latter, he claims consequential losses under section 24(2) of the

Employment Rights Act including cost of household energy bills and wasted costs of completing the 'knowledge' test set by TFL to enable him to become a black cab driver. I make no award for such costs as I am not satisfied that they are attributable to any deduction made by the Respondent. The Claimant asserts that he has been unemployed since leaving the employment of the Respondent. He had aimed to complete the knowledge test but had been unable to do so on financial grounds. He has been claiming Universal Credit. It is not clear to me why the Claimant is unable to find alternative employment. He is an accomplished person with a law degree and has presented his claim to the tribunal with considerable skill. Whilst I would be sympathetic to him not wishing to work in the mini cab industry again in light of his particular experience, he has offered no reasonable explanation as to why he was not able to mitigate his losses and why his only efforts to find an alternative career have been his unsuccessful efforts to complete the knowledge.

32. The remaining matter to be dealt with is the claim that the Claimant suffered unfavourable treatment contrary to regulation 5 of the Part Time Worker regulations. This claim was the subject of a deposit order (with other claims) which I made on 9 July 2019. It currently stands as struck out as the Claimant failed to pay the deposit. However the Claimant applied for reconsideration of the judgment on 13 January 2020 on the basis of an EAT decision he obtained in a case he had brought against another cab company: Augustine v Econnect Cars Limited UKEAT/0231/18 which found that although he worked 35 hours a week he should be considered to be a part time worker. Having considered the Claimant's application and the Respondent's written representations, I find that it would be in the interests of justice to revoke the strike out judgment in relation to this claim alone. I was not able to deal with the matter today. No details have been provided of the typical hours worked by drivers for the Respondent in order to determine if the Claimant was a part time worker, nor has the Respondent had the opportunity to show that the circuit fee if it amounted to less favourable treatment was justified. I have listed the claim for a substantive merits hearing for one day on **1 July 2020**. Notice of hearing will follow shortly.

33. In the meantime I urge both parties to use their best efforts to try and resolve this final issue and bring this long running litigation to an end, in which case the hearing could be avoided.

34. Fourteen days prior to that hearing, if it is to go ahead, the parties should serve on each other witness statements and documents that are relative to this issue only. The Respondent should provide details of hours worked by its drivers during the period of the Claimant's employment, and details of any justification for the circuit fee they rely upon. The Claimant should also serve a schedule of loss setting out what compensation he is seeking in relation to this claim. The matters to be determined will be:

35. Was the Claimant a part time worker during his engagement with the Respondent?

36. Who are his comparators and were other drives at the Respondent working considerably more hours than him?

37. Did the charging of the circuit fee amount to less favourable treatment of the Claimant as regards the terms of his contract?

38. If so can that treatment be justified on objective grounds?

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Employment Judge Siddall
Date: 18 February 2020.