



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Perry

**Respondent:** Upandunda Limited

**Heard at:** Manchester

**On:** 4 December 2020

**Before:** Employment Judge Holmes (sitting alone)

## Representatives

For the claimant: In person

For the respondent: Mr J Shaw (Managing Director)

## JUDGEMENT AND ORDERS FOR REMEDY HEARING

It is the judgment of the Tribunal that:

- (1) By concession by the respondent , the claimant was unfairly dismissed.
- (2) The claimant's claim for a redundancy payment is dismissed upon withdrawal by him.
- (3) The remedy to which the claimant is entitled will be determined at a remedy hearing before an Employment Judge sitting alone on **Monday 8 June 2021** starting at **10.00am** or as soon as possible afterwards. The hearing will be at Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA, and will be held in person , unless the Tribunal notifies the parties otherwise. The time estimate for the hearing is one day.
- (4) Any application to change the date of the remedy hearing because one or more witnesses are unavailable for good reason must be made by **Friday 23 December 2020**. Any such application should include dates of availability between **June and September 2021** and must be copied to the other party.

## ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

## 1. Issues on remedy

The respondent must provide to the Tribunal and the claimant by **Friday 5 February 2021** its comments upon the List of Issues on Remedy in the Schedule hereto, stating whether the same are agreed, or are to be amended or added to in any way.

## 2. Response from the claimant

The claimant shall by **Friday 26 February 2021** confirm his agreement to, or shall otherwise comment upon the List of Issues on Remedy.

## 3. Further Documents

- 3.1 By **26 February 2021** the claimant must send to the respondent copies of all documents relevant to the issues on remedy. These should be collated in a single bundle in chronological order.
- 3.2 By **26 February 2021** the respondent must write to the claimant providing copies of any additional documents in its possession or control which are relevant to the issues on remedy.

## 4. Remedy hearing bundle

The claimant is by **26 March 2021** to prepare a bundle of documents for the remedy hearing. That bundle should be individually page numbered. One copy of that bundle should be provided to the respondent. Three copies of that bundle should be brought by the claimant to the hearing (one for the witness table, one for any members of the public who may attend, and one for the Employment Tribunal). The claimant and the respondent should each bring their own copies of the bundle to the hearing.

## 5. Further Witness statements for remedy

On or before **Friday 23 April 2021** each party must have provided to the other any further written statements relating to the issues on remedy.

# REASONS

1. The final hearing of the claimant's claims of unfair dismissal, for notice pay, and other claims was listed before the Tribunal for one day. There had been a previous preliminary hearing, on 8 November 2019, which was to have been the final hearing, but was converted to a preliminary hearing to determine the claimant's length of service. The respondent had contended that the claimant lacked two years qualifying service to bring a complaint of unfair dismissal, but Employment Judge Allen determined that he did. He made case management orders for the future conduct of the claims, and listed a final hearing for 6 April 2020. That hearing could not proceed, and it was originally re-listed for 9

October 2020, but that was to be by CVP video participation, which the respondent had difficulties with, and it was accordingly postponed to this date.

2. The claimant appeared in person, and Mr James Shaw, Managing Director, appeared for the respondent. The claimant had, as ordered, prepared a joint bundle, and he, and the respondent's witnesses had made witness statements.
3. The claimant had also, as ordered, prepared a Schedule of Loss. In it he sets out (presumably with some advice, research or assistance) his claims for a basic award, and a compensatory award for unfair dismissal, notice pay, a redundancy payment, an uplift for failure to follow the ACAS code of practice, and an additional award of 4 weeks pay for failure to provide him with a written statement of terms of employment.
4. In setting out his loss of earnings claims, the claimant has sought 8 weeks loss of earnings, from the date of his dismissal, at the rate of £480,00 per week, a total of £3840.00. He then gives credit for income received from (what appears to be) self employed earnings to a total of £1,010.00. He goes on to say that he is not seeking an award for future loss of earnings.

### **The hearing**

5. Having read the witness statements, and the documents, from which it was clear that the claimant was dismissed by an email, after no investigatory or disciplinary meetings, and was not provided, before his dismissal with details of the allegations against him, or of the evidence that the respondent's unilateral investigation had produced, the Employment Judge enquired of Mr Shaw whether he had taken any advice after the Tribunal's determination at the preliminary hearing that he could present a claim for unfair dismissal. Mr Shaw said he had, albeit only briefly. The Employment Judge then enquired whether the respondent was still maintaining that this was a fair dismissal, especially from a procedural point of view. Mr Shaw said he thought it was, and repeated an oft cited misapprehension held by some small employers that dismissal for gross misconduct could be instant, and that no procedure was necessary.
6. The Employment Judge explained the basic requirements of the ACAS code of practice, which applies to all dismissals save for redundancy dismissals, that before any disciplinary action is taken the employer will carry out a reasonable investigation, which would normally involve the employee, inform the employee of the allegations against him, and hold a meeting at which he would have an opportunity to put his case as to why the proposed disciplinary action should not be taken. None of that had happened in this case.
7. The Employment Judge invited Mr Shaw to reflect upon this, and, if needst be, take some time, or advice, and consider whether the respondent could now concede that the claimant was unfairly dismissed, on a procedural basis.
8. His purpose in doing so was that this would allow the Tribunal to then consider remedy. It seemed to the Employment Judge that there were various potential issues on remedy open to the respondent, which the Tribunal and the

parties could then focus upon, once the issue of liability was determined or conceded. He went through these, and will return to them below, but when Mr Shaw enquired whether the respondent would still be able to advance these if unfair dismissal was conceded , he was assured that it would.

9. Mr Shaw, on behalf of the respondent then, after declining any more time for consideration, or the taking of advice, did concede that the claimant had been unfairly dismissed on the basis of the procedure followed.
10. The Employment Judge is grateful for this pragmatic and helpful approach, and will now turn to the issues on remedy that he considers will arise, and which he ventilated with the parties in the hearing.

### **Issues on Remedy**

11. Annexed to the Case Management Summary after the conclusion of the preliminary hearing is a Schedule containing a List of Issues. In relation to remedy, at para. 11, the only issue recorded is “in particular, if the claimant is awarded compensation and/or damages, [the Tribunal] will decide how much should be awarded.” No specific issues are identified, which is not a criticism of the Tribunal or the parties , neither of whom are represented. Nonetheless, paras. 4 and 5, under the heading “Unfair Dismissal” do address issues as to remedy, in terms of contribution , and would the claimant have been dismissed anyway, had a fair procedure been followed. The parties perhaps have not fully understood those issues, and what the determination of them would require from them.
12. The Employment Judge, having had the benefit of the witness statements and some documents , was now in a better position to consider in more detail what the issues were likely to be. He explained in the hearing, and does so again, in a little more detail, what appeared to him to be the likely issues.
13. Central to these issues is the evidence that the respondent has put forward, primarily in support of its contention that it was fair and lawful to dismiss the claimant , that he had, prior to the termination of his employment been guilty of misconduct in terms of use of the company van for his own purposes, which were the conducting of his own business during the respondent’s time, and using its resources. That may, if proved, as explained, have ramifications for what awards may be made under the various heads that he is claiming.

### **The basic award**

14. The claimant has sought a basic award, based on the two complete years service that he had at the date of his dismissal, and his age. Subject to agreement of his gross weekly pay (in fact it is the respondent which has given the figure of £480 per week in the ET3) that would ordinarily be an award that the Tribunal would be likely to make. As explained this award is not dependent upon any losses being sustained by the claimant , and is a basic entitlement in most cases of unfair dismissal.

15. Such awards, however, can be subject to reduction. This is the effect of Section 122(2) of the Employment Rights Act 1996, whereby if the Tribunal is satisfied that prior to the dismissal the claimant had behaved in a manner that would make it just and equitable to make a reduction in the basic award, it may do so. This section is slightly different to the compensatory award section, discussed below, as there is no requirement for there to be a link between the conduct and the dismissal. Thus, if the respondent can show that, regardless of whether the respondent was even aware of it, or dismissed the claimant because of it, that the claimant was guilty of conduct of such a nature that it would just and equitable not to make any basic award at all, or to reduce it by an appropriate per centage, such a reduction may be made.

### The compensatory award

16. As explained, this head of award requires that a claimant has suffered loss. The claimant seeks loss of earnings, and loss of statutory rights, under this head. The Tribunal is entitled to consider whether the claimant contributed to his own dismissal, pursuant to Section 123(6) of the Employment Rights Act 1996 which provides that the Tribunal may make a reduction in a compensatory award, if satisfied that the claimant has been guilty of action which contributed to his own dismissal to the extent that it would be just and equitable to do so. This thus differs from the basic award reduction, which does not require a link between the conduct and the dismissal. In practice it may be the same conduct relied upon in both cases, but it is possible for the former to rely upon unknown conduct, but for the compensatory award it must have been known of, and to have been a factor in the dismissal.

### “Polkey”

17. The Employment Judge explained another argument that any legal representative would be likely to make in the case of a procedurally unfair dismissal, namely that, had a fair procedure been followed the outcome would have been the same, a reduction based on the case of *Polkey v A E Dayton Services Ltd [1988] ICR 14*, and hence known as a *Polkey* reduction.
18. In such cases the Tribunal will consider what difference a fair investigation and disciplinary procedure would have made. The respondent will doubtless argue that it would have made no difference, and the claimant that he would not have been dismissed had such a procedure been adopted. To assess that, the Tribunal clearly needs to know what the claimant would have said in any investigation or disciplinary meeting, and whether he would have had any prospects of successfully defending the allegations and avoiding dismissal. If dismissal would still have been the outcome, but it would have been delayed for such a process, the Tribunal will often award compensation based upon the length of time a fair procedure would have taken. The Tribunal can also assess the per centage chance of a fair procedure making any difference.

### The Notice Pay claim

19. This brings the Tribunal to a discussion of the claimant's claim for notice pay, he having been dismissed without notice. The issue here is slightly different, as it is not what the respondent reasonably believed that matters, as it is in the test in relation to unfair dismissal, rather the Tribunal must form its own view as to whether the claimant was or was not, on the balance of probabilities, guilty of conduct which entitled the respondent to dismiss him without notice. The Tribunal therefore has to form its own view, and is not bound by the view of the respondent, and does not have to consider the range of reasonable responses test. The respondent therefore has to prove as a fact that the claimant was guilty of misconduct which was so serious as to merit his summary dismissal, and that he was dismissed for it. Here the respondent cannot rely upon anything it did not know at the time. Again, it is likely that the same matters will be relied upon as are relied upon for reduction of the basic and compensatory awards. There is no room for contribution or per centage reduction on this head of claim, it either succeeds, or it does not. The only permissible deduction from notice pay are earnings received during it.
20. It was pointed out to the claimant during the hearing as well, that where there is an award of notice pay, it will usually overlap with the first few weeks of loss of earnings claimed as part of the compensatory award. Such loss cannot be awarded twice.

### **Other issues**

21. Going through the claimant's Schedule of Loss, it was noted that he includes, as he had in his claim form, a claim for a redundancy payment. It is neither party's case that he was dismissed for redundancy, and the basic award being calculated on the same basis, the claimant confirmed he was not pursuing such a claim. It is accordingly dismissed.
22. The claimant has sought an uplift for failure to follow the ACAS Code of Practice. This would apply only to the compensatory award, (and possibly notice pay award, if made) after any due reductions were made by the Tribunal.
23. Finally, the claimant has sought an additional award of 4 weeks for failure to provide a written statement of terms of employment. This is provided by s.38 of the Employment Act 2002, which provides that where there has not been the provision of such a statement, a Tribunal must (if any other relevant claims succeed) make an additional award of 2 or 4 weeks pay. Only if there are exceptional circumstances may the Tribunal not make such an award, if it would be unjust and inequitable to do so.
24. In the documents there does not appear to be a written statement of terms of employment, or a contract of employment which would satisfy the requirements of s.1 of the Employment Rights Act 1996. There is an offer letter of 7 November 2015, in which some of the required particulars are set out, but it may not totally comply with the requirements of s.1. Reference is made in it to an Employment Manual, and other documents, but these have not been produced.

### **List of Remedy Issues**

25. The Employment Judge has applied these provisions to the facts which he has seen the respondent has advanced, and has set out what he sees as the issues on remedy in the attached Schedule. The respondent must check them, and ensure that all the matters it wishes to rely upon are included, as it will not be permitted to advance any others.
26. The claimant will be permitted to comment upon them as issues, and to check that he agrees they are the issues.

### Next Steps

27. As , at present, there is nothing in the claimant's witness statement, or his documents, which addresses the respondent's allegations, the claimant needs to answer the respondent's case. To that end he needs to make a further witness statement for remedy, addressing the allegations that the respondent makes against him, and setting out what he would have said, or produced, in any investigation or meeting if the respondent had held any with him. In particular, if he has any explanation for the items allegedly found in the vehicle, now that he has been provided with copies of them, he should provide one. If he is saying that he did not use the van for working for himself, and did not use it other than in accordance with the limitations the respondent imposed (assuming he agrees that they were imposed) on personal use, he must say so, and explain why it may appear that he did so.
28. Further , he needs to provide more documents, in fact all documents, which are relevant to remedy. These will include documents in relation to his self employment registration (he refers to this in his Schedule) , and the receipt of the payments he has given credit for in his Schedule. It will be important to establish the dates of those payments, as some or all of them may have been received in the notice period as well. It is unclear if those are gross or net payments. On a related note, though a minor one, in his calculation of his loss of earnings over eight weeks, the claimant appears to have used gross, not net figures, whereas the Tribunal would usually make such an award on the basis of net, not gross, pay.
29. The respondent has probably put in its witness evidence, and provided documents in relation to everything that it is going to seek to prove and rely upon. If, however, it has not fully done so, it is permitted to disclose more documents and additional witness evidence. Mr Shaw may also care to elaborate upon the significance of the invoices and other material found in the respondent's van, and of the dates , times of transactions, and the identities of the suppliers that from whom materials were apparently being purchased by the claimant . A better copy of the handwritten document found would also be useful, with the original being brought to the next hearing.
30. It would also assist the Tribunal if both parties would put page numbers on their witness statements, and make cross references to the pages in the remedy bundle to any documents they are referring to.

31. Further, Darren Scott's statement seems to jump from para. 16 to para. 19 (though this may be a mistake on the Employment Judge's part, the absence of page numbers makes it hard to tell) . The Employment Judge accordingly made the orders above, and has listed a remedy hearing for the final determination of the claims.

## Conclusion

32. Given the further delay, further work required , and , it will now be appreciated, the potential complexity of the issues on remedy , the parties are encouraged , and were in the hearing , with the claims and issues becoming clearer, to explore settlement, ideally through ACAS, to whom they should produce this document to assist any conciliator to appreciate these issues and to assist the parties in any discussions.

Employment Judge Holmes

Dated : 4 December 2020

JUDGMENT AND ORDERS SENT  
TO THE PARTIES ON

21 December 2020

FOR THE TRIBUNAL OFFICE

- (1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.**
- (2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rules 74-84.**
- (3) You may apply under rule 29 for this Order to be varied, suspended or set aside.**



## SCHEDULE

### List of Issues on Remedy

#### Unfair Dismissal

##### 1.The basic award.

- a) Was the claimant, prior to his dismissal , guilty of conduct such that it would be just and equitable to reduce the amount of the basic award?
- b) The conduct that the respondent relies upon is:
  - i) on various occasions the claimant absenting himself from where he was working , with the respondent's van on the basis that he was going to get materials, but returning with none;
  - ii) on other occasions, the claimant absenting himself from where he was working, with the respondent's van;
  - iii) the claimant using the respondent's van for his personal use, and thus without insurance;
  - iv) on 31 May 2019 the claimant carried out work not for the respondent at a school in Wythenshawe, using the respondent's van;
  - v) generally working on his own account , or otherwise than for the respondent, whilst employed by the respondent , and using its van for that purpose, in his own time and its time.

##### 2.The compensatory award.

- a) Was the claimant, prior to his dismissal , guilty of blameworthy or culpable conduct which contributed to his dismissal , such that it would be just and equitable to reduce the amount of the compensatory award, and, if so, by how much?
- b) The conduct that the respondent relies upon is:
  - i) on various occasions the claimant absenting himself from where he was working , with the respondent's van on the basis that he was going to get materials, but returning with none;
  - ii) on other occasions, the claimant absenting himself from where he was working, with the respondent's van;
  - iii) the claimant using the respondent's van for his personal use, and thus without insurance;
  - iv) on 31 May 2019 the claimant carried out work at a school in Wythenshawe, using the respondent's van;

v) generally working on his own account whilst employed by the respondent , and using its van for that purpose, in his own and its time.

### **3."Polkey"**

The dismissal being conceded to have been procedurally unfair, what adjustment, if any, should be made to any award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed anyway, and when would such a dismissal have been likely to have occurred?

### **4.Uplift.**

Did the respondent unreasonably fail to comply with the ACAS Code of Practice and, if so, would it be just and equitable to increase any compensatory award and, if so, by what percentage (up to a maximum of 25%)?

### **5.Wrongful Dismissal**

a)To how much notice was the claimant entitled? (It appears to be the statutory minimum of 3 weeks.)

b)Did the claimant fundamentally breach the contract of employment by an acts of so-called gross misconduct?

In particular:

i) on various occasions the claimant absenting himself from where he was working , with the respondent's van on the basis that he was going to get materials, but returning with none;

ii) on other occasions, the claimant absenting himself from where he was working, with the respondent's van;

iii) the claimant using the respondent's van for his personal use, and thus without insurance;

iv) on 31 May 2019 the claimant carried out work at a school in Wythenshawe, using the respondent's van;

v) generally working on his own account whilst employed by the respondent , and using its van for that purpose, in his own and its time.

c) Did the respondent dismiss the claimant without notice by reason of this misconduct?

### **6.Additional award.**

a) Was the respondent in breach of its duty to provide a written statement of terms of employment as required by s.1 of the Employment Rights Act 1996, so as to require the Tribunal, by s.38 of the Employment Act 2002, to make an additional award of 2 or 4 weeks pay ?

b) If so, were there exceptional circumstances such that the Tribunal does not make such award, as it be unjust and inequitable to make such an award?

**7. Generally.**

In each instance, what is the correct basis for the calculation of each award?

Employment Judge Holmes  
Dated : 4 December 2020