



EMPLOYMENT TRIBUNALS

Heard at: Watford (by video) **On:** 17 September 2021

Claimant: Mr Nigellus Vaz

Respondent: Mr Darshan Singh Grewal

Before: Employment Judge Fowell

Representation:

Claimant: In person

Respondent: In person

JUDGMENT ON REMEDY

1. The claimant is awarded compensation as follows:
 - a. For unfair dismissal, a basic award of £1,614 and a compensatory award of £500 amounting to £2,114.00;
 - b. For unlawful deduction from wages, £24,851.48;
 - c. For failure to provide a statement of employment particulars (4 weeks pay), £1,736.36
 - d. Amounting in total to **£28,701.84**
2. No separate award is made for breaches of the Working Time Regulations 1998.
3. Applying the guidance in **Walters t/a Rosewood v Barik** UKEAT/0053/16/BA, the award for unlawful deduction from wages is a gross amount which the respondent can satisfy by payment to the claimant of the net amount due and payment to HMRC of any tax and national insurance which falls to be deducted at source.
4. For the purposes of the recoupment provisions:

- a. The prescribed element is £500
 - b. The total awarded is £28,701.84
 - c. The period of the prescribed element is from 16 September 2020 to 17 September 2021
 - d. The excess over the prescribed element is £28,201.84
5. The application for a reconsideration of the decision on liability is dismissed.

REASONS

1. The Judgment on liability was that:
 - a. The claimant was unfairly dismissed.
 - b. The dismissal was not automatically unfair under section 104A Employment Rights Act (National Minimum Wage).
 - c. The complaint of unlawful deduction from wages in respect of the national minimum wage was upheld.
 - d. The complaint of breach of regulation 10 of the Working Time Regulations 1998 (WTR) in relation to daily rest was upheld.
 - e. The complaint of breach of regulation 11 of the Working Time Regulations 1998 (WTR) in relation to weekly rest was upheld.
 - f. The complaint of breach of regulation 13 and 13A of the Working Time Regulations 1998 (WTR) in relation to annual leave was upheld.
 - g. The respondent was in breach of its duty to give the claimant a written statement of employment particulars, for which a further award of four week's net pay is made.
2. This remedy hearing was listed following a two day hearing to determine liability held on 9 and 10 August 2021. The main reason was to allow Mr Vaz a further opportunity to submit documentary evidence about his losses and for Mr Grewal to have the chance to consider them. In the event the only additional documents were in the form of an email to the tribunal which attached a screenprint showing Mr Vaz in receipt of Universal Credit. He received £866.68 in September 2021, prior to which it was £837.26.
3. Mr Vaz has not found alternative employment in the period of one year and one day

since his dismissal. He says he has been looking for part-time work because he now has full-time caring responsibilities for his two children, aged six and three. On enquiry he explained that housing costs of over £1200 a month are being met by the local authority and paid directly to the landlord so his total income from public sources is over £2000 per month. There are no documents to verify the precise amounts, or even the basis on which the Universal Credit payments have been calculated. Nor is there any evidence of efforts to look for other work.

4. This difficulty leads onto further concerns about assessing compensation, given that the employment in question did not involve any payments of tax or national insurance and so was illegal. The question of illegality was dealt with briefly in the decision on liability: suffice to say that applying the decision of the Supreme Court in **Patel v Mirza 2017 AC 467, SC**, I found that given Mr Vaz's small responsibility for this state of affairs and the imbalance of power, he should be entitled to enforce his claim.
5. However, on a practical note, the evidence on the last occasion was that he was in receipt of tax credits in addition to his earnings from the respondent. It is not clear what, if any, information was given to the DWP regarding the level of his earnings or what those tax credits were.
6. According to the calculations set out below, and on the basis that Mr Vaz was working for 12 hours a day, seven days a week, without holidays and subject to the accommodation offset, the level of his earnings should have been £2,739.71 per month. Has he been paid at that level these amounts would have been taxable. The level of tax paid would have brought the net income to below £2,000 per month, i.e. below the level he is presently receiving from all sources. It is therefore in practice very difficult to assess the extent to which he has suffered loss of income as a result of his dismissal.
7. On this issue, the onus is on him to show the level of his income before and after his dismissal, he has had the opportunity to do so and it remains shrouded in mystery. The only elements which can be calculated with any confidence are the basic award for his complaint of unfair dismissal and the extent of the unlawful deduction from wages reflecting the failure to pay the minimum wage.
8. It is now established that any payments for unlawful deduction from wages ought to be assessed on a gross basis, and Mr Grewal can satisfy the judgement by paying part of the award in the form of tax and national insurance which would have been due had the underpayment not occurred. That will involve him in declaring the position to HMRC.
9. For all the above reasons therefore I make no compensatory award here, save for a sum in respect of loss of statutory rights. As just noted, Mr Vaz has not shown that he has mitigated his loss, and is in receipt of more income per month than his previous level of net earnings, subject to child tax credits or working family tax

credits, about which he has supplied no evidence.

10. Mr Grewal says he has no means to fund any such award, but that is not a reason to reduce it. My task is to calculate the amount due, regardless of whether it can be paid or enforced. The calculations are as follows.

Unlawful deduction from wages

11. The levels of National Minimum Wage (NMW) per hour at the relevant times were as follows:

- a. April 18 to March 19 £7.50
- b. April 19 to March 20 £7.83
- c. April 20 to March 21 £8.21

12. At 12 hours per day, the daily rates are, respectively:

- a. £90.00
- b. £93.96
- c. 98.52

13. The daily accommodation offset in each case is:

- a. £7.00
- b. £7.55
- c. £8.20

14. The net daily NMW rates therefore become:

- a. £83.00
- b. £86.41
- c. £90.32

15. That corresponds to monthly figures (working every day) of:

- a. £2,517.67
- b. £2,621.10
- c. £2,739.71

16. The weekly sum in each case was over £538, and so that is the relevant figure for

calculating the basic award. Based on 2 years' service over the age of 41, that award is £1,614.

17. It is possible to claim back unlawful deduction from wages for two years. The judgment on liability set out findings on what amounts were being paid at what points in time. The previous 24 complete months before dismissal were as follows, applying the relevant changes in each case from the beginning of the month:

Month	Weekly NMW	Monthly NMW	Paid PW	Paid PCM
August 2020	£632.24	£2,739.71	£400.00	£1,733.33
July 2020	£632.24	£2,739.71	£400.00	£1,733.33
June 2020	£115.01	£498.38	£0.00	£0.00
May 2020	£115.01	£498.38	£0.00	£0.00
April 2020	£115.01	£498.38	£0.00	£0.00
March 2020	£604.87	£2,621.10	£300.00	£1,300.00
February 2020	£604.87	£2,621.10	£300.00	£1,300.00
January 2020	£604.87	£2,621.10	£300.00	£1,300.00
December 2019	£604.87	£2,621.10	£300.00	£1,300.00
November 2019	£604.87	£2,621.10	£300.00	£1,300.00
October 2019	£604.87	£2,621.10	£300.00	£1,300.00
September 2019	£604.87	£2,621.10	£300.00	£1,300.00
August 2019	£604.87	£2,621.10	£300.00	£1,300.00
July 2019	£604.87	£2,621.10	£300.00	£1,300.00
June 2019	£604.87	£2,621.10	£300.00	£1,300.00
May 2019	£604.87	£2,621.10	£300.00	£1,300.00
April 2019	£604.87	£2,621.10	£300.00	£1,300.00
March 2019	£581.00	£2,517.67	£400.00	£1,733.33
February 2019	£581.00	£2,517.67	£400.00	£1,733.33
January 2019	£581.00	£2,517.67	£400.00	£1,733.33
December 2018	£581.00	£2,517.67	£400.00	£1,733.33
November 2018	£581.00	£2,517.67	£400.00	£1,733.33
October 2018	£581.00	£2,517.67	£400.00	£1,733.33
September 2018	£581.00	£2,517.67	£400.00	£1,733.33
Totals		£56,051.45		£31,199.97

Hence, the total NMW due in that period was £56,051.45

The amount paid was £31,199.97

Underpayment **£24,851.48**

18. These figures assume that during lockdown, from April to June 2020, Mr Vaz was working for three hours per day, less accommodation offset. Some ongoing work was required from the pub manager during this period, and that is my assessment of the likely level, given that there were some key workers staying overnight.
19. Since these figures assume that Mr Vaz was working 52 weeks a year, no separate award is made for holiday pay or other rest breaks.
20. There is no power to award damages for injury to feelings in such cases.
21. The award of four week's pay for failure to provide a statement of employment particulars was part of the decision on liability. It was overlooked during the hearing, and the oral decision did not include this element, but this written version must correct that oversight. A week's pay for these purposes is the net amount due, based on a monthly gross sum of £2,739.71, which corresponds to a net monthly payment of £1,881.06 and hence a weekly sum of £434.09.

Reconsideration

22. In the course of the hearing Mr Grewal raised the fact that an application for reconsideration of the decision on liability had been made, so it will be convenient to deal with that application in this judgment.
23. It was received by the Tribunal on 13 September 2021 and forwarded to me shortly after the remedy hearing. It states:

"Reconsideration is sought on the basis of inaccuracies within the determination / judgement and errors made in law. The documentary evidence though limited did not satisfy the questions posed and the judgement was biased.

There were several inconsistencies within the claimants evidence that were not considered nor deemed as such."
24. No further particulars were given of the alleged inaccuracies, inconsistencies, errors or bias.
25. Rule 72(1) of the Employment Tribunal Rules of Procedure provides that if the Judge considers that there is no reasonable prospect of the original decision being varied or revoked the application shall be refused. That is the case here.
26. The Rules provide that a party can only apply for a reconsideration if it is required "in the interests of justice". Under the previous Rules a number of reasons could be invoked, i.e.:
 - a. that an administrative error had resulted in a wrong decision;
 - b. that the party did not receive notice of the hearing;

- c. that the decision was made in the absence of the party;
- d. that new evidence was available; and finally
- e. that the interests of justice required a review.

27. Now all of these situations are covered by the single “interests of justice” test. The Employment Appeal Tribunal in **AB v Home Office** UKEAT/0363/13/JOJ held that the new wording was broadly to the same effect, i.e. it was intended to cover the sort of situations as in (a) to (d) above, where something has gone badly wrong with the decision making process. Nothing of that sort has been raised.

28. In **Fforde v Black** UKEAT/68/80, Lord McDonald held when considering (under the previous rules) whether the interests of justice require a review,

‘... this does not mean, as the appellant seems to think, that in every case where a litigant is unsuccessful he is automatically entitled to have the tribunal review it. Every unsuccessful litigant thinks that the interests of justice require a review. This ground of review only applies in the even more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order.’

29. Applying that guidance, there is no basis for a reconsideration here, and this application must therefore be refused.

Employment Judge Fowell

Date 17 September 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

18th October 2021.....

..THY.....

FOR THE TRIBUNAL OFFICE