



EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 3 December 2024

Claimant: Mr Harith Taha

Respondent: Novatek Europe Limited

Before: Employment Judge E Fowell

Representation:

Claimant Julie Duane of counsel, instructed by Clements Solicitors

Respondent Louise Simpson of counsel, instructed by Doyle Clayton Solicitors

JUDGMENT ON REMEDY

1. The claimant is awarded compensation as follows:
 - (a) For wrongful dismissal of **£6,039.48**
 - (b) For unfair dismissal, a basic award of **£16,718** and a compensatory award of **£33,600**
2. The total awarded is therefore **£56,357.48**

REASONS

Introduction

1. At the last hearing, on 13 and 14 November 2024, I found that Mr Taha had been unfairly dismissed. I also concluded that his dismissal was in breach of contract and so he is entitled to his notice pay.
2. This morning's hearing was to assess his compensation and I had some further documents in a remedy bundle of 124 pages. That included Mr Taha's previous P60s, details of his commission structure at Novatek, his bank statements, various adverts for jobs which he could have applied for and schedules of loss from each

side. I also had, separately, the judgments from the two previous wages claims which Mr Taha brought against the company. I heard some further evidence from Mr Taha and I am grateful to both counsel for their submissions in what is a more difficult exercise than usual.

3. The first complication is that his earnings at Novatek involved a mixture of basic pay and commission. Not only that, but he had been off sick for about a year before his dismissal, during which time he had exhausted his entitlement to sick pay, and his commission payments had slowed to a trickle. It is therefore difficult to assess what earnings he would have received had he not been suspended on his return to work and then subject to the various unfounded disciplinary allegations that led to his dismissal.
4. At the heart of the decision on liability was the breakdown in relations between Mr Taha and the Managing Director, Mr Moreno. That developed following the recruitment of Mr Smith, in a similar capacity to Mr Taha, in 2020, and subsequent tensions over the allocation of clients and over commission opportunities. In trying to work out what Mr Taha would have earned, had he not been dismissed, I have to assume that he would have been treated fairly, and given a reasonable opportunity to recover his earnings. That would have meant a fair division between him of clients and opportunities between him and Mr Smith. Quite how that balance would have been struck is unclear. Many of the clients would have been Mr Taha's but Mr Smith would have been working on them in his absence. I have no evidence about Mr Smith's earnings so all of that is largely a matter of speculation.
5. I will start therefore with the more straightforward aspects.

Wrongful dismissal

6. It is agreed that given Mr Taha's long service of 19 years, and the lack of any written contract of employment providing for more generous terms, the relevant notice period is 12 weeks, but the parties differ over the value of net weekly pay.
7. The figure put forward for the claimant is £909.05, reflecting his average earnings in the last two full years worked, to April 2022. The respondent says that it should just be his basic weekly pay of £503.29. That is based in turn on a gross figure of £646.15 or an annual basic salary of £33,600.
8. The Employment Rights Act 1996 sets out the rules on calculating a week's pay for these purposes at sections 221 to 223. Section 221 provides:
 - (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.

9. Pausing there, Mr Taha did work normal working hours, and so these sections apply. It continues:

(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.

(3) 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 vary with the amount of work done in the period, the amount of a week's pay is the amount of remuneration for the number of normal working hours in a week calculated at the average hourly rate of remuneration payable by the employer to the employee in respect of the period of twelve weeks ending—

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

10. On the face of it, subsection (2) - which concerns those whose remuneration does not vary with the amount of work done – applies to those who work fixed hours for a fixed salary. Their pay does not depend on how much they achieve each month. Whereas subsection (3) appears to apply to those whose rewards *do* vary with effort. That is not quite the case however. There are some commission arrangements where the harder a person works the more productive they are, and the more they earn. But more typically, sales are not the result of extra effort. Mr Taha could work round the clock for a month and not necessarily achieve any more in the way of sales, and so his earnings did not vary with the amount of work done. As a result, he falls within sub-section (2). The Court of Appeal reached that conclusion in a very similar case: **Evans v Malley Organisation Ltd t/a First Business Support** 2003 ICR 432, CA.

11. Consequently, the lower figure applies and so damages for wrongful dismissal have to be based on 12 weeks' pay at £503.29 per week, or **£6,039.48**

Unfair dismissal

Basic Award

12. The basic award is agreed in the sum of **£16,718**.

Compensatory Award

13. The compensatory award is subject to an upper limit of 12 months' gross pay, i.e. 52 weeks' pay, calculated in accordance with section 221(2) above. Hence, there

is an upper limit of £33,600. That may well strike Mr Taha as rather arbitrary and unfair, but that is the limit I am obliged to apply.

14. With that in mind, I approach the remaining calculations. The starting point is to assess the earnings which Mr Taha would have received had he remained in the respondent's employment, given a fair division of client's and opportunities.
15. Mr Taha says that he had many clients and had been working with them for many years. The projects in question were typically delivered over five years, with recurring commission payments, and he should therefore have been able to recover his previous level of income without much delay.
16. The respondent's position is that there was little or no chance of Mr Taha earning any commission given that he was off sick for so long. In particular they say that the commission structure had changed and it now excluded such repeat business (described as Service Level Agreements or SLAs). I was referred to the judgment of the Tribunal in his first wages claim (2304039/2022). That case involved evidence from both Mr Taha and Mr Moreno. Employment Judge Taylor gave judgment on 4 April 2023 and found as follows:
 10. The claimant's basic salary at the time he presented his claim to the Employment Tribunal was £2,271 net, plus commission. Commission was paid twice a year on 1 July and the 31 January.

...
 12. Employees engaged in a sales role were allocated an individual sales target each year (164-169). This formula was fixed by Mr Moreno-Gellini each year and the formulation changed from year to year, depending on the needs of the business as identified by him. Several factors were taken into account including, the need to attract new business and the need to encourage and motivate sales staff; for example, in recent years repeat client purchases did not qualify for commission. Mr Moreno-Gellini exchanged emails and held meetings with the small sales team, by video, to discuss the proposed commission schemes before they were set down in writing and applied to each member.
 13. All sales staff received an email setting out their sales target for the year 1 January to 31 December. To qualify for a commission payment the claimant and the other members of the sales team had first to exceed their personal sales target for each six month period.
 14. There was a dispute between the parties about how the commission payments were calculated. The claimant contended that commission payments were based on the date of a purchase order put through by him. The respondent disagrees. The tribunal finds that a purchase order records what product and services a client has agreed to buy and at what price. The product can be complex and often there is a continuing dialogue between the client and the company about how complex software products are delivered over a period of time.

15. The respondent gave evidence, that was accepted by the tribunal, that commission is calculated by reference to the invoice date, that is the date a request for payment is made to the client. Often a sale can result in several invoices being submitted to the client, reflecting an agreement that the contract would be delivered to the client in two or more stages, over a period of up to 4 years. As an example, commission payable to the claimant for the half year July 2016 and January 2017 headed 'Purchase Order Schedule' was shown to have been calculated by date of the invoice (58-59).

...
19. The recent commission structure documents (246 and 248) evidence that employees in sale roles were notified each year of the commission scheme applicable to them, personally. Employees were entitled to commission if their sales reached the applicable minimum target. For each six-month period commission would be based on what had been invoiced during that period. Commission was calculated on invoice date. Employees are entitled only to commission from sales they themselves had made. It follows members of the sales team were not entitled to commission on sales made by their colleagues.
20. For invoices dated 1 January to 30 June any commission was scheduled to be paid by 31 July of that year. In respect of invoices dated 1 July to 31 December any commission would be paid by 31 January the following year. The claimant's minimum target for each six month period in 2022 was £195,000 in invoiced sales. Accordingly, the respondent notified the claimant of the 2021 and 2022 commission calculation, including the minimum target for each six-month period. Between 1 January 2022 and 30 June 2022 the claimant's invoices did not reach the minimum target (259, 260) and for the period July 2022 to December 2022 the Claimant' total invoiced sales did not reach the minimum target (261,262,264,265,266 and 290). Therefore, the claimant was not entitled to any commission on 31 July 2022 and he was informed of this (237 and 231).
21. The claimant stated that he had not signed any document to confirm agreement to the commission structure the respondent claims applied to him. That submission does not assist his case. The respondent established that the commission structure was changed from year to year. For the purpose of this case the tribunal found the claimant was informed in clear terms on 8 April 2021 (113) that if he did not accept the proposed commission scheme, for that year, he would not be entitled to any commission at all. The claimant and all of the other members of the sales team were informed, after consultation, of the company (and individual) commission schemes for 2021 and 2022 (246 and 268).
17. So, commission arrangements were decided annually by Mr Moreno, bearing in mind the need to attract new business and to encourage and motivate sales staff. Sales targets were set for the calendar year. Commission payments would then be calculated on the basis of the amounts invoiced to the client and paid twice a year, on 31 July and 31 January.

18. The commission structures for 2021 and 2022 were included in the bundle for this hearing at pages 1 and 2. They exclude SLAs. That arrangement would of course have been a favourable one from Mr Smith's point of view given that he did not such a long track record of sales and the same body of established clients as Mr Taha, but I accept that Mr Moreno would need to achieve a fair outcome between the two of them and so removing those legacy payments may well have achieved that aim. No doubt extra rewards were included for gaining new clients as a quid pro quo.
19. What I do not have however is the commission structure for 2023, the year that Mr Taha returned to work, nor for 2024, when he might still have been working there. The question is not therefore what Mr Taha would have earned under these old arrangements, but what terms applied in 2023 and what would have applied in the altered circumstances of his return to work in August that year.
20. To have any chance of incentivising Mr Taha, the targets in question would have to be set at an achievable level. He earned nearly £70,000 in the year to April 2021 and nearly £60,000 the year after, when some clients were allocated to Mr Smith, but anyway much more than his basic salary of £33,600. If it had stayed at that basic level very long it would be a cause for concern for the respondent as much as for him. The levels of commission are not large. They vary from 4% to 9% of the earnings to the company, so the more commission he earned the better for them.
21. I also bear in mind that that this was a very small business, which makes it even less likely that Mr Moreno, applying himself to the need to incentivise Mr Taha and to act fairly, would have allowed a situation to continue in which Mr Taha laboured away for the rest of 2023 without any prospect of him achieving a commission payment the following January. What then, would have happened?
22. The best evidence I have for the level of reward that Mr Taha might reasonably expect is from the P60 for April 2022. This is for a period when both he and Mr Smith were working at the company. That figure is £57,919.75. It is a reduction on the previous year of about £11,000. That reflects the arrival of Mr Smith.
23. That is of course now about two and a half years ago during a period of significant wage inflation. Figures on wage inflation are published by the Office for National Statistics and are a matter of public record. The annual growth rate of regular private sector pay was 8.1% in May to July 2023, which is about the time that Mr Taha returned to work. The following year it was 4.7%. The combined effect of those rises is an increase of 13.1% over those two years. Given that the actual period is another 6 months later, I will use the figure of 15% to give the best estimate of what would be a corresponding figure now for the earnings Mr Taha had in 2021/22. That raises the total to over £66,000.

24. His basic salary was still £33,600 at the date of his dismissal, in August 2023, and applying a more conservative 7% increase to that (extending the 4.7% figure over 18 months), it ought now to stand at about £36,000.
25. That is therefore an estimate, in today's terms, of his previous remuneration at Novatek and the level he could expect to return to in due course, i.e. a basic salary of £36,000 and commission of £30,000. If there is any reason to believe it should be lower (or higher) based on market forces or other changes within the company, it was not put forward.
26. How long might it have taken to reach that notional amount? Again, that is largely a matter of conjecture. It seems unlikely that Mr Moreno would have reintroduced a reward scheme based on SLAs, so Mr Taha would not simply have achieved commission based on past sales. I also accept that in the five months from August 2023 to January 2024, he is unlikely to have achieved a commission payment, given the time lag involved. But there ought to have been some significant payment in July, and steady sums from then on. In my view, given the need to incentivise him, the likely outcome would have involved him earning at his previous level in 2025, and to have narrowed the gap by half during 2024. That would involve making £51,000 in 2024 and £66,000 in 2025.
27. The figure of £51,000 would have to reflect a gross commission payment of £15,000 in July 2024, which does not appear unreasonable on the basis that he would have worked for 11 months to achieve it. There would be a small amount of higher rate tax to pay on that, so the net payment would have been an extra £10,411.
28. A further such payment in 2025 would come within the same tax year and would involve tax 40%, leaving £9,000, so the net commission payments would total £19,411, or £9,705 each
29. In this (admittedly hypothetical) scenario, his basic salary would have continued during 2023 at £33,600 per year, or £2,271 net per month, rising to £36,000 per year, or £3,000 gross per month in 2024, or £2,414 net.
30. His dismissal was on 7 August 2023 and his notice pay of 12 weeks would have taken him to the end of October 2023. A monthly list of payment received from then to date would therefore look like this:

Month	Pay
November 2023	£2,271
December 2023	£2,271

January 2024	£2,414
February 2024	£2,414
March 2024	£2,414
April 2024	£2,414
May 2024	£2,414
June 2024	£2,414
July 2024	£2,414 + £9,705 = £12,119
August 2024	£2,414
September 2024	£2,414
October 2024	£2,414
November 2024	£2,414

31. Turning to his current earnings, Mr Taha got another job in short order. He started with Calibre Technology, an Indian company, from 11 September 2023.
32. In his witness statement for the main hearing he stated, at paragraph 99:
- “I began mitigating my losses on 11 September 2023, finding new employment with a net weekly pay of £477.87 as can be seen from my bank statements [502 – 522], I have found ad hoc work, which means there are times where I do not find work as easily. The amount of £447.87 has been calculated based upon the amount of pay I received between October 2023 and April 2024.
33. The figure in the schedule of loss is £341.29, on the basis of his bank statements to November 2024. The respondent puts it slightly higher, at £353.70 per week, and I will use those figures, as being unlikely to understate the amounts. Still, it is a considerable drop from his previous earnings. That is a monthly figure of £1,532.70. There is also a continuing pension loss of £23.08, so I will use the figure of £1,509.62 in assessing the shortfall, or £1,510 ignoring pence.
34. I have no documentary evidence from Calibre, such as a contract of employment or payslips, and it appears that as an Indian company, which does not have a UK arm, it does not seem to provide this level of documentation. That is surprising but was not disputed.

35. It was put to Mr Taha that he has failed to mitigate his loss and that there were many alternative roles which he could have taken up. However, on examination, each of them was in a slightly different industry or line of work. His specialism is in quality management software systems for the pharmaceutical industry which has its own particular 'LIMS' system - Lab Information Systems Management. It is a very niche area. He is also limited by his existing health conditions and so was previously working from home, and his age, at 55, is also now a factor.
36. I accept therefore that he has taken reasonable efforts to mitigate his loss. He is also expecting to accumulate commission in his present role which is a similar one although most of the clients are based in India.
37. Adding those figures into an appropriate table for the purposes of comparison, it would look like this:

Month	Novatek Pay	Calibre pay	Shortfall
November 2023	£2,271	£1,510	£761
December 2023	£2,271	£1,510	£761
January 2024	£2,414	£1,510	£904
February 2024	£2,414	£1,510	£904
March 2024	£2,414	£1,510	£904
April 2024	£2,414	£1,510	£904
May 2024	£2,414	£1,510	£904
June 2024	£2,414	£1,510	£904
July 2024	£12,119	£1,510	£10,609
August 2024	£2,414	£1,510	£904
September 2024	£2,414	£1,510	£904
October 2024	£2,414	£1,510	£904
November 2024	£2,414	£1,510	£904
Total			£21,171.00

38. Looking forward, there would be further significant shortfalls in 2025. Some estimate has to be made of the commission which Mr Taha might earn at Calibre in that time. Here, I have even less to go on, but it would be wrong to discount this prospect. On a very broad basis, I expect that Mr Taha will increase his earnings with Calibre as he begins to accumulate commission, or might leave if this did not come to pass and better opportunities presented themselves. Reasonable gross figures might be £40,000 per year in 2025 and increasing at perhaps £5,000 per year for the next two years. I have to bear in mind that Mr Taha is highly qualified and experienced, so even with his health concerns and the need to work for home, he should expect well above average earnings.
39. The precise figures are perhaps immaterial. On the basis of these assumed figures Mr Taha would have received an extra commission payment of £9,705 net in January 2025 and again in July 2025. These sums suffice to bring the total to well over the statutory maximum, and for the avoidance of doubt I see no difficulty in assessing future loss over the next 12 months.
40. It follows that there is no point in going on to consider the ACAS uplift, since that too is subject to the statutory cap. In case I am wrong however about the above figures this does seem to me an appropriate case for an uplift. The Code sets out the basic principles for handling disciplinary procedures, which should:
- (a) establish the facts of each case
 - (b) inform the employee of the problem
 - (c) hold a meeting with the employee to discuss the problem
 - (d) allow the employee to be accompanied at the meeting
 - (e) decide on appropriate action, and
 - (f) provide the employee with an opportunity to appeal.
41. Given my finding that the allegations were largely spurious (§82) it could be said that the maximum award should apply, but I take the view that it is the mechanics of the process that have to be followed, and the only specific defect was in relation to the appeal. As noted at §52, Mr Taha waited 6 weeks after his appeal and then withdrew it having found another job. That is a considerable period. Given the other occasions on which Mr Taha's grievances were ignored, I conclude that there was never any intention to hold an appeal and on that basis an uplift of 10% is indicated. The fact that he withdrew the appeal is simply a recognition of the respondent's lack of interest.

42. If it made any difference to the total I would also add £500 for loss of statutory rights. However, it follows that the claimant is entitled to the statutory maximum compensatory award of £33,600.

Employment Judge Fowell

Date 3 December 2024

Sent to Parties.
12 December 2024

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