EMPLOYMENT TRIBUNALS

Claimant: Mr S Josic

Respondent: Alto Automotive Limited

HELD AT: Liverpool **ON:** 24 and 25 May 2017

BEFORE: Employment Judge Robinson
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr P Byrne, Solicitor

JUDGMENT

The judgment of the Tribunal is that the claims of unfair dismissal for asserting a statutory right and making a protected disclosure, and claims for breach of contract and unlawful deduction of wages all fail and are dismissed. The claim for ordinary unfair dismissal is also dismissed for jurisdictional reasons as the claimant does not have the requisite period of employment for two years.

REASONS

1. The claims before me are ones of ordinary unfair dismissal, unfair dismissal for making a protected disclosure and unfair dismissal for asserting a statutory right. The claimant also has claims for unlawful deduction of wages in relation to overtime, lunch money and for the repayment to him for shoes and/or boots (PPE). Those claims are also set out in the ET1 as claims of breach of contract.

2. The respondent has counterclaimed for the sum of £916.67 and the respondents recognised that they owed the claimant expenses of £100 and holiday pay of £161.53, a total of £261.53 and therefore their counter claim was the difference between those two figures amounting to a sum of £655.14 which the claimant has not repaid to the company. That claim is not being pursued now by Mr Burn except that any monies found by the Tribunal to be owed to the claimant by the respondent should be offset against that sum on the basis that the claimant's

contract with the respondent company as the company to be reimbursed by an employee within twelve months of that employee's start date training costs incurred by the company. The training costs I found were in the sum of £916.67.

Further Findings of Fact

3. Mr Josic is a qualified heavy good vehicle driver. He worked for the respondent for a very short time, less than a month, from 1 September 2015 to 27 September 2015. The first week of his employment was a training week and he then drove lorries for the next three weeks.

4. The claimant's allegation is that he made qualifying protected disclosures in that he disclosed information to the respondent that tended to show that the respondent was failing to comply with a legal obligation, and that the health and safety of an individual was being endangered. At a later point he says that criminal offences have been committed. As will be seen from the facts below I find that Mr Josic is a whistle blower and has made qualified protected disclosures.

5. The claimant however was not hourly paid, he was paid a salary. If he was required to work overtime he would only do that on either a Saturday and Sunday and only with prior agreement with the respondent managers. At no time did the claimant receive such prior agreement that he should receive overtime.

6. As all other employee, the claimant was allowed to buy his own PPE, in particular driving boots. The respondent would have reimbursed the claimant for the purchase of PPE if the employee put in a receipt. The claimant did not present a receipt to the respondents consequently the respondents never had the opportunity to repay any monies allegedly incurred by the claimant.

7. The respondents have all tachograph information from all drivers independently checked by an organisation known as TLS Analysis. The claimant did sign a contract which allowed the respondent to re-claim pro rata training costs if that employee and in particular this claimant left within twelve months of employment starting. The exact amount is set out above.

8. The respondent accepts that some monies are due to the claimant with regard to expenses and holiday pay as set out above. Mr Grayson however on behalf of the respondents at this hearing whilst being cross examined accepted that he owed the claimant £4 for lunches for four weeks which amounted to £16, those sums however will be offset by the counter claim that has been made of £655.14. The rest of the monies due from the claimant from the respondent which I find are due are written off by the respondents as they are not pursuing in these proceedings the claimant for those outstanding sums.

9. The appropriate law with regard to the Working Time Directive and EU drivers hours and the rules that are put in place are as follows. I accept that the claimant does not agree with this summation however it is a finding of fact established that the working time directive for HGV drivers sets out regulations that drivers should not exceed nine hours driving per day and that twice a week that nine hour period can be extended to ten hours. The driving hour per week must not exceed 56 hours and there should be a maximum working time of 60 hours. The average weekly hours

are calculated either over a 17 week period or if agreed between the parties 26 weeks, but must not exceed over that reference period 48 hours per week.

10. The difficulty in calculating hours in this case is that Mr Josic only worked for a very short period of time, His independently recorded time by the company is 34.29 hours in week one; 39.02 hours in week two and 57.12 hours in week three. That averages out, according to the independent analysis, at 47.29 hours over the three weeks which is under the working time average of 48 hours calculated over a 17 week period.

11. The claimant's first complaint which he alleges is a protected disclosure (at page 58 of the bundle) was made on 21 September 2015. He alleges in his letter he is not working legally and that he would like to change his shift pattern. He acknowledges that he is not used to the “tacho” device. The letter actually ends with the claimant asking for advice from his employer and requesting a four days on, four days off working week.

12. The claimant also recognised that he had made mistakes with regard to use of the tachograph. He recognised that if he continued to work the hours that he was working for a certain point of the reference period (17 weeks) he might have to take two or more weeks off if the hours continued to be as long. The respondents were fully aware, having run their business for many years, that because of troughs and peaks in their business their drivers did work long hours some weeks but then much shorter hours other weeks. They understood the reference period and their duty to the drivers to make sure that those drivers did not breach the appropriate working time regulations or any other legal requirement. That letter from the claimant of 21st September 2015 is not a protected disclosure. It is simply the claimant asking advice of his employers with regard to working time.

13. The second letter however at page 59 of the bundle dated 22nd September 2015, is a protected disclosure. It is made to the employer and it raises wider issues than the claimant's own contract issues. It suggests there are breaches of the law being committed, potential criminal offences and a failure to comply with legal obligations. In that letter the claimant says that he has heard from other drivers that the respondent company are allowing their drivers to breach the current legislation. The respondents therefore were receiving information, albeit second hand, from the claimant.

14. Mr Grayson informed the claimant that he wanted to see the claimant’s tachographs after those two letters had been received so that he could, in his own words “see what the claimant was doing wrong”. That was not a detriment to the claimant. Mr Grayson simply wanted to sort the potential problem out. The respondent's drivers all drove legally and were monitored appropriately. The respondents did have an independent company check the tachographs, the respondents have run a clean business for 30+ years and the company has no prosecutions under the Working Time Regulations or the equivalent regulations for HGV drivers. Having heard the respondent witnesses I also accept that if there were breaches of any of the regulations by their drivers the respondents would wish to correct those immediately. The managers acknowledged that there is always a risk, in those circumstances, of losing their operating license and also the danger for their own drivers individually to get in to trouble.

15. Within a few days and by 26 September the claimant had written a third letter which included his tachograph charts as requested. The claimant complains in that letter about breaches of the law and that letter also meets the definition of a protected disclosure. He does raise issues over his own contract, and he does say that he did not opt out of his statutory rights "not to work more than 48 hours per week on average". He quotes the Working Time Regulations 1998 to his employer and he also widens his complaint by saying that since he has raised these issues some workers were treating him differently. He refers to "yesterday's boiling atmosphere" and wants a reply to his emails in writing. He also complains for the first time about overtime saying that if he works over 48 hours he is entitled to overtime payments. The claimant did not understand that because he received an annual salary there was no overtime on offer to the drivers of the respondent company unless they were asked to drive outside the working week and then only when given permission by their managers to work and be paid that overtime.

16. The letter of 26th September has been triggered in part by an incident the day before. That incident involved Mark Dunn, the Traffic Planner, from whom I heard. Mr Dunn had to go out to meet the claimant at Hartshead Moor Service Station on the M62 to collect the claimant on 25 September 2015, because the claimant said he could not make it back from Doncaster to Haydock without being in breach of the Working Time Regulations. By this time Mr Grayson had become exasperated with Mr Josic. Mr Dunn was also fed up with the claimant because of the incident at Hartshead Moor. The claimant started an argument with Mr Dunn when Mr Dunn picked him up. Mr Dunn drove the claimant back from the Service Station in the claimant's lorry to Haydock. The claimant harangued Mr Dunn about both working and driving hours during the drive home.

17. Mr Dunn had insisted both on the telephone before he went to collect the claimant and during that journey home that the claimant was not out of time with regard to the Working Time Regulations and he would have had plenty of time to get back to Haydock, a drive of just over an hour from Hartshead Moor Service Station. Mr Dunn told the claimant that there had been no need for him to go out to the claimant and collect him.

18. Mr Grayson, having had a word with Mr Dunn, recognised that he now had a problem on his hands. He believed that the claimant did not understand the relevant legislation about working time. Secondly he believed the claimant was confrontational with his manager and the claimant's allegation that he was being tricked into making a mistake was entirely unsustainable. Thirdly, now that the claimant's tachographs had been analysed the respondent realised that the claimant himself was failing to operate the tachograph properly. Fourthly, there had been a series of driving infringements by the claimant for the week commencing 21 September. The respondent company had trained the claimant for a week before he started. The respondent managers felt that the claimant had not learned from those training sessions.

19. On 27 September Mr Grayson wrote to the claimant by email ending his employment. The email is curt and to the point. It includes this phrase: “It is clear to both of us that this is not going to work out”. Eventually on 2 November 2015 the claimant emailed the respondent to ask for an explanation as to why his contract had

been terminated. The claimant had not issued proceedings at that point but Mr Grayson's reply gave the following reasons for the respondent's dismissal :-

(1) Refusing to carry out a reasonable request.

(2) Having little or no understanding of the drivers' regulations.

(3) Giving misleading information about your previous experience.

(4) Being rude and disrespectful to other members of staff.

(5) Breaking traffic laws relating to parking on a motorway carriageway.

20. That last reason however could not have been known as at 27 September 2015. That relates to something that had happened in Swindon when the respondent found out from Gwent Police that the claimant had parked up illegally on a hard shoulder.

21. The claimant believes, and still believes, that he is interpreting the law correctly and that the respondents managers are interpreting the law incorrectly.

The Law

22. The principles I have applied to the facts of this case are these. As the claimant does not have two years' service it is for the claimant to prove his case with regard to this matter. The burden is upon him. I have to decide whether the claimant has made protected disclosures, if so was that the reason or principal reason for his dismissal. There is only one detriment in this case and that is the dismissal itself, I have to be satisfied, amongst other things, that the claimant is an employee, the claim is made in time, that he made a protected disclosure, the disclosure qualified, was not made for personal gain and can the claimant show that the principal reason for the dismissal was the disclosure. In other words was there a causal link between his dismissal and the disclosure.

23. In the case of Beatt -v- Croyden Health Services NHS Trust the Court of Appeal held where there is a potential for concluding that the making of a disclosure is the principle reason for a dismissal the decision maker's belief about whether the disclosure is protected is irrelevant. With regard to the claimant's claim for asserting a statutory I have to identify the right being asserted. Those rights are set out in Section 104(4) of the Employment Rights Act 1996 and include amongst other things the rights conferred by the Working Time Regulations but do not include the Road Haulage (Working Time) Regulations 2005 which EU drivers are regulated by for the purposes of UK law. Those 2005 Regulations are not contained within Section 104 for the claimant cannot claim the relevant protection. The claimant however also asserts that Regulation 4(1) of the Working Time Regulations 1998 also applies to the Road Haulage business.

24. However Regulation 18 sets out the excluded sectors in relation to those regulations and sub paragraph (4) of Regulation 18 confirms that Regulations 4(1) and (2), 6 (1) and (2) and 7, 8, 10 (1), 11 (1) and (2), and 12(1) do not apply to workers to whom directive 2002 / 15 / EC of the European Parliament and of the Council on the organisation of the working times of persons performing mobile

transport activities dated 11th March 2002 applies. The respondent relies on that provision.

25. Applying that law to the facts of this case and for ease of presentation I set out further facts below, I concluded as follows.

26. There are no issues as regards the claimant being an employee or whether the claim was in time. Both those issues favour the claimant. I accept that two of his three alleged protected disclosures are protected disclosures in that they give information about potential criminal offences and a breach of legal obligations. So I then moved on to decide whether the principle reason for the claimant's dismissal was his disclosures.

27. It matters not whether Mr Grayson thought the emails from the claimant were protected disclosures or not.

28. I am required to answer the question asked of me objectively whether those emails are protected disclosures, and whether ultimately they have anything to do with the dismissal of the claimant.

29. Let me deal first of all with the claimant's claim that he was dismissed for asserting a statutory right. The industry is an excluded sector with regard to the right that the claimant is claiming. Consequently that claim cannot succeed. Even if I am wrong with regard to that issue I had to decide whether there was any causal link between the claimant's allegation that he was asserting a statutory right and his dismissal in the same way that I had to see whether there was a link between his complaints (his protected disclosures) and his dismissal.

30. The answer, in short, is that the claimant has not proved his claim.

31. It is accepted by the claimant that he has issued many proceedings against haulage companies and that he is actually, according to his evidence been banned by 15 agencies and 5 major companies for driving for them.

32. On the face of it that issue has no relevance to these particular proceedings but I find that the claimant believes that he is right with regard to his interpretation of all the regulations governing HGV drivers and that the haulage companies, for whom he has worked, are wrong. Whether the claimant is on a crusade with regard to those issues I know not but I had to decide whether the claimant's interpretation of the various regulations were correct or whether the respondents interpretation was correct.

33. I decided that the respondent's managers were correct in their assertion that the relevant regulations are the Road Haulage Regulations as opposed to the Working Time Regulations.

34. The respondent’s managers were faced with a new employee who was demanding, within three weeks of him starting driving for the respondents, a change to his shift pattern. He was confrontational with the respondent's other employees. He says himself that people had stopped talking to him within a few weeks of his employment. It is clear that he exasperated both Mr Grayson and Mr Dunn. He also was displaying to the respondents an alarming misunderstanding, not necessarily

with regard to the regulations but with regard to the use of the tachograph. Indeed, although this was not a reason for the claimant's dismissal, the company subsequently found out the claimant had parked his vehicle on the hard shoulder of a motorway for a prolonged period when there was no emergency. The matter was being investigated by the Police in Gwent. The Police had on 3rd October 2015 asked the respondents for the tachograph relating to the claimant's vehicle when parked on the hard shoulder on 22nd September 2015. That incident demonstrates the claimant's lack of understanding of his legal duties as an HGV driver.

35. Despite the claimant's complaints I also found that the respondents appropriately employed TMS Analysis to check all their drivers times and to check whether they were working within the relevant Working Time Regulations.

36. Mr Grayson became concerned about the claimant's infringements and noted that those infringements could lead to fixed penalties and infringements relating to rest periods and consequently on 22nd September 2015 he emailed the claimant saying this:-

> "I may consider you for the four on four off shift but not until you have gained more experience. I will look at it after the end of this year. Please can you leave all your tachograph charts for me to copy and study so that I can understand what you are doing wrong. I will return them to you on Monday to keep with you for 28 days. The reference period is 26 weeks. Once I understand how you have made your calculations I will make sure you get some training on how to calculate the hours. I have 20 drivers all on the same work as you and none of them has the problem with the hours".

37. In short Mr Grayson and Mr Dunn ultimately decided that the claimant was making serious mistakes in his use of the tachographs compounded by him being difficult to deal with on a personal level. They concluded the claimant did not understand the regulations, he made mistakes on his tachograph, seemingly breaching the law himself, and was not able to be self critical and sought to blame the respondents for making him work outside what he considered the law to be.

38. Both Mr Dunn and Mr Grayson were exasperated with the claimant on 25 September 2015 when they realised that despite what the claimant was saying he did have sufficient legal time to get his lorry and himself back from the Service Station near Leeds to Haydock. The claimant had simply become awkward with the respondent managers.

39. The claimant, almost immediately into his contract, wished to change his shift pattern and, despite acknowledging that there was no contractual entitlement to overtime payments, still wanted to be paid for his overtime. In other words for the time he said he was driving over the 48 hours per week limit.

40. The reason for the dismissal had nothing to do with the claimant's protected disclosures and everything to do with the claimant being difficult and his lack of knowledge of the driving and working regulations.

41. With regard to notice pay, under section 86 of the Employment Rights Act 1996 the claimant is not entitled to notice because he was not employed for a month.

His contractual notice entitlement only kicked in after he was employed for four weeks.

42. The respondent actually paid him for the full month of September to 30th September 2015, Consequently with regard to holiday pay, although I have received no evidence as to what is payable and due what I have seen in the Schedule of Loss is that Mr Josic is claiming two days which amounts to £173.36. Even if that sum is owed (and I am not convinced it is) it is offset, in part, by the extra payment that he received from the 27th September to 30th September. The respondents are also entitled to deduct from the final wage the cost of the training and the relevant section of his contract which the claimant has signed on 31st August 2015 reads as follows:-

> "A contribution for training costs will be clawed back in the event that a newly trained driver leaves or is dismissed for any reason during the first twelve months of employment. A pro-rata deduction will be made depending on the number of weeks worked based on a full year charge of £1,000. This will be retained from the final pay from the driver in the event there is insufficient outstanding pay an invoice will be issued".

43. Consequently any sums due to the claimant either for expenses or for holiday pay including lunch money owing to the claimant are offset and subsumed in the sum of £916.67 that the claimant owes the respondent.

44. Finally the claimant is not entitled to any overtime payments on the basis that he agreed and signed up to a contract which pays him a salary and not an hourly rate.

45. In short therefore all the claimant's claims are dismissed.

21-07-17

Employment Judge Robinson

JUDGMENT AND REASONS SENT TO THE PARTIES ON

24 July 2017

FOR THE TRIBUNAL OFFICE