**Case Number: 2300419/2017**

***JB***

# THE EMPLOYMENT TRIBUNAL

**BETWEEN**

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

**Held at Croydon (By video)** **On 3 November 2021**

**BEFORE: Employment Judge Siddall (Sitting Alone)**

**Representation**

**For the Claimant:** **In person**

**For the Respondent:** **Mr H Skudra**

## REVISED JUDGMENT ON REMEDY FOLLOWING REMITTAL BY THE EMPLOYMENT APPEAL TRIBUNAL AND FOLLOWING RECONSIDERATION

The decision of the tribunal is:-

1. It is declared that the Respondent failed to pay the Claimant the National Minimum Wage. The sum he is awarded is increased to a total of £5116.79 gross.

2. The Claimant is awarded an uplift of 12.5% in relation to the damages awarded to him for wrongful dismissal, a sum of £58.13 (12.5% of £465).

3. The Claimant is awarded a sum of £425.44 in relation to mobile phone charges in accordance with section 24(2) of the Employment Rights Act 1996.

4. The total award made to the Claimant is £4163.94.

# REASONS

1. A remedy hearing took place on 18 February 2020. I awarded the Claimant various sums including notice pay, and (following reconsideration) a figure of £574.73 by way of a shortfall in the National Minimum Wage. The Claimant appealed that decision arguing that I had not made proper allowance for vehicle rental costs and deposit, and uniform costs. He argued that under regulation 13 of the National Minimum Wage Regulations these should be deducted in considering whether the correct amount of NMW had been paid. The EAT agreed with him and remitted these matters back to this tribunal on the question of the correct sum of NMW shortfall to be awarded.

2. The EAT also remitted two other matters: first the question of whether the Claimant should be awarded any consequential losses under section 24(2) of the Employment Rights Act 1996; and finally the question of whether there should be an ACAS uplift to the sum of £465 I had awarded by way of notice pay.

3. I will deal with each of the remitted points in turn.

**NMW shortfall**

4. I find that the full sum of £3982.85 claimed by the Claimant in relation to vehicle rental charges and rental deposit shall be deducted from the wages he received when calculating what he was paid, for the purposes of his NMW claim. Having considered the judgment of the EAT I find that these were expenses 'in connection with' the employment for the purposes of regulation 13 National Minimum Wage Regulations 2015. I have considered the Respondent's argument that there should be a reduction for only a proportion of these costs on the basis that the Claimant enjoyed private use of the vehicle during periods when he was not working. I find that the matter is dealt with decisively by the EAT at paragraph 36 of their judgment: the expense 'neither had to be necessarily incurred, nor wholly or exclusively incurred. The test that Parliament has determined appropriate in the context of a national minimum wage calculation is whether the expenditure is in connection with the employment'. This statement leaves no room for a 'pro rata' approach to the deduction and there is nothing in the legislation which would appear to support that either.

5. Again in accordance with the EAT judgment the figure for uniform costs is to be deducted from the wages paid in calculating the correct figure. The total uniform cost is £88.

6. The exact amount of the NMW shortfall, taking into account these findings, could not be established before the close of the hearing. The Respondent had produced a spreadsheet showing its own calculation but the Claimant wanted time to consider this. I agreed that I would reserve issuing my judgment for 7 days to give him the time to comment and for any errors to be corrected. I understand that an inputting error was identified. On 9 November 2021 the Respondent sent me a revised spreadsheet which calculated the total NMW shortfall at £3680.37. I have not seen any correspondence from the Claimant asserting that he disputes this figure and so I have included it in my judgment. My earlier judgment awarding the Claimant the sum of £574.73 was therefore revised and replaced with an award of £3680.37 gross.

**Reconsideration**

7. On 30 November 2021 the Claimant sought reconsideration of the decision on the NMW shortfall. He argued that the calculation was incorrect as the 'circuit fee' charged by the Respondent before drivers could access the booking system had not been properly accounted for. In short, he pointed out that the Respondent's calculations had made allowance for the circuit fee where it had been paid direct by him out of cash payments he received from customers. They had not made allowance for the circuit fee deducted from 'account' payments received by the Respondent from account customers. I note that the circuit fees figure that had been used in my earlier remedy judgment and in this judgment had not been challenged previously by the Claimant. He had not raised the issue with the EAT and nor had he pointed this out when he was given the chance to consider the Respondent's calculations after the hearing on 3 November. Nevertheless he is entitled to seek reconsideration of the remedy judgment now issued. It is important to ensure that his NMW entitlement has been calculated correctly. I decided that it was in the interests of justice to reconsider the amount of NMW awarded. I requested the Respondent to consider the Claimant's application and provide a revised calculation if requested. They did so on 14 January 2022. They agree that an error had been made. They calculate that the correct amount of the NMW shortfall is £5116.79. They copied their correspondence to the Claimant. As of today's date I am told that the tribunal have received no correspondence from him to query this figure. Accordingly I have made a decision to vary my earlier decision and to increase the amount of the NMW shortfall in line with the Respondent's revised calculation. The revised Judgment set out above reflects that figure.

**ACAS Uplift**

8. In relation to the ACAS uplift, it is the Respondent's case that they did not apply a disciplinary procedure before terminating their contract with the Claimant because they were operating on the assumption that he was self-employed and that the statutory provisions did not apply to him. They

point out that the Claimant did not seek to raise either a grievance or an appeal in relation to the termination of his employment. The Claimant asserts that the scheme set up by the Respondents to treat the drivers as self-employed was a deliberate effort to circumvent the law relating to employment rights and that they should have applied a fair process before bringing his employment to an end. I find that the truth is somewhere between the two positions. The Respondent, like many other private hire vehicle companies, had made arrangements to hire drivers on the understanding that they were self-employed contractors. There has been a great deal of litigation over recent years which has now largely established that many of them are at least workers. In the case of the Claimant I found that he was in fact an employee. I find that the Respondent did not carry out a disciplinary process before terminating the Claimant's contract because they believed that they were not required to do so. The Claimant believed himself to be an employee and he brought tribunal proceedings asserting this very soon after his employment with the Respondent ended: yet he did not seek to assert his rights to trying to raise either a grievance or an appeal against termination. I conclude that whilst the Respondent was not without fault in failing to give the Claimant any chance to put his side of the story before they peremptorily arrived to collect his vehicle, this should not be treated as in the most serious category of cases as they were operating under the view that the procedures did not apply; and nor were they alerted to the fact, at this stage, by the Claimant that he believed their assumption to be incorrect (which he could have asserted in a grievance or appeal). In all the circumstances I find that an uplift of 12.5% (ie midway within the range up to 25%) should be applied and I award the Claimant an additional sum of £58.13 (the notice pay award amounting to £465).

**Consequential losses under section 24(2) of Employment Rights Act 1996**

9. The Claimant also claims consequential losses under section 124(2) of the Employment Rights Act 1996. Under this provision I can award such amount as is considered appropriate in all the circumstances to compensate a worker for any financial loss sustained by him which is attributable to his claim for unlawful deductions/failure to pay the NMW. I deal with each of the Claimant's claims under this heading in turn.

10. The Claimant claims lost employer's pension contributions of £412.14. No pension scheme was offered to the Respondent's drivers such as the Claimant who were treated as being engaged on a self-employed basis. I agree with the Claimant that following the finding that he was an employee of the Respondent, it is very likely that the pension auto-enrolment rules applied. However the question I must consider is whether I should make a payment of compensation for him.

11. The first point I take into account is that even if the Claimant had been enrolled in a pension scheme, the employer's contributions would not have been paid direct to him but into the scheme.

12. I have looked to see if there is any case law on the issue of whether an employee can be reimbursed for an employer's failure to make *employers* pension contributions into a scheme. I remind myself that in a claim for unfair dismissal, an employee could be awarded compensation for loss of pension, which is often calculated on the basis of the amount of employer's pension contributions which would have been made, had employment continued. I have noted the case of *Somerset County Council v Chambers* UKEAT/0417 which makes it clear that contributions to a pension scheme do not come under the definition of wages. The tribunal's reasoning included the fact that pension contributions are not payable to the employee.

13. In response to this the Claimant makes the point that he does not seek compensation for lost pension contributions by way of a claim for unlawful deductions, but by way of a claim for *consequential* losses as a result of the failure to pay him NMW. I accept that. I agree that in this case the Claimant and his fellow drivers may have lost out by not being enrolled in a pension scheme. Is this attributable to the fact that he was not being paid NMW?

14. I return to the fact that the Respondent at all times treated the Claimant as a self-employed contractor, responsible for his own tax and pension arrangements. It seems to me that this is the reason why he was not given access to a pension scheme. I find it more likely than not that if the Claimant had been treated as a PAYE employee, he would have been auto-enrolled into a scheme, whatever his level of pay. I find that the failure to make pension contributions is attributable to this factor and not to the pay arrangements that were in place. Even if this were not the case, it does not seem appropriate that any sum should be awarded direct to the employee. He would never have received those payments and ultimately they would have been reflected in his eventual pension entitlement. In all the circumstances I find that an award under this heading is not appropriate.

15. The Claimant claims compensation for lost employer's national insurance contributions amounting to £1127.23. I agree that as the Respondent failed to pay the Claimant the NMW and he is entitled to payment of the shortfall, employer's national insurance contributions may now become due. However I am not satisfied that the Claimant has demonstrated that he has suffered a 'loss sustained by him'. He has not produced evidence from HMRC for example to show how his national insurance record has been affected. Again, those sums would never have paid direct to the Claimant. They would have been paid to the Respondent direct to HMRC under the usual PAYE obligations. It seems to me that there are a number of possibilities here. First, the Respondent will have to record the sums paid to the Claimant by way of NMW and may have to account for these to

HMRC. That may lead to HMRC charging the Respondent direct for the unpaid contributions. Second it is open to the Claimant to write to HMRC to notify them of the fact that he was not being paid NMW. They are of course the enforcement body for breaches of NMW legislation. He could request that he is credited with the unpaid NI contributions on the payments that he should have received.

16. In the absence of any evidence about the effect of the underpayment of NMW upon the Claimant's national insurance record I am not able to conclude that at present this is a loss sustained by him. I find that the claim is premature. The position may change once the NMW shortfall has been paid. This may be a matter that is better taken up with HMRC.

17. I award the Claimant the sum of £425.44 in relation to the additional mobile phone charges that he incurred. He says and I accept that he was required to have a phone with specific capacities and a specific amount of data to run the 'app' through which he was able to log on as a driver and be given work. Whilst he made the payments during his employment, he defaulted on his phone bills first when he had to go off sick in the autumn of 2016 and then when his contract was terminated. Ultimately the phone company cancelled the contract when he could not keep up the payments. They charged him a cancellation charge which he is still paying off on a monthly basis. Whilst I accept that to an extent these charges arose not because of his overall rate of pay but because his employment came to an end, I take into account the fact that he was required to have an expensive phone, that he was finding it difficult to manage on the wages he was receiving and that he fell into significant financial problems around August or September 2016 after he fell ill. Given that these problems commenced during his period of employment with the Respondent I find that they are attributable to his claim and that it is appropriate to award him that sum.

18. I do not make any award in relation to the wasted costs that the Claimant says he incurred because he was unable to complete the Knowledge for London. He purchased training materials in 2015. He says that it was his intention to work for the Respondent as a private-hire driver whilst completing his Knowledge training. To do this, it was recommended that he purchased a moped but he says he could not afford this on the wages received from the Respondent. He has produced letters showing that TFL granted him three separate extensions to the time period during which he would have to take his first written assessment, the final extension being granted until August 2019, some three years after his engagement with the Respondent ended. During that time the Claimant worked for short periods for three other organisations. He worked for another private hire company from September to November 2016 and with another employer November 2016 to March 2017. He did one shift for Deliveroo. He was unemployed and on benefits from March 2017 to August 2019. He has now set up his own self-employed business. He never took the Knowledge written assessment and claims all his initial costs of application, a total of £691.14.

19. The Claimant had from February 2016 to August 2019 to complete this written assessment. Whilst accepting that he has struggled financially, I do not accept that his failure to achieve this qualification can be said to be attributable to the Respondent. Even if he was unable to progress his training during the six months he was working for them he had a further 3 years to complete it. The fact that he was not financially able to move forward throughout that period is not wholly down to the Respondent. It appears that in the period from 16 September 2016 to March 2017 the Claimant worked for two other companies, but for whatever reason his employment with them was very short-lived. No doubt this also contributed significantly to his financial difficulties. Second whilst it was the evidence of the Claimant that the normal practice was for people learning 'the Knowledge' to purchase a moped, there was no evidence of other efforts to learn the routes during the seven months when he was employed by the Respondent. Third, it was put to the Claimant and he accepted that there was no guarantee that he would have passed the written assessment at first attempt. He indicated that this was not an issue as it is possible to keep taking the assessment provided you pass within the time limit (usually two years). This evidence seems to acknowledge the possibility of a failure of the written assessment at the first attempt. I find that even if he had been able to progress his studying of the Knowledge during his period of employment from February to September 2016, there is a chance that he may not have passed the assessment during that period.

20. In all the circumstances I find that the Claimant's failure to progress his training within the extended time period cannot be said to be attributable to the Respondent – there are too many intervening or potentially intervening factors, such as his failure to secure or remain in other work. He has not established that the reason why he was not able to take the written assessment over a total period of around three and a half years was attributable to the amount he was paid during the seven or so months he worked for the Respondent in 2016. The wasted costs he has claimed are too remote from the events of his employment with the Respondent and specifically from the amounts he was paid by them.

**Employment Judge Siddall**
Date: 11 February 2022.