



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE ELLIOTT
MEMBERS: MS N CHRISTOFI
MR S GODDEN

BETWEEN:

Ms J Chikale

Claimant

AND

Ms I Okedina

Respondent

ON: 2 May 2017

Appearances:

For the Claimant: Mr G Anderson, counsel

For the Respondent: No appearance

JUDGMENT ON REMEDY

The unanimous Judgment of the Tribunal is that the respondent shall pay to the claimant the sum of **£72,271.20**.

REASONS

1. This decision was given orally on 2 May 2017. Written reasons are given as the respondent was not in attendance.
2. By a judgment sent to the parties on 10 November 2015 the claimant

Ms Judith Chikale succeeded in her claims for unfair dismissal, breach of contract for wrongful dismissal and failure to pay wages, unlawful deductions from wages, holiday pay, failure to provide written particulars of employment and failure to provide an itemised payslip. Her claims for race discrimination were dismissed, the claim for indirect race discrimination was dismissed on withdrawal and the claim for direct race discrimination failed.

The respondent's non-attendance

3. The respondent did not attend this hearing. We noted from the tribunal file that the tribunal had made the standard call to the parties on the working day before the hearing (in this case Friday 28 April 2017) and the respondent's representative's line was "dead".
4. On the morning of this hearing, our clerk made the normal checks for communication from the respondent and this included making a call to the representative, the number was dead, and a call to the respondent herself. Our clerk spoke to a colleague of the respondent who said she was on maternity leave. The respondent is a self-employed business woman (liability judgment paragraph 3).
5. At 10:06am the respondent's representative called the tribunal office and told a tribunal clerk the following "he has no intention to attend and asks that the hearing go ahead without him". Under Rule 47 we therefore proceeded in the respondent's absence.

The issue

6. The issue for this hearing is the amount of compensation payable to the claimant.

Our relevant findings

7. We found that the claimant's period of service commenced on 9 September 2010 and that it was continuous to 18 June 2015. She therefore had four complete years' service.
8. The claimant was unfairly dismissed and is entitled to a basic and a compensatory award.
9. We found that the claimant was dismissed without notice and claim for wrongful dismissal succeeded for the statutory minimum period of notice of four weeks.
10. On the unreasonable failure to comply with the ACAS Code we awarded an uplift of 5% on those jurisdictions to which it applies.
11. We found that the claimant was not a member of the respondent's

family and that the respondent did not satisfy the burden of proving that the exemption in Regulation 57(3) of the National Minimum Wage Regulations 2015 applied. We found that the claimant was therefore entitled to be paid at the rate of the national minimum wage. Credit must be given for sums paid to the claimant. The NMW claim was also put as a claim for unlawful deductions from wages.

12. On holiday pay we found that the full amount of the accrual from the start of the leave year on 9 September 2014 until the termination of her employment on 18 June 2015 was due to the claimant.
13. It was accepted for the claimant that because of the method of calculation of remedy under section 12 of the Employment Rights Act 1996 that no financial remedy flowed from our finding that there had been a failure to provide her with itemised pay statements.
14. We found that although the claimant had been given written particulars of employment they did not provide particulars of the date of commencement of the employment, the date upon which continuous service began or any terms as to holidays or holiday pay and to this extent there was therefore a failure to comply with the statutory obligation to provide written particulars of employment. We found that the claimant was therefore entitled to a remedy under section 38 of the Employment Act 2002.
15. The claimant confirmed that the above represented all the matters upon which it was necessary for us to make an award.

Our findings as to the claimant's hours of work

16. We found that the claimant worked for the respondent in the UK for the 23.5 months that she lived in the respondent's house in Woolwich, namely from 6 July 2013 to 18 June 2015. We found that from the outset, the claimant worked for 12 hours per day from Mondays to Saturday and 8 hours on a Sunday. This increased in August 2014 to 14 hours a day on Mondays to Saturdays inclusive and continuing at 8 hours a day on Sundays. The claimant is entitled to be paid at the rate of the national minimum wage for those hours. The claimant only acknowledged having been paid only £3,300 (liability bundle page 109M).

Witnesses and documents

17. We had no witness evidence and the only documents we had in addition to our liability judgment was the document replicated at Appendix 1 to these reasons and the claimant's schedule of loss which had been served on the respondent.

Findings

18. The period of the award for the NMW was from 6 July 2013 to 18 June 2015. The method of calculation is set out in the legislation. We asked whether the calculation had been sent to the respondent, an earlier version was sent in December 2016 pursuant to the order made at paragraph 164 of the liability decision.
19. Counsel for the claimant reworked the calculation just before this hearing. This resulted in slightly fewer hours as it was originally based on the Amended Particulars of Claim dated 1 February 2016 (page 87 liability hearing bundle) – 8830.1 hours. The revised calculation was for 8,654 hours worked, based on our findings of fact. This was a revision in the respondent's favour. It was unopposed and we accepted it and find that this is the amount due to the claimant as per Appendix 1 to this judgment.
20. The number of hours the claimant worked is according to our finding at paragraph 104 of the liability decision and set out at paragraph 16 above.
21. The claim for breach of contract for notice pay is for four weeks net pay. The claimant's gross weekly pay based on her hours of work on our findings, should have been £553.01 and net £480.92. Four weeks at £480.92 is £1,923.68. It is subject to the uplift of 5%.

The law

22. The compensatory award is dealt with under section 123 Employment Rights Act 1996:

(1)the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales.....

23. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) awards of compensation can be adjusted if there is an unreasonable failure to comply with the ACAS Code. The award is an amount considered by the tribunal to be just and equitable and not exceeding an increase or decrease of 25%.

24. Schedule A2 of TULR(C)A lists the jurisdictions to which section 207a

applies which includes section 23 of the Employment Rights Act 1996 (unlawful deductions from wages), breach of contract and unfair dismissal.

25. Section 38 of the Employment Act 2002 provides for an award for a failure to provide a statement of employment particulars. If the tribunal finds in the claimant's favour it must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead. The minimum amount is two weeks' pay, the higher amount is four weeks' pay subject to the relevant statutory cap on a week's pay. Subsection (5) applies where there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.
26. Section 17 of the NMWA creates a contractual entitlement to the full amount of the national minimum wage where a worker is paid at a rate which is less than that. In 2013 the relevant rate for the NMW was £6.31; in 2014 it was £6.50 and in 2015 it was £6.70. In 2016 the rate was £7.29 and on 1 April 2017 it increased to £7.50. The NMW historically increased in October of each year until 2017 when it increased to £7.50 from 1 April 2017.
27. Section 17 creates an entitlement to whichever is the higher of the remuneration in fact received and what the claimant is entitled to under the NMW or the formula set out in section 17(4). The formula is $(A/R1) \times R2$.
28. In relation to the formula in section 17(4), A is the difference between what was paid and what should have been paid and R1 is the rate of the NMW which was payable in respect of the worker during the pay reference period. R2 is the rate of NMW as it is now (the time of the determination, namely £7.50).

Conclusions

Unlawful deductions from wages (national minimum wage)

29. The award for the NMW is from 6 July 2013 to 18 June 2015 in accordance with the formula set out in section 17 NMWA less the amount for which the claimant gives credit, of £3,300.
30. Counsel for the claimant had prepared a calculation which we accepted and append to this decision as Appendix 1. The award for the NMW is the gross amount of £61,044.44 which gives credit for the £3,300 already received by the claimant.
31. To this we add 5% under section 207A of the TULR(C)A 1992 which is £3,052.22 making a total of **£64,096.66**.

32. The claimant accepts that the contractual claim for wages is subsumed by the NMW claim.

Notice pay

33. The claim for breach of contract for notice pay is for four weeks net pay. The claimant's gross weekly pay based on her hours of work on our findings, should have been £553.01 and net £480.92. Four weeks at £480.92 is £1,923.68. Adding the 5% uplift creates an award for wrongful dismissal (breach of contract) of £96.18 making a total of **£2,019.86**.

Unfair dismissal

34. There is no claim for future loss of earnings because of the claimant's immigration status.
35. The basic award based on four years' service is £1,900. Loss of statutory rights is awarded at £300.
36. The sums of £300 and £1,900 (basic award) equals £2,200 to which we add the 5% uplift of £110 making the total award for unfair dismissal the sum of **£2,310.00**.

Holiday pay

37. The holiday pay calculation is from 9 September 2014 to 18 June 2015 – a total of 283 days. The claimant had accrued 21.71 days' holiday. The claimant's average wages during that time (taking account of the NMW increase in October 2014) is £84.46. The calculation is based on the NMW for the time period by the number of days in the time period.
38. For the period from 9 September 2014 to 1 October 2014 is 20 days with 17 full working days and 3 Sundays with shorter hours. For this period there are 17 days x 14 hours at £6.31 = £1,501.78 Sundays are calculated as 3 days x 8 hours at £6.31 NMW = £151.44. The total pay that the claimant should have received for this period is therefore £1,653.22.
39. For the period from 1 October 2014 to 18 June 2015 there were 263 days made up of 37 Sundays and 226 weekdays. For the weekdays the calculation is 226 days x 14 hours at £6.50 = £20,566. For Sundays the calculation is 37 days x 8 hours at £6.50 = £1,924. The total pay that the claimant should have received for this period is therefore £22,490.

40. We have added those two figures of £1,653.22 + £22,490 making £24,143.22 and divided this by the holiday pay period of 283 days to arrive at an average daily wage for the relevant leave period of £85.31. This is then multiplied by accrued holiday of 21.71 days making £1,852.08. We have then applied the 5% uplift of £92.60 making a total award of holiday pay in the sum of **£1,944.68**.

Failure to provide written particulars of employment

41. We found that there was a failure to provide a compliant statement of particulars of employment. Under section 38 Employment Act 2002 we must, subject to subsection (5) (set out above) increase the award by the minimum amount of 2 weeks' pay and we may, if we consider it just and equitable, increase to the higher amount of four weeks' pay. We accepted the claimant's submission that although the written particulars were partially compliant, this was yet another example of the respondent's approach to the claimant's employment rights which was largely to disregard them. We therefore considered it just and equitable to award the higher amount of 4 weeks' pay. A week's pay is limited to the statutory cap on a week's pay. A week's pay at the relevant time was capped at £475 and the award is **£1,900**. There is no uplift applied to this.

42. The claimant did not pay tribunal fees so there is no award for this.

The final award

43. The final award to the claimant is made up as follows: unlawful deductions from wages £64,096.66; breach of contract for notice pay £2,019.86, failure to provide written particulars of employment £1,900, unfair dismissal £2,310 and holiday pay £1,944.68 making a total award of **£72,271.20**.

44. The respondent shall pay to the claimant the sum of **£72,271.20**.

Employment Judge Elliott

Date: 2 May 2017

Appendix 1

Chikale v Okedina - updated NMW calculations for remedy hearing on 2 May 2017

Time period	Days (12 or 14 hours) and Sundays (8 hours)	Number of hours	Remuneration received	R1: NMW during reference period	Remuneration would have received with NMW	A: difference between figure received and entitlement	R2: NMW at time of determination	(A/R1)*R2: entitlement
6 July 2013 - 30 September 2013 (86 day 86 days, 26 sundays)		928	£183.47	£8.19	£5,744.32	£5,560.85	£7.50	£6,737.70
1 October 2013 - 9 November 2013 (39 d 39 days, 5 sundays)		448	£83.20	£8.31	£2,826.88	£2,743.68	£7.50	£3,261.11
10 November 2013 - 30 June 2014	233 days, 33 sundays	2648	£533.33	£8.31	£16,708.88	£16,175.55	£7.50	£19,226.09
1 July 2014 - 31 July 2014	31 days, 4 sundays	356	£200.00	£8.31	£2,246.36	£2,046.36	£7.50	£2,432.28
1 August 2014 - 31 August 2014	31 days, 5 sundays	404	£200.00	£8.31	£2,549.24	£2,349.24	£7.50	£2,792.28
1 September 2014 - 30 September 2014	30 days, 4 sundays	396	£200.00	£8.31	£2,498.76	£2,298.76	£7.50	£2,732.28
1 October 2014 - 31 October 2014	31 days 4 sundays	410	£200.00	£8.50	£2,665.00	£2,465.00	£7.50	£2,844.23
1 November 2014 - 30 November 2014	30 days, 5 sundays	404	£200.00	£8.50	£2,626.00	£2,426.00	£7.50	£2,799.23
1 December 2014 - 31 December 2014	31 days, 4 sundays	410	£200.00	£8.50	£2,665.00	£2,465.00	£7.50	£2,844.23
1 January 2015 - 31 January 2015	31 days 4 sundays	410	£200.00	£8.50	£2,665.00	£2,465.00	£7.50	£2,844.23
1 February 2015 - 28 February 2015	28 days, 4 sundays	368	£200.00	£8.50	£2,392.00	£2,192.00	£7.50	£2,529.23
1 March 2015 - 31 March 2015	31 days, 5 sundays	418	£200.00	£8.50	£2,717.00	£2,517.00	£7.50	£2,904.23
1 April 2015 - 30 April 2015	30 days, 4 sundays	396	£300.00	£8.50	£2,574.00	£2,274.00	£7.50	£2,623.85
1 May 2015 - 31 May 2015	31 days, 5 sundays	418	£300.00	£8.50	£2,717.00	£2,417.00	£7.50	£2,788.85
1 June 2015 - 18 June 2015	18 days, 2 sundays	240	£100.00	£8.50	£1,590.00	£1,480.00	£7.50	£1,684.62
Total		8654	£3,300.00		£55,155.44	£51,855.44		£61,044.44