



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S N Andrabi  
**Respondent:** Gerry's Offshore Incorporations Limited  
**Heard at:** East London Hearing Centre (by Cloud Video Platform)  
**On:** 29 July 2021  
**Before:** Employment Judge Gardiner  
**Members:** Mr P Lowe  
Mr M Rowe

## Representation

**Claimant:** Mr A Ohringer (Counsel)  
**Respondent:** Mr J Arnold (Counsel)

# REMEDY JUDGMENT

## The judgment of the Tribunal is that:-

1. The basic award has been agreed by the parties at £7,620.
2. The Employment Tribunal having held that the statutory cap under Section 124(1ZA) is £66,660, representing 52 x £1280.77, that amount is ordered as the compensatory award by consent.

# REASONS

1. It is now accepted by the Claimant that the payment to be made under Section 38 is an adjustment to the compensatory award and therefore subject to the statutory cap. The remaining issue requiring our decision at this Remedy Hearing is the amount of the statutory cap. The parties agree that it is 52 multiplied by "a week's pay". The dispute is whether "a week's pay" was restricted to the weekly equivalent of the £4000 per month recorded on the Claimant's payslips from April 2015 onwards; or whether it should also

include the weekly equivalent of the £1550 paid in addition and latterly described as “partial rent”.

2. The issue we need to decide turns on how “a week’s pay” should be interpreted in the Claimant’s case. Both parties addressed this issue in their skeleton arguments and in their oral closing submissions.

3. The relevant statutory provisions are as follows:

Section 220 Employment Rights Act 1996: The amount of a week’s pay of an employee shall be calculated for the purposes of this Act in accordance with this Chapter

Section 221 Employment Rights Act 1996:

(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date;

(2) Subject to section 222, if the employee’s remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week’s pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

4. The key phrase is this: “the amount of a week’s pay is the amount which is payable by the employer under the contract of employment in force on the calculation date”. At the Remedy Hearing, the only witness evidence on this issue was provided by the Claimant, who was cross-examined by Mr Arnold on behalf of the Respondent.

5. The calculation date in an unfair dismissal claim is the Effective Date of Termination ie the end of the Claimant’s employment. The Claimant received no statement of employment particulars, and no document clearly setting out the amount which was payable by the Respondent in relation to the work to be carried out in the United Kingdom.

6. The Claimant’s role for the Respondent, a company registered in England and Wales, started on 1 January 2015. At that point, and for several months previously, the Claimant had been receiving a monthly sum of £4,500 after deduction of taxes. The Claimant agreed to relocate to the UK on the basis that his monthly take home pay would be no less than £4,500. This was agreed by the Respondent. In March 2015, he was permanently transferred to the United Kingdom on an Intra Company Transfer visa. His understanding was that his take home salary would remain unchanged, although he appreciated that the company’s liability to pay tax on his salary would alter in accordance with that applicable to a UK resident.

7. Although the Respondent has never provided the Claimant with a statement of employment particulars, we find that the contractual term as to pay at the start of January 2015 was that the Claimant would receive net pay of £4,500 each month.

8. Around April or May 2015, the Claimant was contacted by Gerry's finance in Karachi. He was told that the parent company was carrying out a tax restructuring. As a result, his net salary would now be treated as a gross amount. The Claimant strongly objected. This objection was made on the basis that this would be a breach of the agreement which he had reached with the Respondent and the understanding on which he agreed to move to the UK.

9. In the light of the Claimant's objections, the Claimant was told by the Respondent that it was working with a tax consultant to restructure the take home amount in a tax efficient way, so that there would be a living allowance and a salary. Subsequently the payment mechanism for paying monthly payments to the Claimant was changed. Rather than one monthly salary payment being paid into one account in the Claimant's name, there were now to be two payments. One payment of £4000 per month gross, would be a payment of salary paid into one account. The Claimant was issued with a payslip that corresponded to this salary payment and was paid a lower net sum after deductions made through payroll as recorded on the payslip. The other payment, of sums approximating to £1550 per month, would be paid into a different account. For at least two months, this payment was described by the Respondent as appears from the Claimant's bank account as "salaries", before subsequent monthly payments were retitled "partial rent".

10. The issue for the Tribunal to determine is whether the effect of these changes was merely to change the mechanism of payment; or whether it amounted to a variation in the contract of employment to change his weekly pay. Mr Arnold argues that the effect was to change the weekly pay, such that the Claimant was paid a lower sum by way of salary but also received a contribution towards his rent. He accepted, in the course of oral argument, that there was no particular financial benefit to the Claimant as a result of this revised arrangement. However, he maintained that by continuing to work and receive these two streams of payment, the Claimant was accepting a variation to his contractual terms. He considered that sufficient consideration was provided in that the Respondent agreed to continue employing him in the UK on this basis.

11. Our conclusion is that there was no contractual variation to the Claimant's pay. He continued to be entitled to the same monthly pay as he had previously been entitled to receive, namely a net sum of £4,500 a month. All that changed was that the mechanism of payment changed. We reach this conclusion for the following reasons:

- a. The Claimant was initially engaged on a five-year fixed term contract in the UK whereby he was promised £4,500 a month net. On the parties' calculations, this is equivalent to gross income of £66,660 on a yearly basis.
- b. The terms of an employment contract are determined at its formation and strong evidence of mutual agreement is required to establish that the terms have been

lawfully varied. Any change by the employer that is imposed by the employer in the absence of agreement is likely to be a breach of contract.

- c. The Respondent has not advanced any witness evidence to support the variation for which it contends. Rather, it seeks to rely on the evidence from the Claimant himself and evidence as to the changes in the mechanism of payment which were subsequently implemented. However, Mr Arnold has not explained by whom the contractual variation was initiated, when the contract was so varied, and how the variation was achieved. In circumstances where there was no immediate benefit to the Claimant, Mr Arnold has not explained why the Claimant would agree to such a change. In short there is no evidence whatsoever evidencing an express agreement to vary the contract in the terms he proposes.
- d. We do not accept that the documentary evidence on which he relies necessarily implies that the parties have agreed to vary the core term as to remuneration in the employment contract. It is equally consistent with there being a change to the payment mechanism rather than the contractual terms.
- e. Furthermore, the way in which the 'partial rent payment' was calculated was not by reference to the actual amount of the Claimant's rent. Rather it was the arithmetical adjustment required to top up the Claimant's net salary to £4,500 from the lower net sum he received in £4000 gross being paid to him through the payroll. The 'partial rent payment' did not correspond to the rental amount. Rather it was consistent with the continued existence of the original term as to the net salary that would be received, namely £4,500 per month.
- f. The original designation chosen by the Respondent describing the smaller payment as being made in relation to "salaries" was correct. It was the top up needed to maintain the salary payment to which the Claimant was entitled as a term of the contract.
- g. We note that further payments were made to the Claimant in relation to genuine expenses incurred in the course of the working relationship. These were distinct payments which were not aggregated with the monthly payments designated as "partial rent".

12. Therefore, we do not accept that the caselaw on which the Respondent relies assists it with its argument, namely the case of *S & U Stores Limited v Wilkes* [1974] ICR 645. The payment made to the Claimant designated as 'partial rent' was "a profit or surplus in the hands of the employee", in the same way as was the remainder of his salary. The Claimant was not required to live in particular accommodation in order to carry out his role, nor is there evidence that he spent time carrying out the role from his home. The payment designated as "partial rent" was not the value of a benefit-in-kind (free accommodation) or a sum agreed to be paid by way of reimbursement or on account of expenditure (rental of accommodation while living in the UK).

13. The decision to split the payments into two was made for tax reasons. It was not done in order to change the contractual terms, nor did it have that effect. The subsequent designation that it was a 'partial rent' payment was merely a label employed by the Respondent that did not reflect the reality of the payment.

14. For these reasons, we find that the statutory cap is £66,660.

**Employment Judge Gardiner**  
**Date: 30 July 2021**