Case Number: 1401237/2016

EMPLOYMENT TRIBUNALS

Claimant: **Mr S Josic**

Respondent: **Glevum Transport Ltd**

Heard at: **Bristol** **On: 12 May 2017**

Before: **Employment Judge O Harper**

Representation
Claimant: **In Person**
Respondent: **Mr Fullagar, Solicitor**

RESERVED JUDGMENT ON REMEDY

The respondent is ordered to pay to the claimant a compensatory award in the sum of £1,242.22.

REASONS

1. Following a hearing which took place on 20 and 21 February 2017 I gave a Reserved Judgment and Reasons finding in the claimant's favour on two heads of claim. I found that the claimant had been automatically unfairly dismissed pursuant to Section 103A of the Employment Rights Act 1996 for having made a protected disclosure and alternatively, had been automatically unfairly dismissed pursuant to Section 101A of the Employment Rights Act 1996 for having proposed to refuse to comply with a requirement which the respondent proposed to impose contrary to the Working Time Regulations 1998.

2. I gave directions for a remedy hearing and clarified the issues for me to resolve were as follows:

    What is the appropriate award for compensation?

Are there any grounds for reducing the award ie would the claimant have been dismissed in any event?

Should any award be uplifted under Section 207A of TULCRA 1992 for failure by the respondent to follow any disciplinary/grievance procedure?

3. The respondent's case is that the claimant would have been dismissed in any event for matters unrelated to the protected disclosure, namely conduct towards a client/customer of the respondent shortly before he was dismissed and for his general attitude towards Mr Harry, General Manager of the respondent. The respondent also contends that the claimant has failed to mitigate his loss.

4. The claimant contends that he would not have been dismissed for his conduct/attitude. He claims financial loss from the date of his dismissal to the date of hearing and for thirty-six weeks into the future. There is a dispute regarding the claimant's weekly net earnings with the respondent. The respondent challenges the claimant's calculation of his net earnings with the respondent and the claimant's calculation of his current earnings.

5. I have heard evidence from the claimant and from Mr Harry, General Manager of the respondent. I have received in evidence a written statement from Mr Fisher who formerly worked as a Transport Allocator for a client of the respondent known as GBA. Mr Fisher had been expected to attend today's hearing, but at short notice he indicated that he was unable to attend due to a personal commitment. He advised the respondent's representative shortly before the hearing that he was required to take his mother to a hospital appointment. He has provided an email confirming the content of his witness statement. The witness statement itself is unsigned. I do not attach the same weight to that statement as I would were he here to be cross examined. However, I find that I can attach some weight to it because some of the matters referred to in Mr Fisher's statement relating to the incident at Kia UK are supported by the claimant's own evidence – (he admits using swear words to a representative of Kia) and Mr Harry's own evidence that he received a telephone call from a representative at the Kia dealership at around the time of the incident.

6. I heard submissions from both parties and I was referred to the following cases on behalf of the respondent:

Savage v Saxena [1998] ICR 357 EAT

Software 2000 v Andrews [2007] ICR 825

O'Donoghue v Redcar and Cleveland Borough Council 2001 EWCA Civ 701

Gover v Property Care Ltd 2006 EWCA Civ 286

Nelson v BBC (2) [1980] ICR 110

7. The relevant statutory provisions are contained in Section 123 of the Employment Rights Act 1996.

> ***Section 123 Compensatory Award***
>
> *(1) Subject to the provisions of this Section and Sections 124, 124A…, 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 insofar as that loss is attributable to action taken by the employer.*
>
> *(6) Where the Tribunal finds, that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

I bear in mind that the guidance in the case of *Polkey v A E Dayton Services Ltd [1988] ICR 142*.

8. I note following the case of *Whitehead v Robertson Partnership EAT 00331/01*, the EAT stressed the importance of Employment Tribunals adequately explaining their reasons for making a Polkey reduction. Therefore as the respondent contends that the claimant would have been dismissed for the Kia incident and his attitude and behaviour in general, I must consider the following.

   - What potentially fair reason for dismissal, if any might emerge as a result of a proper investigation and disciplinary process?

   - Depending on the principal reason for any future hypothetical dismissal would dismissal for that reason be fair or unfair?

   - Even if a potentially fair dismissal was available would the employer in fact have dismissed the employee as opposed to imposing some lesser penalty, and if so, would that have ensured the employee's continued employment?

9. I bear in mind that the claimant had not completed two years service and therefore was not entitled to pursue a claim of ordinary unfair dismissal. In those circumstances the question of fairness or unfairness under section 98 of the ERA is not relevant.

10. It is appropriate at this juncture to deal with the question of credibility since the claimant challenges Mr Harry's credibility on the matters for me to resolve. The claimant's credibility has been challenged in relation to his attempts at mitigation and the reasons he has put forward for not securing employment at a comparable rate of pay and in relation to his calculations.

11. I found Mr Harry credible and convincing in his explanations as to why he would have dismissed the claimant for attitude and behaviour within a short period of time. His evidence was corroborated to a certain extent by the claimant's admission of his behaviour and words used to Mr Harry and also the written statement of Mr Fisher.

12. I found the claimant's evidence not credible in relation to his current earnings and his attempts at mitigation. It seemed unlikely to me that he was banned by numerous transport agencies or transport companies. No supporting evidence was produced by him and he gave no adequate explanation for refusing full-time employment which was offered to him in August 2016. I therefore find the following facts proved on the balance of probabilities.

13. On 29 March 2016 an incident occurred at a client/customer of the respondent at the Kia dealership in Basingstoke. I refer to my Judgment on liability at paragraphs 21 – 28. The claimant worked for the respondent on a contract between the respondent and a company known as GBA delivering vehicles on behalf of GBA. Kia was a customer of GBA. I find that the claimant initially refused to sign a delivery form and that an argument took place between him and a representative at the dealership.

14. The claimant accepts that he swore at the representative and used the word "shit" towards the representative. The claimant does not dispute that there was some argument at the premises.

15. At the time Mr Harry received a telephone call from the Sales Principal at the Kia dealership complaining about the claimant's behaviour. Mr Harry spoke to the claimant on the day and asked him for his version of events. The claimant made some admissions to his behaviour, indicating that he had been provoked in some way. Mr Harry at that point passed on the claimant's version of what had happened to the Deputy Manager at the Kia Dealership. He explained what the claimant had told him. The Sales Principal responded saying that the claimant's version of events did not ring true with the version of events witnessed at the Kia premises.

16. Mr Harry heard nothing further directly until Friday 1 April when he received a telephone call from GBA (the intermediary contractor between the respondent and Kia dealership). The claimant worked on the GBA contract delivering cars for the respondent.

17. On 31 March, Mr Fisher transport allocator for GBA received a telephone call from Dealer Support at Kia UK. The complaint from Kia was that a driver of the respondent (the claimant) had sworn at the Sales Manager of the Kia dealership at Basingstoke and had a very bad attitude. The caller advised Mr Fisher that they did not want the individual delivering their vehicles again. Mr Fisher subsequently discovered that the individual about whom the complaint was made was the claimant. Mr Fisher formed the view that he did not want the claimant working on the GBA contract anymore because they could not afford to have drivers upsetting a large client of GBA.

18. There was a subsequent telephone conversation between Mr Fisher and the claimant on Friday 1st April. The claimant called advising that he did not have enough hours that week to be able to deliver his load from Immingham to Suzuki in Chippenham. Mr Fisher concluded that the claimant's attitude during that telephone call was poor.

19. In a subsequent telephone call to Mr Harry that day, Mr Fisher told Mr Harry he was very unhappy about the attitude of the claimant during his conversation with him and also that he had upset the client Kia at Basingstoke. He told Mr Harry he did not want the claimant doing any further

work for GBA. He advised Mr Harry that Mr Harry needed to find another driver to undertake the GBA work.

20. On 1 April in discussions with Mr Harry regarding the claimant's permitted hours that week, the claimant became argumentative and said to Mr Harry words to the effect "do you understand English or what?" Mr Harry considered the claimant's attitude towards him rude and argumentative.

21. The claimant was employed by the respondent to work solely on the GBA contract. Having been advised by Mr Fisher that GBA would no longer accept the claimant as a driver I find that he would have been dismissed by Mr Harry within a short period of time after that notification. I find that Mr Harry would have taken into account the complaint made by Kia and the claimant's attitude and behaviour towards Mr Harry, such as using phrases towards him "don't you understand English?"

22. There was no other work available within the respondent. Although the respondent employs drivers to undertake day driving for Honda those positions were fully staffed. There would have been no opportunity for the claimant to be transferred to driving for Honda because those drivers who were employed to undertake those roles had specifically chosen not to work nights in order to be able to spend time with their families. Mr Harry therefore could not have moved any of the existing drivers on the Honda contract to GBA in order to create a vacancy for the claimant. In any event I find that he would not have done so because of the report that he had received from GBA regarding the claimant's behaviour towards a customer of GBA. In those circumstances I find that the claimant would have been dismissed in any event a short time after 1st April 2016.

23. I reject the claimant's contention that he would not have been dismissed because it was difficult to obtain drivers with the necessary qualifications and experience. I find that the claimant's attitude and behaviour would have trumped any concerns which the respondent had about trying to find an alternative driver.

24. I conclude that had the respondent followed a proper procedure and called the claimant to an investigatory/disciplinary hearing it is likely that his employment would have terminated within two weeks of the first of April. He would therefore have remained employed until Friday 15 April 2016. He would have been dismissed for matters unrelated to the protected disclosure he made. It is therefore just and equitable to limit the compensatory award to loss sustained for the period up to 15th April 2016.

25. In relation to the claimant's earnings with the respondent I find that the claimant's basic daily rate of pay was £113.80. A higher daily rate of £128.80 was paid for working on Bank Holidays. In addition, there was a tax free allowance of £24 in respect of each night spent sleeping in the vehicle, a mileage bonus for driving per hundred kilometres of £3.00 and an allowance of £15 per day for early start, attendance and car money.

26. Although the claimant responded to an advert indicating that the maximum annual earnings for the role would be around £42,000, this would only be achieved if the driver was willing to work the full complement of hours. The claimant in his dealings with the respondent during the two weeks that he

was employed made it clear that he would only work 48 hours per week. I find that it is likely that he would have maintained this stance throughout. In those circumstances the weekly earnings that he contends he would have earned with the respondent of £678.60 are incorrect. He worked for the respondent for some two weeks and earned during the first week, which included a Bank Holiday worked, the sum of £595.22 net and the following week £398.54. Therefore he earned an average of £496.88 net per week. On the evidence before me the claimant worked 48 hours per week for those weeks.

27. It has been difficult to ascertain what the claimant's average weekly earnings would have been had he remained employed by the respondent. Mr Harry contends that if the claimant had worked forty-eight hours per week he would have earned £434.52 per week net and that his annual holiday entitlement would have been calculated on the basis of £113.80 per day gross. I am not convinced by those calculations because it is clear that a higher rate of pay was paid for working on Bank Holidays. It appears that the claimant was quite willing to do that.

28. I am however; satisfied that he would not have worked more than forty-eight hours per week because as a matter of principle he would have insisted on that. I therefore conclude that the only accurate way of working out what the claimant's weekly average net earnings would have been is to rely on the payslips which represent earnings during his employment. I therefore find that his average weekly net earnings would have amounted to £496.88 net which equates to yearly earnings of £25,837.76 net. Therefore had he not been dismissed on 1st April and remained employed until 15th April 2016 he would have earned £993.76 net.

29. The claimant seeks an uplift to the award of 25% for the respondent's failure to follow any disciplinary procedure. Section 207A(2) of TULR(C)A provides that:

> *"If in any proceedings to which this Section applies, it appears to the Employment Tribunal that:*
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> *(a) The claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
>
> *(b) The employer has failed to comply with that Code in relation to that manner,*
>
> *(c) The failure was unreasonable, an Employment 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 25%."*

30. Unfair dismissal is a jurisdiction which falls within the category of relevant proceedings. The relevant code of practice is the Acas Code of Practice 1: Disciplinary and grievance procedures (2015). Mr Harry purported to dismiss the claimant for misconduct.

31. The respondent's failure to follow the Code relates firstly, not holding any investigation or disciplinary hearing (breach of paragraphs 5, 9, 11 and 13). Secondly, not affording the claimant an opportunity to appeal the decision to

dismiss him (breach of paragraph 26). The respondent did not inform the claimant of his right of appeal.

32. I bear in mind the guidance in *Kuehne & Nagel v Cosgrove EAT 0165/13* I may consider adjusting the compensatory award only once an express finding is made that a failure to follow the Code was unreasonable. In the circumstances of this case I find that the failure to follow the Code was unreasonable. No explanation has been given for why the claimant was not called to an investigatory/disciplinary hearing, or why he was not advised of his right of appeal in the dismissal letter. I accept that Mr Harry may have not deliberately set out to breach the Code because he was not aware of its requirements, but I conclude that he ought to have been. The respondent's business is unionised and falls within a regulated sector. Mr Harry therefore ought to have made himself aware of the ACAS Code. The breaches were significant not minor.

33. In those circumstances I consider that an uplift of 25% is the appropriate uplift to make. I therefore order the respondent to pay to the claimant a compensatory award in the sum of £1,242.22 (£993.76 plus 25% uplift of £248.44). I make no award for loss of statutory rights since the claimant only worked for the respondent for two weeks and had not acquired any statutory rights.

34. Having reached the above conclusions it is strictly not necessary for me to deal with the other matters which have been raised in relation to mitigation and future loss of earnings. However, for the sake of completeness I make the following findings.

35. Since the claimant's employment with the respondent terminated he has set up his own Company through which he provides driving services, currently to a company called B&M. He is an employee of the Company. There are no other employees. He has no additional costs although he does have to pay VAT. Since the termination of employment until the date of hearing the claimant's bank statements reveal that net of VAT he has received £14,147. He will be liable to pay income tax on that sum over his personal allowance. He does not work full-time.

36. I have been provided with a range of adverts showing that within a reasonable distance of the area in which the claimant lives there have been numerous vacancies for LGV/HGV drivers since the termination of his employment. The claimant accepts that the majority of those jobs are within his skills and experience. He has explained that he has restricted himself to travelling to a site that is no more than ten miles away from his home. Since he was prepared to travel from Liverpool to work for the respondent in Wiltshire such a geographical restriction is unreasonable. He also gave evidence that he has been banned/had disagreements with a significant number of transport agencies/transport companies no evidence has been provided to support that.

37. In August 2016 he had a conversation with a transport agency that offered him full-time employment with the company for whom he now works as a contractor for B&M. The transcript of that telephone call indicates that the offer was for permanent full-time employment. The claimant rejected that indicating he only wished to work one or two days per week. He has

explained that the reason that he rejected that offer was because he did not want to work for the company at the time due to its reputation for health and safety. I find that explanation not credible and unconvincing. He is now working for them and he has provided no documentary evidence to substantiate any concerns he may have had. Having seen the list of vacancies and the claimant's acceptance that there were jobs that he could have taken up I find that although he did apply for some roles and may well have been rejected for them, he could have secured full-time employment at a similar rate of pay no later than first week of August 2016 (when he rejected the offer of full-time employment with B&M). Therefore beyond that date he has failed to mitigate his loss. Therefore, had I reached a different conclusion as to when he would have been dismissed by the respondent, I would have awarded the claimant financial loss only up to 8 August 2016.

38. In summary, I find that the claimant would have been dismissed by the respondent by 15 April 2016 and the award is therefore limited to that period together with an uplift of 25% for the respondent's failure to follow the ACAS Code of Practice.

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Employment Judge O Harper

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Date: 1st June 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS