

THE INDUSTRIAL TRIBUNALS

CASE REF: 8245/18

CLAIMANT: Robert Ashley Jones

RESPONDENT: Grab a Cab (NI) LLP t/a New City Cabs

DECISION

The decision of the tribunal is that the tribunal finds the claimant's claims against the respondent to be well-founded, as follows:

- (1) Unfair dismissal;
- (2) Notice pay;
- (3) Unlawful deduction of wages; and
- (4) Unpaid holiday pay.

Further, the tribunal determines that the respondent is in breach of the requirement to provide the claimant with a statement of terms and conditions of employment. Under Article 27 of the Employment (Northern Ireland) Order 2003 the tribunal makes an award in respect of this breach.

The tribunal Orders the respondent to pay to the claimant the total sum of **£5,841.78**, subject to recoupment, as stated below.

Constitution of Tribunal:

Employment Judge (sitting alone): Employment Judge Leonard

Appearances:

The claimant appeared and represented himself.

The respondent did not enter a response to these proceedings and there was no representation at hearing by or on behalf of the respondent.

THE ISSUES TO BE DETERMINED AND THE EVIDENCE

1. The claimant, by claim dated 15 June 2018, claimed against the named respondent "New City Cabs" in regard to: (1) unfair dismissal; (2) notice pay; (3) arrears of pay; and (4) holiday pay. There was no response to the claimant's claim. The matter was case-managed. There was a Case Management Discussion held on 6 September 2018 both in regard to the claimant's case and also in respect of five other claimants who had instituted claims against the same respondent. In respect of the claimant, an Employment Judge found the claimant's claim in respect of redundancy pay to be well-founded and the Employment Judge made a default judgement in the sum of £1,085.00 in respect of redundancy pay, which judgement was issued on 19 September 2018.
2. The tribunal therefore had to determine the remaining issues as set out in the claimant's claim or otherwise arising in these proceedings and if any of the claims were to be determined as being well-founded, the matter of appropriate remedy.
3. The tribunal heard oral evidence from the claimant and noted any documentation produced in evidence in the matter.

FINDINGS OF FACT

4. In consequence of the oral evidence of the claimant and any documentary evidence, the tribunal on the balance of probabilities made the following findings of fact material to the issues requiring to be determined:-
 - 4.1 The claimant was employed by the respondent as the taxi operator, commencing in that employment on 9 July 2012. The claimant worked night shifts throughout the working week. The claimant's normal working hours consisted of 30 hours per week. In this employment his gross pay was £225.00 per week and his nett pay was £215.06. In that regard, it is noted that the default judgement in respect of redundancy pay in respect of the claimant indicated that the gross weekly pay was £217.00 per week. However, upon the evidence adduced, the tribunal's finding is that of the applicable gross pay in this employment was £225.00 per week.
 - 4.2 The claimant never received a written contract of employment, but he did receive written wage advice documentation. He commenced employment on a "week in lieu" basis; thus his wages were always paid one week in arrears. The respondent's manager was a Mr William McKinstry. The claimant was requested to attend the workplace by Mr McKinstry on 22 January 2018. Other members of the respondent's staff were also present on that date. Mr McKinstry announced to all employees present that the respondent company was insolvent and, in effect, the claimant was given verbal notice by Mr McKinstry of termination of his employment contract, with immediate effect on that date. The claimant was summarily dismissed from employment with the respondent, with effect from 22 January 2018. At that date the claimant was aged 26. The claimant received payment of his normal wages up to that date of dismissal. However, he remained unpaid for the "lying week" which had been the arrangement subsisting from the commencement of employment and he now claims one week's pay in that regard.
 - 4.3 The claimant's contention is that Mr McKinstry, as manager of the respondent, would have been aware of the financial difficulties encountered by the respondent

company for some considerable time prior to the date of dismissal but that he did not inform the employees, including the claimant. Effectively, there was no warning whatsoever provided to the claimant, nor was there any consultation engaged in with the claimant by the respondent's management regarding potential redundancy. The claimant's evidence supports the proposition that the respondent company was, on balance, in some manner of financial difficulty and that the respondent needed to engage in a process of redundancy concerning staff and that staff members, including the claimant, were dismissed with effect from 22 January 2018 upon the grounds of redundancy.

- 4.4 The claimant's evidence was that in the year prior to the termination of employment, the claimant took and he received very little paid annual leave. His evidence was that he was owed five weeks' pay in respect of untaken annual leave upon the statutory basis. In the absence of any contrary evidence, the tribunal finds the claimant to be a credible witness and accepts this evidence from the claimant in that regard.
- 4.5 After having been dismissed by the respondent, the claimant signed on for Job Seekers' Allowance with effect from 25 January 2018, which he received and, seeking new employment, the claimant remained in receipt of Job Seekers' Allowance continuously up to 13 April 2018, at which time he was fortunate to commence full-time work for Applegreen. In this latter employment, the claimant's wage was greater than the wage earned by him in his employment with the respondent. There is no continuing financial loss claimed by the claimant, nor was any such loss sustained by the claimant beyond 13 April 2018.
- 4.6 Notwithstanding the mention made of the respondent company potentially being in an insolvent situation, there was no evidence at the hearing date that the respondent company was formally insolvent in that the company had entered into liquidation, administration or into a voluntary arrangement. Upon the evidence, the tribunal determined that there was no reason for the proceedings to be stayed and the tribunal proceeded on the basis that the respondent company was not formally insolvent at this material time. The tribunal did not need to determine any further findings of fact for the purpose of the decision in this case.

THE APPLICABLE LAW

5. The Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order"), Article 118, provides that the statutory minimum period of notice required to be given by an employer to terminate the contract of employment of an employee who has served for over two years, is not less than one week's notice for each year of continuous employment. In the absence of evidence of enhanced contractual terms, this minimum statutory notice is deemed to be incorporated into any contract of employment. It is a breach of contract on the part of any employer to fail to provide either pay in lieu of notice or due notice upon termination of employment. A breach of contract claim may be brought under the terms of the Industrial Tribunals Extension of Jurisdiction Order (Northern Ireland) 1994. This enables an employee to recover sums due under a contract of employment which arise or are outstanding upon termination of any employment.
- 5.1 Article 45 (1) of the 1996 Order provides that:

"An employer shall not make a deduction from wages of a worker employed by him unless – (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction".

Article 45(3) of the 1996 Order provides that:

"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion".

The Court of Appeal in England in the case of ***Delaney –v- Staples (t/a De Montfort Recruitment) [1991] ICR 331***, held that there was no valid distinction to be drawn between a deduction from a sum due, and non-payment of that sum, as far as the relevant statutory provision was concerned. Article 59 of the 1996 Order provides that the definition of “wages”, in relation to a worker, means:

"... any sums payable to the worker in connection with his employment, including - (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise...",

subject to certain statutory exceptions which do not apply to the facts of this case.

- 5.2 Articles 33 and 36 of the 1996 Order require an employer to provide an initial statement in writing of employment particulars and also covering any subsequent changes to particulars. Article 33 (1) provides that where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment, but Article 33 (2) provides that this shall be given not later than two months after the beginning of the employment.
- 5.3 The Employment (Northern Ireland) Order 2003 ("the 2003 Order") at Article 27 provides that where the employer is in breach of the duty to the employee under Article 33(1) or 36(1) of the Employment Rights Order to give a written statement of initial employment particulars or of particulars of change, the tribunal shall make a minimum award of either two weeks' or, if in all the circumstances it considers it just and equitable to do so, four weeks', gross pay if there is a breach of the requirement to provide such a written statement of employment particulars by the employer. This entitlement applies only where the tribunal finds in favour of any claimant in respect of proceedings concerning specific statutory entitlements relating to a claim by an employee under any of the jurisdictions listed in Schedule 4 to the 2003 Order. Schedule 4 encompasses any claim under Article 55 of the 1996 Order 1996, that being a claim in respect of unauthorised wages deductions and also includes breach of contract claims and Working Time Regulations claims, redundancy payment and unfair dismissal claims.
- 5.4 The Working Time Regulations (Northern Ireland) 1998 ("the 1998 Regulations") as amended by the Working Time (Amendment) Regulations (Northern Ireland) 2007 implement the provisions of Article 7 of the 2003 Directive (Directive 2003/88/EC) in

Regulation 13 in regard to annual leave. Regulation 16 relates to payments in respect of periods of leave and at 16 (1)-(3) provides:

“A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under Regulation 13 [and Regulation 13A], at the rate of a week’s pay in respect of each week of leave”.

- 5.5 The 1996 Order provides at Article 126 that an employee has the right not to be unfairly dismissed by his employer. Article 130 of the 1996 Order provides for the test of fairness concerning the dismissal by an employer. It is for the employer under the provisions of Article 130 (1) (a) to show the reason (or, if more than one, the principal reason) for the dismissal, and, under Article 130 (1) (b), that it is either a specified reason as set out in Article 130 (2) or some other substantial reason of a kind such as to justify the dismissal. A specified (potentially fair) reason for dismissal that is set out in Article 130 (2) (c) concerns redundancy. If a tribunal makes a finding of unfair dismissal, and an order for re-engagement or reinstatement is inapplicable, a tribunal may make an order for compensation, including both a basic award and a compensatory award. For the compensatory award under Article 157, the award is such amount as the tribunal considers just and equitable, having regard to the loss sustained by the complainant in consequence of a dismissal, insofar as that loss is attributable to action taken by the employer.
- 5.6 In regard to the matter of fair procedure concerning a redundancy process, the established law is that any employer contemplating dismissing an employee on grounds of redundancy ought properly to warn and to consult with the affected employee.
- 5.7 The Industrial Relations (Northern Ireland) Order 1992, as amended by the Employment Act (Northern Ireland) 2011, includes Article 90AA which applies to proceedings before an industrial tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 4A (which includes the statutory jurisdictions claimed by the claimant in this case). If it appears to the tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice (as issued by the Labour Relations Agency) applies, and to which a statutory dispute resolution procedure does not apply and the employer has failed to comply with that Code in relation to that matter, and that failure was unreasonable, the tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 50%. The 2003 Order was amended by the Employment Act (Northern Ireland) 2011, but Article 17(1) to (4) subsists in relation to non-completion of statutory procedure (the dismissal and disciplinary procedures) and adjustment of awards by industrial tribunals and, under Article 23, in relation to procedural fairness in unfair dismissal. If it appears to the industrial tribunal that the claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies, the statutory procedure was not completed before the proceedings were begun, and the non-completion of the statutory procedure was wholly or mainly attributable to failure by the employer to comply with a requirement of the procedure, the tribunal shall normally increase any award which it makes to the employee by 10% and may, if it considers it just and equitable in all the circumstances to do so, increase it by a further amount up to 50%. In regard to procedural fairness, the 1996 Order (as amended by the 2003 Order) provides at

Article 130A that an employee who is dismissed shall be regarded as unfairly dismissed if one of the procedures set out in Part I of Schedule 1 to the 2003 Order (the dismissal and disciplinary procedures) applies in relation to the dismissal, the procedure has not been completed, and the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements. Schedule 1 to the 2003 Order sets out statutory dispute resolution procedures which must be followed in most circumstances.

THE TRIBUNAL'S DECISION

6. The applicable contract terms in this matter, in the absence of any evidence of a written contract during the currency of this employment, are those which upon the evidence were orally agreed between the claimant and the respondent as might have been varied from time to time. The tribunal accepts that at the material time, that is to say at the conclusion of the employment contract, the applicable wage rate was £225.00 per week gross and £215.06 nett, as agreed for the normal 30 hour working week. The effective date of termination was 22 January 2018 and at that time the claimant had been continuously employed in this post for five years. The tribunal does not need to concern itself with redundancy pay as an award has already been made to the claimant by an Employment Judge, by Order dated 19 September 2018. However, in respect of the matter of unfair dismissal and the basic award, the amount awarded in the said Order dated 19 September 2018 shall have properly to be taken into account.
7. The employment was summarily terminated by the employer on 22 January 2018. There was no warning given and no prior consultation on the employer's part concerning what was in effect a summary dismissal of the claimant. The law on this is well-settled. The general law is in accordance with the guidelines as set out in the case of *Williams v Compair Maxam Ltd [1982] IRLR 83 EAT*, which were approved by the Court of Appeal in Northern Ireland in *Robinson v Carrickfergus Borough Council [1983] IRLR 122*. The general importance of adhering to procedural safeguards has been emphasised by the House of Lords (per Lord Bridge) in the case of *Polkey v AE Dayton Services Ltd [1987] IRLR 503*. It is sufficient to say, without the necessity to provide much elaboration, that for whatever reason (and regrettably in the absence of any response or of any evidence from or on behalf of the respondent the tribunal has no information) there was no proper warning and no consultation and there was very evidently no endeavour made by the respondent company to explore possible re-deployment or any other such course of action. With a dearth of information, it is impossible for the tribunal to assess whether warning and consultation would have been utterly futile. In these matters the tribunal thus looks to issues of procedural fairness. In this case, the dismissal of the claimant in the absence of any warning and consultation was procedurally unfair. Further to that, no statutory dismissal procedures were invoked by the respondent in effecting the termination and the matter is also automatically unfair for that reason. It follows that the claimant was unfairly dismissed by the respondent, without notice or pay in lieu of notice.
8. At the time of the dismissal, the claimant was owed wages amounting to one week. The tribunal also accepts upon the basis of the available evidence that the claimant was due unpaid holiday pay amounting to the equivalent of five weeks' pay.

9. Concerning the matter of appropriate statutory uplift under Article 17 (3) of the 2003 Order, taking account of the applicable principles in that respect and determined cases providing guidance to this tribunal (see in that regard *Cex v Lewis [UKEAT 0013/07]*, *Metrobus v Cooke [UKEAT 0490/06]*, *Butler v GR Carr (Essex) Ltd [UKEAT 0128/07]*, *Aptuit (Edinburgh) v Kennedy [UKEATS 0057/06]*, and *McKindless Group v McLaughlin [UKEATS 0010/08]*), the tribunal determines that this is a matter where a decision was taken to dismiss the claimant entirely in disregard of these essential statutory procedures. In the absence of the respondent, the tribunal is unable to explore why that is the case more fully. The tribunal determines under such circumstances that the statutory uplift which ought to be applied is 30% and thus a figure of 30% uplift is applied to the computation of the award that is set out below.
10. Articles 33 and 36 of 1996 Order require the provision of written employment particulars. Article 27 of the 2003 Order applies to proceedings before tribunal relating to the claims set forth in Schedule 4 to the 2003 Order. This entitlement applies only where the tribunal finds in favour of any claimant in respect of proceedings concerning specific statutory entitlements. In this case these specified entitlements in regard to which the tribunal has found in favour of the claimant include unfair dismissal and unauthorised wages deductions, notice pay and holiday pay. That being the case, where the claimant's claim encompasses Articles 33 and 36 of 1996 Order and the respondent has been determined to be in breach of the duty to provide the required statement of employment particulars, the tribunal is required to make one of the specified awards unless there are exceptional circumstances which would make such an award unjust or inequitable. In this case the tribunal does not determine that there are any such exceptional circumstances. The tribunal determines that it is just and equitable to make an award of two weeks' pay under these particular circumstances. This latter is included in the computation of the award that is set out below.
11. For these reasons, the tribunal finds the claimant's claims to be well-founded. Specifically regarding the claim of unfair dismissal, if a tribunal makes a finding of unfair dismissal, which it does in this case, and an order for re-engagement or reinstatement is inapplicable, which it is in this case, a tribunal may make an order for compensation, including both a basic award and a compensatory award. The tribunal makes an award of compensation in favour of the claimant against the respondent concerning unfair dismissal and Orders that respondent to pay to the claimant the sums set out below:-

(a) Basic Award

The tribunal determines that a basic award is potentially applicable. The claimant's gross pay in the employment with the respondent was £225.00 per week. At effective date of termination, the claimant was aged 26 years and he had been continuously employed for 5 years. Whilst the claimant has been afforded an award by an Employment Judge in respect of redundancy pay, this tribunal's determination is that the gross weekly wage was slightly higher than was determined. However, it is noted that the Employment Judge determined the claimant's relevant age as being 27, whereas he was aged 26. There is a slight negative disparity but the tribunal does not regard it as being the tribunal's task to address that in this decision. For this reason, the tribunal makes no further determination in respect of the basic award.

(b) Compensatory Award

The only consequential loss sustained by the claimant as a result of this dismissal relates to the period from the effective date of termination, 22 January 2018, up to the date when the claimant gained employment; no further loss continued thereafter. That latter date is 13 April 2018. The total period of loss and thus of the compensatory award is 81 days, or 11 weeks and 4 days (say 11.5 weeks). The applicable loss calculation is as follows:-

The claimant's nett pay in the employment with the respondent was £215.06 per week.

$$£215.06 \times 11.5 = £2,473.19$$

(c) Award for loss of statutory rights

The tribunal's award for loss of statutory rights is = £300.00.

(d) Award under Articles 33 and 36 of 1996 Order and Article 27 of the 2003 Order

$£215.06 + 30\% (= + £64.52) = £279.58 \times 2 = £559.16$. (Note: Article 17 (5) of the 2003 Order provides that where an award falls to be adjusted under Article 17 and also under Article 27, the adjustment under Article 17 shall be made before the adjustment under Article 27).

(e) Award for failure to pay wages in lieu of notice

$$£215.06 \times 5 = £1,075.30.$$

(f) Unpaid Wages due

$$£215.06 \times 1 = £215.06.$$

Total Award (before statutory uplift)

The total award is £4,622.71 (before statutory uplift).

Uplift in Compensatory Award (Article 17(3) of the 2003 Order) (Note: item (d) is already addressed).

The enhancement applied to the foregoing heads: (b) £2,473.19; (c) £300.00; (e) £1,075.30 and (f) £215.06, which total £4,063.55, on foot of the discretion afforded to the tribunal by Article 17(3) (c) of the 2003 Order is 30% = £1,219.07.

Total award of the tribunal = **£5,841.78.**

Recoupment of Benefit from Awards

12. Recoupment of Benefit from Awards

The claimant did receive social security benefits to which the Employment Protection (Recoupment of Job Seeker's and Income Support) Regulations (Northern Ireland) 1996 (as amended by the Social Security (Miscellaneous Amendment No. 6) Regulations (Northern Ireland) 2010) apply; the following recoupment of benefit is therefore applicable in this case:-

- | | |
|-----------------------------|---------------------------------|
| (a) Monetary Award: | £5,841.78. |
| (b) Prescribed Element: | £3,215.15 |
| (c) Prescribed Period: | 25 January 2018 to 23 May 2019. |
| (d) Excess of (a) over (b): | £ 2,626.63 |

AND the attached Recoupment Notice forms part of the decision. Your attention is drawn to the notice below which forms part of the decision of the tribunal.

13. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 23 May 2019, Belfast

Date decision recorded in register and issued to parties: