



# EMPLOYMENT TRIBUNALS

**Claimant:** Richard Dolloway

**Respondent:** First Call Travel Limited

**Heard at:** Cardiff **On:** 9<sup>th</sup> August 2018

**Before:** Employment Judge Howden-Evans

**Representation:**

Claimant: In person

Respondent: Mr Stanley, consultant

## RESERVED JUDGMENT

The employment judge's decision is:

1. Mr Dolloway was unfairly dismissed and is awarded £4,048 compensation for unfair dismissal.
2. Mr Dolloway was dismissed without the notice he was entitled to. He is awarded £4,000 for damages for wrongful dismissal (ie notice pay).
3. Mr Dolloway's claim for unpaid wages following unlawful deductions is well-founded. In addition, First Call Travel Limited failed to provide Mr Dolloway with itemised payslips. First Call Travel Limited is ordered to pay the sum of £1,600 for unlawful deductions and failure to provide itemised pay statements.
4. Mr Dolloway's claim for annual leave which he had accrued but not yet taken is well founded and First Call Travel Limited are ordered to pay him £1,600 for outstanding holiday pay.
5. In total, First Call Travel Limited owes Mr Dolloway **£11,248**.
6. In the event of this debt not being paid within 14 days of this judgment, interest will accrue on this debt, at a rate of 8% per annum on any amount of this award

that remains unpaid 14 days after the date of this judgment. (See Article 3 (1) Employment Tribunals (Interest) Order 1990).

## REASONS

1. First Call Travel Limited is based in Merthyr Tydfil and provides coach, minibuss and taxi hire services. It also runs a bus service between Merthyr and Swansea. It employs approximately 30 people and has two directors, Shaun Mahony and his partner Puja Rajani, who run the company from their family home.
2. Richard Dolloway commenced employment with First Call Travel Limited in 2009. Initially he was employed as a driver, subsequently he was promoted to the position of transport manager and more recently he has worked as a driver / administrator.
3. Mr Dolloway alleges that during a heated discussion on Tuesday 7<sup>th</sup> November 2017, Mr Mahony verbally terminated his employment. Mr Mahony and Ms Rajani allege Mr Dolloway verbally resigned. Initially, everyone believed the heated discussion took place in October 2017, but whilst giving evidence, everyone has agreed the correct date of the discussion was Tuesday 7<sup>th</sup> November 2017.
4. Mr Dolloway notified ACAS in accordance with the early conciliation procedures. On 26<sup>th</sup> January 2018 Mr Dolloway issued these tribunal proceedings, alleging he had been unfairly dismissed. He was also seeking his notice pay, outstanding holiday pay, outstanding wages and alleged he had not been provided with payslips. First Call Travel have alleged that Mr Dolloway owes the company money from a coachtrip to Blackpool that Mr Dolloway organised.
5. This case was listed for a one-day hearing, on 9<sup>th</sup> August 2018 in Cardiff, before an employment judge sitting alone. First Call Travel Limited was represented by Mr Stanley; Mr Dolloway represented himself. Before the hearing commenced, Mr Dolloway had become very emotional and heated in verbal exchanges with Mr Stanley and Mr Mahony. When Mr Dolloway had calmed down we were able to start the hearing.
6. It transpired that there had been only partial compliance with the standard case management directions. Mr Stanley had a small bundle of documents that First Call Travel Limited wished to rely upon and witness statements for Mr Mahony and Ms Rajani, that had been provided to Mr Dolloway the previous day. The night before the hearing, Mr Dolloway had sent an email to the tribunal and to Mr Stanley containing the evidence he wished to give. I discussed with parties whether there were any other documents that ought to be considered. Mr Dolloway wished to add text messages he had exchanged with Mr Mahony, Ms Rajani and various drivers. He also wanted to add a letter from the Office of the Traffic Commissioner. The tribunal clerk kindly helped Mr Dolloway to print off copies of these documents. Mr Stanley was provided with copies of these documents and time to take instructions upon them. By consent all the additional documents were added to the hearing bundle. Everyone confirmed they were happy to proceed with the final hearing without any further adjournment.

7. To assist the parties, I prepared a written list of issues that we discussed. Everyone agreed this captured the issues / questions I needed to answer. The list of issues was as follows:

### **List of Issues**

#### **Unfair dismissal claim**

1. Did Mr Dolloway resign or was he dismissed by Mr Mahony?
  - What words were used by each person in the meeting on 24<sup>th</sup> October 2017? *It later transpired this meeting had taken place on Tuesday 7<sup>th</sup> November 2017*
2. If Mr Dolloway was dismissed, was there a fair reason for this dismissal and did the employer follow a reasonable process?
3. If Mr Dolloway was unfairly dismissed, was Mr Dolloway likely to have ceased employment at some point in the future?
  - This would lead to a reduction in Mr Dolloway's loss of earning compensation
4. If Mr Dolloway was unfairly dismissed, did Mr Dolloway's own conduct play a part in his dismissal and is it reasonable to reduce compensation because of this?
  - This would lead to a reduction in Mr Dolloway's compensation

#### **Notice Pay claim**

5. If Mr Dolloway was dismissed, had Mr Dolloway committed a fundamental breach of his contract which released his employer from giving notice?
6. If Mr Dolloway was entitled to receive notice, how many weeks' should this notice have been?
7. Did Mr Dolloway receive any notice / notice pay?

#### **Holiday pay claim**

8. What were the dates of Mr Dolloway's holiday year?
9. How much of the holiday year had elapsed at the date Mr Dolloway's employment ended?
10. How many days of holiday had Mr Dolloway accrued but not yet taken that remain unpaid?
11. What is the relevant daily rate of pay (after tax etc is deducted)?

12. How much pay is outstanding to be paid to Mr Dolloway?

**Wages outstanding**

13. Was Mr Dolloway paid less in wages than he was entitled to be paid and if so, how much less?

**Payslips**

14. Was Mr Dolloway provided with itemised pay statements at or before his salary was paid each month?

**Breach of contract counterclaim by First Call Travel Limited**

15. Had Mr Dolloway retained money paid by passengers on coach trips that should have been handed over to First Call Travel Limited?  
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8. As Mr Dolloway was representing himself, I explained how witnesses would give evidence. We took a break for Mr Dolloway to read the respondents' witness statements and to highlight any parts of their witness statement that he took issue with, so that he could take each witness to any part of their evidence he disagreed with.

9. Before starting to hear oral evidence, I had read all the documents, including the witness statements and Mr Dolloway's email to the tribunal which contained his witness evidence.

10. Shortly after lunch, we heard evidence from:

- 10.1. Mr Dolloway;
- 10.2. Ms Rajani; and
- 10.3. Mr Mahony.

11. When it came to hearing evidence, I adopted the same procedure with each witness: having read their statement / email of evidence, I accepted their written statement as their evidence in chief. With each witness, there was:

- 11.1. an opportunity for them to clarify anything they felt they hadn't been able to cover in their witness statement;
- 11.2. questions from their opponent;
- 11.3. questions from the employment judge; and
- 11.4. a final opportunity to clarify anything they felt they had not been able to explain during questions.

12. Having heard all the evidence, I heard oral closing submissions from Mr Stanley and Mr Dolloway. As it was now late in the afternoon, there was insufficient time for me to properly consider my decision. Later that evening, Mr Dolloway sent an email to the tribunal explaining he felt there were further points he wished to make in closing submissions. I ordered that either party could provide further written

submissions within 7 days and that either party could provide any final response to written submissions within 14 days, if they wished to do so. I also confirmed I had a detailed written note of the oral submissions that had been made which I would also consider in reaching my decision.

### Findings of Fact

13. Mr Dolloway started employment with the First Call Travel Limited on 12<sup>th</sup> January 2009. He was initially employed as a driver, but subsequently was promoted to the position of transport manager.
14. Mr Dolloway had an excellent relationship with his employer, Mr Mahony. Whilst giving evidence about this relationship he was very emotional and described Mr Mahony as being “*a cracking man*” and “*a good man at heart*”. Equally, Mr Mahony was very fond of Mr Dolloway and had affectionately called him “*old man*” when they worked together. Each man had a lot of respect for the other. However, both Mr Dolloway and Mr Mahony have a short temper and there had been numerous incidents during their working relationship when they had each flown off the handle. On occasion, this had turned violent, with things being thrown (particularly by Mr Mahony). During the hearing, when Mr Dolloway was asking questions of Mr Mahony, there were occasions when I had to intervene as each man was becoming heated with the other and neither man was listening to the other. It is easy to see how the incident on 7<sup>th</sup> November 2017 quickly escalated.
15. Mr Mahony was very supportive of Mr Dolloway during his employment. Due to a historic allegation (of which Mr Dolloway was acquitted), Mr Dolloway did not have a clear DBS certificate. First Call Travel Limited had a number of home-school transport contracts with local authorities. The situation with Mr Dolloway’s DBS certificate meant at least one local authority would not allow him to undertake home-school transport runs.
16. Between 11<sup>th</sup> March 2015 and 12<sup>th</sup> March 2016, Mr Dolloway was disqualified from being transport manager, due to tachograph offences. He also had a 3 month ban from driving coaches as a result of the same offences. Rather than dismiss Mr Dolloway, Mr Mahony found Mr Dolloway other work to be completing during this period.
17. In return for this support, Mr Dolloway went over and above as an employee, seeking and winning a number of lucrative contracts for the business and working hard for Mr Mahony.
18. In 2017 their relationship seems to have been more strained than in previous years. Mr Dolloway had put messages on Facebook in July 2017 “*Can’t take no more this shit I’ve had from work this last hour...bye everyone thanks my employer*”. Mr Dolloway explained this had been prompted by Mr Mahony phoning him when he was working in Blackpool and shouting down the phone at him. Following the July 2017 incident there was a short period when Mr Dolloway didn’t turn up for work – Mr Dolloway said he was taking holiday during this period that had previously been arranged with Ms Rajani. Mr Mahony said Mr Dolloway returned to work a few weeks later and they put this incident behind them. It has been suggested that this was a break in Mr Dolloway’s employment. I do not

accept this was the case, as in the ET3, the employer accepted Mr Dolloway's continuous employment started in 2009; Mr Dolloway continued to be paid during this period and there was no attempt to give him a P45 or letter confirming his employment had ceased. It appears the parties had agreed this was his holiday period.

19. On 15th October 2017, Mr Dolloway posted on social media "*Seriously think its time to give up the coach industry had a fantastic time over the years but think time has come*". Mr Mahony and Ms Rajani's evidence, which I accept, was that around this time, Mr Dolloway was also suggesting they make him redundant. Mr Mahony explained there was no redundancy situation, so they didn't pursue this further. Unbeknown to Mr Mahony and Ms Rajani, Mr Dolloway had learnt he had cancer and that was in part why he was thinking of leaving work. Whilst Mr Dolloway's health might have been part of the reason for his post, I also find that, in Mr Dolloway's words, he'd "*had a guts full*" of being blamed for things by Mr Mahony.
20. In October 2017, Mr Dolloway had been finding it difficult to get drivers to work weekends. On Mr Mahony's instruction, he had told drivers they had to work weekends and had written particular drivers' names on the board to work over the weekend. One of the drivers had written a letter of resignation in response to being expected to work weekends.
21. In evidence, Mr Mahony and Ms Rajani both explained that there had been occasions when drivers had left because of Mr Dolloway's behaviour. Whilst I have seen a number of drivers have sent Mr Dolloway text messages confirming how happy they were to work with Mr Dolloway, given Mr Dolloway's short temper and sometimes unreasonable behaviour, I accept it is more likely than not that Mr Dolloway's behaviour had caused some drivers to leave the company. Equally, I am sure some drivers have left the company because of Mr Mahony's short temper.
22. On 7th November 2017, Mr Dolloway and another colleague, Ray Davies, were asked to come to the directors' home, to discuss school bus routes. Mr Dolloway brought the other driver's letter of resignation with him. Mr Mahony and Ms Rajani were worried that the company had not finished paperwork to apply for a permit for a particular school contract and the deadline was due to expire. When Mr Dolloway walked into the kitchen, Mr Mahony was sat at the table and Ms Rajani was stood by the sink. Mr Davies sat at the breakfast bar and Mr Dolloway handed the driver's letter of resignation to Ms Rajani. Mr Mahony asked what the letter was about. When Ms Rajani told him, Mr Mahony sprang out of his chair in a rage and there was a heated row between Mr Mahony and Mr Dolloway. During this row, I accept that Mr Dolloway called Mr Mahony a "*pompous prick*". Equally, I accept Mr Mahony called Mr Dolloway "*a useless fat bastard*" – In oral evidence, Ms Rajani accepted it was a heated row and both men ended up name calling. Mr Mahony's oral evidence was that he had used words such as "*I'm finished I don't have to listen to this*". Given my observations of Mr Mahony and Mr Dolloway's interactions during this hearing, I accept it is more likely than not that at some point, Mr Mahony's words went beyond this – I accept he used words like "*I've lost a school driver, you useless fat bastard, get out you're sacked*" as Mr Dolloway alleges. These words gave Mr Dolloway the impression he had been dismissed. The employment judge considers that an objective bystander would have come to

the same conclusion. Given their history of heated rows, each man probably thought they would at some point heal this rift as had happened previously. However, this time no one backed down in the minutes, hours and days that followed. There was no attempt to apologise and retract the words that had been said in the heat of the moment.

23. In the weeks that followed the heated row, both parties acted as though Mr Dolloway's employment had come to an end. Mr Dolloway did not return to work for the company and the company ceased paying his wages. He continued to receive enquiries from customers of the business and passed this potential work on to Mr Mahony. This is an indication of Mr Dolloway's respect for Mr Mahony and the business and also reveals how loyal and decent he is as an employee.
24. One feature of Mr Dolloway's employment is that he has not been provided with his payslips. I accept Ms Rajani's evidence that payslips had been produced by the company's accountant and were received by the company, but the legal obligation is to ensure that each employee actually receives their payslip every month. Mr Dolloway was in difficulty explaining the alleged cut in wages he experienced in Summer 2017, as he had not received payslips. His evidence, which I accept was that the terms of his contract were that he would receive £500 take home pay each week. This is the pay he had received for a period of time prior to Summer 2017.
25. There were no payslips in the bundle or any documents related to any alleged change of terms in Summer 2017. It would have been easy for First Call Travel Limited to explain any change of terms, if there had been payslips and a letter or revised contract of employment explaining the change of terms. I do not accept there was any real change in Mr Dolloway's job description in August 2017, from the job he had been undertaking in recent months. This was not the period when he was disqualified from being transport manager or driver. As such, I think the reason behind any reduction in the pay being received by Mr Dolloway was Mr Mahony was trying to "cut back on everything" as the company's wage bill was expensive. This was in the absence of any agreement with Mr Dolloway that he would work on reduced wages.
26. There was an allegation by First Call Travel Limited that Mr Dolloway had not accounted for all the money taken on a particular coach trip. Having considered the text messages and the witness evidence, I accept that there were no funds left over from this trip to be paid to First Call Travel Limited. Mr Dolloway was instructed by Ms Rajani to pay wages to other drivers and various other expenses from this money, which exhausted the funds received from this trip.

## **The Law**

### **Unfair dismissal (liability)**

27. The employer bears the burden of proving, on a balance of probabilities, that Mr Dolloway was dismissed for one of the potentially fair reasons set out in Section 98(2) of the Employment Rights Act 1996 (ERA). In addition, I must go on to consider the general reasonableness of that dismissal under Section 98(4) ERA.

28. Section 98(4) ERA provides that the determination of the question of whether the dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing the claimant. This should be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.
29. On behalf of First Call Travel Limited, Mr Stanley has, quite properly, conceded that if I were to find Mr Dolloway was dismissed by Mr Mahony's words during this row, the respondent would have to accept that Mr Dolloway was unfairly dismissed, as they would not be able to establish a potentially fair reason (s98(2) ERA) or that they had acted reasonably and followed a fair procedure (s98(4) ERA).

### **Unfair dismissal (remedy)**

30. When an employment judge decides that a dismissal is unfair, they must then go on to consider remedy. Mr Dolloway is seeking compensation rather than reengagement (ie returning to work for First Call Travel) only. The employment judge can order two types of compensation - a "basic award" (see Sections 119 to 122 ERA) and a "compensatory award" (see Sections 123 and 124 ERA). The basic award is calculated by a formula that is rewarding the years of loyal service that an employee has given their employer. The compensatory award is, an amount I consider to be "just and equitable in all the circumstances" having regard to the loss sustained by Mr Dolloway as a result of the dismissal and insofar as that loss was caused by the actions of his employer" (Section 123(1) ERA).
31. Deductions can be made from the basic award and from the compensatory award, (Section 122(2) and Section 123(6) ERA), if I find that Mr Dolloway's conduct had in part caused his dismissal.
32. In addition, I have to consider whether it is appropriate for compensation to be reduced by a "Polkey deduction". This comes from the decision of the House of Lords in *Polkey v. A E Dayton Services Limited* [1988] ICR 142. This decision says that when I am awarding compensation, I should consider what would have happened if Mr Dolloway had not been dismissed? Was there a chance he would have ceased employment at some point in the near future anyway? In seeking such a Polkey deduction, First Call Travel bear the burden of proving this.

### **Conclusions**

#### **Unfair Dismissal**

33. In my findings of fact, I have accepted it is more likely than not that Mr Mahony used words that gave Mr Dolloway the impression he had been dismissed and that an objective bystander would have understood Mr Mahony was terminating Mr Dolloway's employment. I have found that Mr Mahony dismissed Mr Dolloway and as there was no procedure followed this was an unfair dismissal.
34. Next I considered whether Mr Dolloway's conduct before the dismissal was such that it would be just and equitable to reduce the amount of the basic award. I am persuaded, that Mr Dolloway's behaviour was equally as bad as Mr Mahony's



behaviour during this row. I have witnessed Mr Dolloway “winding up” Mr Mahony during this hearing. I accept Mr Dolloway’s own conduct was equally responsible for his dismissal – if he had chosen his words more carefully and kept his own temper under control, he might not have been dismissed. As such it is just and equitable to reduce the basic award by 50% to reflect Mr Dolloway’s responsibility for his own dismissal.

35. Next I considered whether the dismissal was to any extent caused or contributed to by any action of Mr Dolloway, such that the compensatory award should be reduced. Again, for the reasons expressed in the paragraph above, I found the dismissal was 50% caused by Mr Dolloway and that it is just and equitable for the compensatory award to be reduced by 50%.

36. Then I considered whether Mr Dolloway was likely to have ceased employment with the respondent at some point in the future. Given the messages that Mr Dolloway had posted, the fact he had “*had a guts full*”, Mr Dolloway’s temperament and his increasingly volatile relationship with Mr Malony, I accept that their employment relationship was coming to an end and it was more likely than not that Mr Dolloway would have resigned or been dismissed within 12 weeks of their row on 7<sup>th</sup> November 2017.

### **Notice Pay claim**

37. Prior to his dismissal, Mr Dolloway had not committed a fundamental breach of his contract which released his employer from giving notice. He was entitled to receive notice or notice pay and he did not receive either. As he had 8 complete years’ service with the respondent he was entitled to 8 weeks’ notice of his dismissal (Section 86 Employment Rights Act 1996).

### **Holiday pay claim**

38. Mr Dolloway’s holiday pay claim was confusing as was the evidence as to what was outstanding. The company’s holiday year follows the calendar year. Having heard evidence from all the witnesses, I accept it is more likely than not that during the period January to November 2017, he had 16 days’ holiday that he had accrued but not yet taken. He is entitled to 16 days’ holiday pay. Mr Dolloway had suggested he had holiday outstanding from the 2016 holiday year. As Mr Stanley explained in submissions, there is no provision that allows you to carry forward outstanding holiday from one year into another. The rule is “use it (in that holiday year) or lose it”.

### **Wages outstanding**

39. I have accepted that Mr Dolloway was paid less in wages than he was entitled to be paid during the period August 2017 to November 2017. I have found that he should have been receiving £500 per week take home pay and was not receiving this amount. The ET3 confirms Mr Dolloway was being paid £400 per week take home pay, which means Mr Dolloway has been underpaid by £100 per week from the period August 2017 onwards.

**Payslips**

40. Was Mr Dolloway provided with itemised pay statements at or before his salary was paid each month? In evidence it transpired that payslips had been prepared by the company's accountant, but had not been given to Mr Dolloway. As such I found that there had been a breach of Section 8 Employment Rights Act 1996. Section 12(4) Employment Rights Act 1996 provides that if an employer had failed to provide itemised pay statements and deductions have been made to an employee's pay, I may order the employer to pay the employee a sum not exceeding the aggregate of the deductions. As the employer is a small business and this appears to have been a mistake, I am ordering First Call Travel pay and additional £200 to Mr Dolloway, as a result of their failure to provide payslips.

**Breach of contract counterclaim by First Call Travel Limited**

41. I have found that there was no money retained by Mr Dolloway and therefore there was no breach of contract by Mr Dolloway.

**Calculations**

The Claimant was 69 years of age at the date of dismissal and had 8 years' continuous service. His net weekly pay was £500 which meant his gross weekly pay must have been £634 per week. (In calculating the unfair dismissal basic award, gross weekly pay is capped at £508 per week). His net daily pay was £100.

**Damages for wrongful dismissal**

**(ie lack of notice / notice pay for period 7<sup>th</sup> November 2017 to 2<sup>nd</sup> January 2018)**

Net pay £500 x 8 weeks	<b>£4,000</b>
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**Unfair Dismissal Award****Basic Award**

8 weeks' gross pay (£508) x 1½	£6,096
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Less 50% deduction for Claimant's Conduct	<u>(£3,048)</u>
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	<b>£3,048</b>
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**Compensatory Award**

Loss of wages from 2<sup>nd</sup> January 2018 to 30<sup>th</sup> January 2018

4 weeks at £500 net weekly salary	£2,000
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less 50% deduction for Claimant's Conduct	<u>(£1,000)</u>
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	<b>£1,000</b>
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**Unlawful deductions from wages and lack of payslips**

Net weekly pay (£500) less net weekly pay actually received (£400) = £100 per week  
for the period 1<sup>st</sup> August 2017 to 7<sup>th</sup> November 2017 = 14 weeks x £100 =

£1,400

Plus £200 for lack of payslips

£200  
**£1,600**

**Outstanding holiday pay**

Net pay £100 x 16 days

**£1,600**

**Total amount owed to Mr Dolloway = £11,248**

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Employment Judge Howden-Evans

Dated: 12<sup>th</sup> October 2018

JUDGMENT SENT TO THE PARTIES ON  
12 October 2018

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS