EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr. T Gurung	**v**	ARL Services (UK) Limited

Heard at: Reading **On:** 30 & 31 October 2017

Before: Employment Judge Milner-Moore

Appearances

For the Claimant: Mr. G Williams (Trade Union Officer)

For the Respondent: Mr. R Morton (Solicitor)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. No order for reinstatement is made.

3. The claimant is awarded compensation as follows:

   3.1. Basic Award – £714
   3.2. Compensatory Award - £11070.10

   The recoupment regulations do not apply in this case.

REASONS

Liability

1. This matter was listed for a two day hearing to consider a complaint of unfair dismissal and to resolve issues of liability and remedy. However, before the matter came for hearing, the response had been dismissed as a result of a failure to comply with an Unless Order. At the start of the hearing, I considered the respondent's application to overturn the dismissal of the response but I refused that application for reasons which are set out in a separate decision. In consequence, under rule 38(3) of the Tribunal's 2013 Procedure Rules, the case was to be treated as if no response had ever been presented. Rule 21 provides that where no response has been entered the Employment Judge may determine the case on the available material, following a hearing if necessary, and that the respondent shall only be entitled to participate in any hearing to the extent permitted by the Judge.

2. The response having been struck out, the respondent could not discharge the requirement that it must show a fair reason for dismissal (section 98(1) Employment Rights Act 1996 "(ERA")). Section 98(4) ERA, which directs the Tribunal to consider the fairness of the dismissal in all the circumstances, only applies where a fair reason for dismissal has been shown. Accordingly, the question of liability for unfair dismissal had to be determined in the claimant's favour.

Remedy

Application for a stay on proceedings pending an appeal

3. Following my refusal of its application set aside the dismissal of the response, the respondent sought a stay on the proceedings, in order to pursue an appeal against that decision. I considered that application but decided that it would not be in the interests of justice to grant such an application. I considered the balance of hardship involved for each party in granting or refusing a stay on proceedings and considered that a stay would involve greater hardship for the claimant who was suffering a continuing loss of earnings. I also considered that it would be consistent with the overriding objective for me to proceed and determine the remaining issues in the case. In that way, if either party wished to appeal the outcome of that determination, the appeal could be dealt with at the same time as the respondent's appeal against my decision regarding the dismissal of the response.

Respondent's participation in the hearing

4. It was a matter for the tribunal's discretion (under rule 21(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) as to whether and to what extent the respondent should be allowed to participate in any remedy hearing. The respondent was keen to participate in any remedy hearing and the claimant raised no objection to this. Accordingly, I concluded that it would be in the interests of justice that

the respondent should be permitted to participate in the remedy hearing to challenge the losses being claimed by the claimant and to address the practicability of reinstatement, provided that, in doing so, the respondent would not be permitted to reopen matters going to liability.

Brief adjournment

5. In the ET1 the claimant had indicated that he would be seeking reinstatement and the claimant's representative confirmed that reinstatement was still being sought. The claimant's representative confirmed that, if reinstatement were not to be ordered, the claimant did not wish to be reengaged. The respondent had assumed, in light of the claimant having obtained some new employment, that he would not wish to return to work for the respondent. The respondent was not therefore prepared with evidence or submissions to address the question of reinstatement.

6. I heard representations from both parties in relation to the way forward. The options were that the case could proceed immediately with no evidence on reinstatement being produced by the respondent, the hearing could be postponed to another occasion in order to enable the respondent to produce further evidence and for the claimant to have an opportunity to respond to it (bearing in mind that this might have adverse cost consequences for the respondent), the case could be adjourned to the second day allocated for the hearing allowing the respondent some time to produce material addressing the question of practicability of reinstatement.

7. Having considered the overriding objective, and in particular the desirability of concluding the case without delay (adjourning to another day would have meant delaying the hearing by several months given the state of the lists), I considered that it would be in the interests of justice to adjourn until the second day of the hearing so that the respondent could make submissions and put forward evidence if it wished to in relation to reinstatement. The claimant's representative did not object to this course of action. I therefore adjourned the case at around 3.00 pm on 30 October 2017.

Evidence

8. On 31 October 2017, I heard evidence and representations from both parties and considered a trial bundle and some additional material. I heard evidence from the claimant, via an interpreter, regarding his losses and the steps that he had taken to mitigate those losses. For the respondent, I heard evidence from Mr. Malik dealing with the question of whether reinstatement should be ordered. The claimant produced an amended schedule of loss and some staff rotas, including rotas in relation to the temporary staff used by the respondent. The respondent produced rotas in relation to the usage of permanent staff and some tables relating to financial performance data.

Issues

9. The issues for determination were as follows:-

9.1 Should an order for reinstatement be made in accordance with sections 113, 114 and 116 of the Employment Rights Act 1996?

9.1.1 Was it practicable for the respondent to comply with an order for reinstatement?

9.1.2 Would it be just to order the claimant's reinstatement.?

9.2 If an order for reinstatement were made:-

9.2.1 What benefits might the claimant reasonably be expected to have received from employment by the respondent between the date of termination and the date of reinstatement?

9.2.2 What amounts should be deducted e.g. in relation to the claimant's other earnings?

9.2.3 What if any rights and privileges must be restored to the claimant?

9.2.4 By what date should any order for reinstatement be complied with?

9.3 If no order for reinstatement were made:-

9.3.1 What compensation should be awarded to the claimant pursuant to sections 119 to 124 of the Employment Rights Act 1996?

9.3.2 What compensatory award would be "*just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer*"

9.3.3 Had the claimant taken reasonable steps to mitigate his loss?

9.3.4 If not, to what extent should compensation be reduced to reflect this failure?

Facts

10. In order to explain the decision that I have reached regarding reinstatement it is necessary to set out findings relating to the circumstances of the claimant's dismissal.

11. The claimant, who was 42 at the time of the hearing, worked as a porter at Heathrow Airport and had been employed in that capacity since 9 July 2013. His employment transferred to the respondent under a TUPE transfer from a company called Aviserve on or around 1 July 2014. The claimant was responsible for transporting luggage through the airport for passengers. The amount charged for that service depended on the amount of luggage and what size trolley was required and whether passengers were going straight to check in or whether they were undertaking the additional journey to the VAT desk. The use of a small trolley to undertake the single journey to check in would cost £10. To take the same trolley to the VAT desk would involve a cost of £20.

12. Porters were issued with a book of tickets, each of which had a face value of £10. The porter would apply a ticket to the luggage being transported to reflect the value of the service provided. Not all of the jobs undertaken by the porters involved passengers approaching them directly and paying cash. Some jobs were booked and paid for in advance. The porter would still apply tickets to reflect the value of the service provided. At the end of each day, porters were expected to be able to reconcile the number of tickets dispensed with the amount of cash received or work undertaken.

13. On 9 July 2013, the claimant signed a "VAT Services document". That document provided as follows:

> "Important Notes
>
> - Porters will determine if a customer wants to use the VAT service before the service commences.
> - ALL TICKETS MUST BE ATTACHED TO VAT SERVICE BAGS BEFORE THE LOAD IS MOVED – MOVING BAGS TO THE VAT WITHOUT THE CORRECT QUANTITY OF TICKETS ATTACHED IS DEEMED GROSS MISCONDUCT.
> - If a customer requests VAT service during movement, the porter will stop immediately and affix the applicable quantity of tickets to the load before continuing the service."

12. On 21 July 2016, a meeting took place which was attended by some of the respondent's staff including Mr. Yunis, who was one of the porter supervisors, and Mr. Nolan, who was part of the management of the respondent. A question was raised about whether, when a porter was required to make a journey to the VAT desk, the porter should apply the additional ticket at the start or whether it was acceptable for the additional ticket to be applied only once the porter was at the VAT desk and once the customer had confirmed that they wished to stay in line to collect the VAT refund. If porters were required to apply the additional ticket at the start, there was a possibility that customers might change their minds if they got

to the VAT Services desk to find a long queue. This would give rise to difficulty if the customer refused to pay for that VAT service and only paid for the standard service as it might mean that the porters had to make up any shortfall. It was suggested that there had been a practice that the additional tickets referable to the VAT service should be applied to the luggage only when the customer was at the VAT Service desk and confirmed that they did indeed wish to pay for that service. It was also suggested that this was a practice that had been endorsed by previous management.

13. The respondent's account is that it agreed to consider what it regarded as a request for a change of process but that the supervisors were told that until the matter had been considered further the existing written procedures were to apply. (The respondent took no action to clarify matters until 28 September 2016 when it issued a written instruction making clear that no change of process was being authorised). However, the supervisors appear to have understood matters differently and a number of them subsequently, in the context of the claimant's disciplinary process, signed a letter to say that they had understood that Mr. Nolan had said that they were permitted to apply the VAT tickets only once the passenger had confirmed, whilst at the VAT Service desk, that they wished to have that service.

14. Both the claimant and other staff members were quite clear that Mr. Yunis had told them that the process had changed and indeed that was Mr. Yunis' own evidence in the subsequent disciplinary process.

15. On 12 September 2016, the claimant was observed by the CEO of the respondent. He was portering a load of luggage which had only two tickets on it to the VAT Service desk. The job in question was a pre-booked job rather than a cash job. Because it was a VAT job, the respondent considered that the load should have had four tickets on but there were only two tickets on it. As a result of this, Mr. Malik suspended the claimant for a breach of the ticketing procedure. During the subsequent disciplinary process, the claimant was charged with a breach of the ticketing procedure and with fraudulent misappropriation of cash. The letter of suspension made reference to a disciplinary and conduct policy and to a disciplinary procedure in the staff handbook at section 12. Neither of these documents was produced by the respondent in the proceedings before me.

16. When interviewed, the claimant's explanation was that what he had done was standard practice, i.e. that it was standard practice to delay applying the VAT tickets until you got to the VAT area and the customer confirmed their intentions.

17. At a subsequent disciplinary hearing, the claimant made a reference to the supervisors meeting on 21 July and he said that the process that he had adopted was one which he had been instructed to

adopt by those supervising him. That argument however did not succeed with the respondent and the claimant was dismissed on 4 October 2016. On 7 October 2016, the claimant appealed on the grounds that it had always been local practice to put two tickets on in the forecourt and two in front of VAT, that the only written instruction that had ever been sent out was issued on 28 September 2016 and that he did not accept that he had been dishonest and considered that he had been differently treated to other employees.

18. The appeal process was conducted by Hassan Janjua. Mr. Janjua received a letter from the supervisors which stated that Mr. Nolan had

> "told to all supervisors booking your cash jobs you could put two tickets on forecourt and the other two tickets on the front of the VAT area for a big trolley… Reason for doing this passenger can change their mind because of long queue, hurry to check in, etc. If we put four tickets on the forecourt we have to pay the difference… that is the reason for doing it this way."

19. Mr. Yunis was subsequently interviewed during the appeal and was quite clear that he had told the porters to adopt a process of putting two tickets on the forecourt and two tickets on at the VAT desk and that that was his clear understanding following the meeting.

20. Mr. Janjua rejected the claimant's appeal in a letter dated 17 February 2017. He concluded that the claimant was guilty of failing to comply with ticketing procedures and fraud but also added a number of additional disciplinary charges including bringing the respondent into disrepute and giving false evidence during the disciplinary process. The claimant was offered a further right of appeal but did not take that up.

21. Mr. Malik's evidence was that the respondent's is predominantly a cash business. Mr. Malik states that it would not be reasonably practicable for the respondent to reinstate the claimant as it could not place trust and confidence in him given his admitted breach of the processes.

22. Mr. Malik also gave evidence regarding the practicability of the claimant's reinstatement by reference to the respondent's financial position. The respondent's business is a seasonal one with particularly busy periods during the summer holidays and occasional spikes in business around other major holidays such as Easter and Christmas. The respondent has on its books around 60 full time permanent staff and also makes use of a number of agency staff. Rotas were produced in relation to the permanent staff for the period October to December and I note that those rotas show around 12 to 15 staff as absent on unpaid leave. When the respondent is less busy and has less of a requirement for porters, one of the means of reconciling demand with workforce numbers is to permit such staff as wish to do so to take unpaid leave in excess of statutory holiday. The other means that Mr. Malik adopts to reconcile workload with staff numbers is to cease making use of temporary agency staff. His evidence was that he would normally "switch off" the agency staff in

October but the claimant has produced a rota for agency staff dated November 2017 which shows that the respondent is still making some use of agency staff even in November 2017.

23. Mr. Malik gave evidence regarding the respondent's financial planning processes and I was directed in particular to an October 2017 spreadsheet which showed a budgeted revenue figure of £151,122.00 for the complete month as against actual revenue received up to 25 October of £88,300.00, a shortfall of around 40%. Mr. Malik's evidence was that his target (which it appears is in some way agreed with Heathrow although I was not given any evidence as to the precise nature of the agreement) is to have a cost to revenue percentage of 65%. That is that costs should not exceed 65% of revenue. He drew to my attention that for October 2017 the cost to revenue percentage is 83%. The spreadsheets produced by the respondent for the last year bear out the seasonal nature of the respondent's work. Between November and March, the cost to revenue percentage ranges between 79 and 70% and then in April to June, it ranges between 73-55%. It is frequently over the 65% figure that the respondent has a target but the respondent did not suggest that this has led to any redundancies. Mr. Malik, when asked what the consequence would be of the cost to revenue percentage figure of 83% in October 2017, said that he would need to try and do some damage control and would need to do a report explaining, but it was not suggested that any radical action in relation to staff numbers would be taken. Mr. Malik said that it would be difficult for him to include the claimant back in the workforce as this would mean adding 160 hours a month which would be difficult for him to manage. He said that the respondent had not recruited any permanent staff since the claimant was dismissed and that over the past three or four years, three or four permanent staff had left and they have not been replaced.

24. Since leaving employment with the respondent, the claimant has, his representative accepted, made limited attempts to mitigate his loss by finding other employment. The claimant was out of the country from 7 October 2016 for around a month because he had a pre-arranged holiday and that he made no attempts to find employment until he returned. The claimant was able to produce only three emails confirming job applications that he had made between November and February 2017. His explanation was that he was hopeful that the respondent might call him and offer him new employment. He then made a few applications unsuccessfully until he was told about a vacancy at a company called KMB by one of his friends and that is where he is currently working. The claimant works 10 hours a week and earns £7.50 an hour. The claimant said that his wife had also started working which had helped.

25. The claimant said that he had made other applications for work online but that he had not saved the relevant emails and so had not been able to produce them in evidence. He thought that he had made eight or nine applications in total. Since getting his job with KMB in April he had

applied for a further two or three jobs. He had not asked KMB if he could increase his hours because he was only a relief worker who helped out when somebody was on holiday or having a day off. The claimant had not received any social security benefits.

26. The claimant was dismissed on 4 October 2016. The schedule of loss sought compensation in the sum of £13,665.20 for losses to the date of the remedy hearing, it did not include any claim for future loss.

27. The claimant and respondent were unable to agree the basic figures relating to gross and net pay which should be used in calculating any loss of earnings. The information before me regarding the claimant's pay was very limited. I had a single pay slip for the month of October 2016 during which the claimant had worked for only four days before being dismissed which indicated that his hourly rate of pay was £7.50 an hour gross. His P60 for the tax year starting on 5 April 2016 showed that his gross annual earnings were £11,923.21 with tax of £262.80 deducted. His P60 for the tax year starting on 5 April 2017 which covered the period 6 April to 4 October 2017 showed gross earnings of £8,775.70 and tax of £287.20 deducted.

28. The claimant's representative had used the second P60 to calculate the claimant's gross and net pay as £337.53 and £292.59 respectively. The respondent objected to the use of the 2017 P60 figures in this way on the basis that they would give an unrepresentative figure for his annual earnings (if doubled, it would have created annual earnings of £17,500.00) which the respondent considered unlikely. They considered that the P60 was unrepresentative because it covered the busiest months of the year when the claimant would have undertaken additional work. They considered that it would be more representative to use the previous year's P60 and to apply a 4% uplift to reflect changes in the national minimum wage which the respondent says would generate weekly earnings figures of £229.99 gross and £225.00 net.

Closing submissions

29. Mr. Williams produced helpful written closing submissions and supplemented these with a brief oral submission. He stated that the claimant was seeking reinstatement and he did not believe that the respondent had shown any grounds why trust and confidence in the claimant should not be possible. It was clear from the evidence that the claimant had been following the directions of his supervisor and adopting a widespread informal practice. He was no more nor less guilty of misconduct than others. He did not believe that the respondent could sustain any reasonable argument that the claimant could not be trusted. The claimant would obviously meticulously follow procedures in future, Nor had the respondent shown that reinstatement would not be practicable. The respondent was still using agency workers in November. Christmas was likely to be a busy period. The respondent had not produced the

agency rotas to show that agency workers would not be made use of in future. Mr. Williams accepted that the claimant could have done more to mitigate his loss but the nature of his dismissal had impacted on his ability to obtain new employment. He considered that a full basic award should be made with no reduction for contribution. He referred me to the authority of Burlow v Langley relating to the fact that the claimant was entitled to three weeks' notice and had taken three weeks' annual leave over his notice period. He considered that the 2017 P60 was the appropriate basis for calculating the claimant's losses but agreed that the national minimum wage had increased by around 4% over the relevant period. He noted that although it may be said that the 2017 P60 was unrepresentative it was impossible to say exactly what his full year's salary would have been.

30. Mr. Morton stated that reinstatement would not be an appropriate remedy. He relied on the following arguments. Mr. Malik's evidence established that it would not be reasonably practicable to take the claimant back given the financial performance of the porter service against the targets that had been set. As regards the use of agency staff, it is perfectly commonplace for employers to make occasional use of agency cover rather than creating permanent positions. Although some agency staff were being used in November the rota showed that a lot of the staff were being placed on unpaid leave. In terms of reasonable practicability, it was necessary to consider whether there was a vacancy to put the claimant into. He argued that there was no such vacancy as in the last two or three years permanent staff had left and not been replaced. The respondent's financial performance did not bear out the suggestion that there was any vacancy. If one looked at the October figures, the respondent was not meeting its cost to revenue targets and it would be unreasonable to expect the respondent to take the claimant back and to incur additional cost in its business. A more appropriate remedy for the claimant would be compensation rather than reinstatement, particularly given that the claimant has got another job. A reinstatement order would require the respondent to create a position for the claimant, that goes beyond what is reasonable and what a tribunal ought to do. The claimant had been gone from the respondent's business for over a year and that would make it difficult for the claimant easily to slot back into the respondent's business. It would raise a significant credibility issue for management to re-engage the claimant after this passage of time. It would lead to employee relations difficulties. As regards the issue of trust and confidence, the claimant accepted that he was in breach of the respondent's ticketing procedures but relied on the fact that there was some sort of informal arrangement or practice that had been adopted and approved by supervisors so as to avoid disputes with customers who might refuse to pay, potentially leaving porters out of pocket. However, that explanation made no sense and would only have applied to cash jobs. Pre-booked jobs had already been paid for and so the concern that customers would challenge porters and decline to pay would not arise. The job where the claimant had been observed in breach of procedures was a pre booked job. Mr. Morton referred me to the authorities of Woodgroup Heavy Industrial Turbines Ltd

v Crossan and United Lincolnshire Hospitals NHS Foundation Trust v Farren. The respondent had dismissed other staff for breaches of the ticketing procedure.

31. Mr. Morton submitted that the most recent P60 covers the period April to October which is the busiest period for the respondent, it is therefore unrepresentative of the Claimant's average weekly earnings. The respondent argued that any compensation should be based on the previous year's P60 uprated by reference to the national minimum wage and indicated that the weekly earnings figures should be £229.99 gross and £225.00 net respectively. He argued that the claimant had not done enough to mitigate his losses and that the claimant had elected not to do so because his wife had obtained employment. That was a choice the claimant had made and not something that the respondent should be required to compensate him for. The claimant could clearly have done more to try to find alternative employment and any award should be reduced to take account of this.

32. I drew the parties' attention City Hackney Health v Crisp which appeared to be authority for the proposition that no reduction could be made for either contributory conduct or a failure to mitigate where an order for reinstatement. I gave the parties seven days to make any further submissions that they wished to make on this point or to bring to my attention any relevant authorities. On 1 November 2017, the claimant's representative wrote to the tribunal providing a copy of Awotona v South Tyneside Healthcare NHS Trust [2005], a decision of the Court of Appeal in which Crisp was approved. No further submissions were received from the respondent.

Law

33. Section 116 of the Employment Rights Act 1996 ("ERA") provides :

> "(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—
> (a) whether the complainant wishes to be reinstated,
> (b) whether it is practicable for the employer to comply with an order for reinstatement, and
> (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement."

34. Where an order for reinstatement is made section 114 provides that:

> (1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.
> (2) On making an order for reinstatement the tribunal shall specify
> (a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the

dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,

(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(c) the date by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances"

Section 117 provides:

"Enforcement of order and compensation.

(1) An employment tribunal shall make an award of compensation, to be paid by the employer to the employee, if—

(a)an order under section 113 is made and the complainant is reinstated or re-engaged, but

(b)the terms of the order are not fully complied with.

(2) Subject to section 124, the amount of the compensation shall be such as the tribunal thinks fit having regard to the loss sustained by the complainant in consequence of the failure to comply fully with the terms of the order.

(2A) There shall be deducted from any award under subsection (1) the amount of any award made under section 112(5) at the time of the order under section 113.

(3) Subject to subsections (1) and (2) if an order under section 113 is made but the complainant is not reinstated or re-engaged in accordance with the order, the tribunal shall make—

(a)an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126), and

(b)except where this paragraph does not apply, an additional award of compensation of an amount not less than twenty-six nor more than fifty-two weeks' pay,to be paid by the employer to the employee

(4)Subsection (3)(b) does not apply where—

(a)the employer satisfies the tribunal that it was not practicable to comply with the order....

(7) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining for the purposes of subsection (4)(a) whether it was practicable to comply with the order for reinstatement or re-engagement unless the employer shows that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement."

35. Where an order for reinstatement is made City Hackney Health v Crisp establishes that no reduction in any compensation awarded may be made on grounds of contributory fault or failure to mitigate

36. The provisions of the ERA establish a two-stage process for consideration of reinstatement. At the first stage, when deciding, pursuant to section 116, whether to make an order for reinstatement, it is necessary to *consider* the question of practicability. At the second stage, if a reinstatement order is made but not complied with, the question of practicability is revisited as no additional award of compensation (pursuant to section 117(3)(b)) will be made where the employer satisfies the Tribunal that compliance was not practicable. At the first stage therefore the Employment Judge must have regard to practicability but need not make a final determination on the point.

37. Practicability in this context should not be equated with "possibility", rather it means "*capable of being carried in to effect with success*". An employer should not usually be required to reinstate in circumstances where there is clearly no vacancy (assuming that this is not a case to which s117(7) applies) and where the effect of reinstatement would be to necessitate redundancies or would result in overmanning.

38. Where an employer alleges that there has been a breakdown in trust and confidence between employer and employee and that reinstatement is therefore impracticable the task of the Employment Judge is to consider whether the employer genuinely believes that the relationship of trust and confidence has broken down and whether the employer's belief is a rational one. The test is summarised the EAT's decision in United Lincolnshire Hospitals NHS Foundation Trust v Farren in the following terms:

> "40. As the case law makes clear (see **Crossan** at paragraph 10, cited above), it had to ask whether this employer genuinely believed that the Claimant had been dishonest, and - per the EAT at paragraph 14 of **United Distillers v Brown** , see above - whether that belief had a rational basis. It was, after all, this employer - not some other and certainly not the ET - that was to re-engage the Claimant. The issue of trust and confidence had to be tested as between the parties in order to determine, even on a provisional basis, whether an order for re-engagement was practicable, whether it was capable of being carried into effect with success, whether it could work. The Respondent might have reached a conclusion as to the Claimant's honesty by an impermissible route in its dismissal decision and might also have drawn the wrong inference at the re-hearing, but the ET still needed to ask, as at the date it was considering whether to order re-engagement, whether it was practicable or just to order this employer to re-engage the Claimant. It thus was the Respondent's view of trust and confidence - appropriately tested by the ET as to whether it was genuine and founded on a rational basis - that mattered, not the ET's."
>
> 42. What we consider the ET did have to do was to consider, as at that point in time, whether the Respondent had made good that which it said made it impracticable or unjust to order re-engagement; that it could no longer have trust and confidence in the Claimant. Given the ET had found that the Claimant had committed the act of misconduct in question, that might not seem to have been an obviously irrational position, but, as Mr. Bourne accepted in oral argument, it was not the only question. The ET also needed to consider whether the

> Respondent had made good its case that trust and confidence could not be repaired, whether its belief in her dishonesty was such that a re-engagement order was unlikely to be carried into effect with success. The ET was thus entitled to scrutinise whether the Respondent's stated belief was genuinely and rationally held, tested against the other factors the ET considered relevant. It was, however, still a question to be tested from the perspective of the Respondent, not that of another employer, still less that of the ET: was it practicable to order this employer to re-engage this Claimant?"

39. If no order for reinstatement is made then section 112(4) provides that a Tribunal shall make an award of compensation in accordance with sections 118-126 ERA. Sections 118-122 deal with the calculation of the basic award. Sections 122-124 deal with the calculation of the compensatory award. Section 123 (1) provides that 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*". Section 123(4) provides that the Tribunal shall apply the common law principles in relation to the duty to mitigate when calculating loss to be compensated. Where it is alleged that there had been a failure to mitigate then the burden of demonstrating such a failure is on the employer and the approach to be adopted in considering whether there has been an unreasonable failure to mitigate is helpfully summarised in the judgment of Langstaff J in Cooper Contracting v Lindsey [2016] I.C.R. D3 as follows:

> "(1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.
> (2) It is not some broad assessment on which the burden of proof is neutral. I was referred in written submission but not orally to the case of Tandem Bars Ltd v Pilloni UKEAT/0050/12, Judgment in which was given on 21 May 2012. It follows from the principle — which itself follows from the cases I have already cited — that the decision in Pilloni itself, which was to the effect that the Employment Tribunal should have investigated the question of mitigation, is to my mind doubtful. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.
> (3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable (see Waterlow , Wilding and Mutton).
> (4) There is a difference between acting reasonably and not acting unreasonably (see Wilding).
> (5) What is reasonable or unreasonable is a matter of fact.
> (6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.
> (7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer (see Waterlow , Fyfe and Potter LJ's observations in Wilding).

> (8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.
> (9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient."

Conclusions

40. I have concluded that it would not be practicable to reinstate the claimant to his former employment, for the reasons set out below.

41. The respondent contends that it no longer has trust and confidence in the claimant and places particular reliance on the fact that it runs a cash business and so must be able to place trust and confidence in its staff. The respondent maintains that, even if one accepts the claimant's account that he considered that his actions were condoned by his supervisor/in line with common practice, the explanation given by the claimant does not stack up. The concern regarding applying the tickets to VAT jobs at the outset was that customers might refuse to pay for the service if there turned out to be a lengthy queue at the VAT desk. The porter would then be out of pocket as he would need to make up the difference. However, that problem could not have arisen on the occasion when the claimant was suspended because the job in question was prepaid.

42. The question for me is whether, despite its having failed to show a fair reason for the claimant's dismissal, the respondent has nonetheless shown that it has a genuine and rational belief that it cannot place trust and confidence in him. I accept, in light of Mr. Malik's evidence, that the respondent has a continuing and genuine concern as to the claimant's reliability. I have tested the rationality of this concern on the assumption that the respondent has not proved the claimant to have been dishonest and by reference to the facts as disclosed by the case put forward by the claimant.

    42.1 The claimant breached the written ticketing procedure in the VAT services document but, in doing so, he was following a common practice that had been endorsed by his supervisors. That much is borne out by the supervisor's letter and by the statements made by Mr. Yunis during the disciplinary process.

    42.2 The case advanced by the claimant was that following the written ticketing procedure was problematic because clients might refuse to pay for portering to the VAT desk if there were long queues. If additional VAT tickets had been issued at the outset this might leave the porter in question "short" and they would be expected to make up the shortfall.

    42.3 The claimant had been dismissed for failing to apply additional VAT tickets to pre-paid job. He could not therefore have been left out of

pocket by following the normal processes as the client had already paid for the service.

42.4 The respondent therefore contends that his explanation makes no sense and remains doubtful as to the claimant's trustworthiness. Whilst other employers might not share those doubts I cannot characterise the respondent's concern on this point as an irrational one.

42.5 Given that the respondent has a genuine and rational concern as to the claimant's trustworthiness I do not consider it likely that a reinstatement order would be carried in to effect with success. It would not therefore be appropriate to make such an order.

43. In the alternative, the respondent has argued that reinstatement is impracticable because there is no vacancy and/or because this would endanger the respondent's achievement of financial targets. I do not consider such arguments to be compelling. Whilst the return of the claimant to the workforce might have required some management action to try to compensate for the effect on financial targets of a rise in staff numbers, the fact was that the respondent's business is one in which it was routinely engaged in trying to balance staffing against fluctuating demand. There are levers available to the respondent to assist with achieving this balance, levers which the respondent routinely used (dropping temporary staff and/or granting unpaid annual leave to staff who wished to take it). Even where targets have been breached this has not resulted in the respondent having to take any drastic action (e.g. redundancies). There is therefore no reason to think that the respondent could not have followed its usual approach when reincorporating the claimant in to the work force and reduced its usage of temporary staff, granted unpaid annual leave to such permanent staff as wished to take it and weathered any adverse impact on its targets for a period until it hit a period of peak demand for porter services.

Compensation

44. In deciding on the appropriate level of compensation I need to determine first what the claimant's weekly pay would have been and whether I should use the figures proposed by the Claimant (based on the claimant's last six months' earnings) or by the Respondent (based on the claimant's earnings during the year 2016/2017 uprated to reflect increases in the national minimum wage).

45. The evidence produced by the respondent bears out that the respondent's is a seasonal business with the peak period of demand covering the summer months. I accept therefore that it would be unrepresentative to use figure obtained from the claimant's last P60 which covers the busiest period of the year. If one uses the average weekly earnings from that P60 it would generate annual earnings of £17,500 (approximately) as opposed

to earnings of £11,923 in the previous year. In calculating the claimant's losses, I have therefore used the annual salary figure from the 2015/2016 P60 (£11923) uprated by 4% (to £12,400) to reflect increases to the minimum wage. Using a salary calculator that figure gives a gross weekly wage of £238 and a net weekly wage of £223 net.

46. I accept that the claimant was able to produce only limited evidence of attempts to mitigate his losses. However, applying the guidance set out in Cooper Contracting v Lindsey, I do not consider that the respondent has discharged the burden of showing that the claimant has unreasonably failed to mitigate his losses.

    46.1 The claimant was at a disadvantage in the labour market given that he had been dismissed for dishonesty.

    46.2 I have also borne in mind that the claimant is not fluent in the English language and that this will have limited the opportunities available to him and made it more difficult for him to submit job applications and to find employment.

    46.3 The respondent attempted to suggest that the claimant had decided not to week new work because his wife had taken up employment. However, that is not borne out by the facts. The claimant had made applications for jobs and had succeeded in finding employment for a day a week. He has explained why he has not been able to take on additional hours with his current employer.

    46.4 Although the respondent asserts that the claimant could have done "more" the respondent has put forward no evidence of any specific vacancies that the claimant could have applied for. There is therefore no evidence that the claimant has unreasonably failed to pursue opportunities that might have resulted in employment for him such that he can be said to have unreasonably failed to mitigate his losses.

47. I have calculated the compensation due to the claimant as follows:

Basic Award

48. The claimant is due a basic award of £714 (3 x £238 gross weekly wage)

Compensatory Award

49. Loss from dismissal to date of hearing: 55.7 weeks x £223 (net weekly wage) = £12,421.10

Plus Loss of Statutory Rights	£250.00
Plus pensions loss at 1% of gross pay	£124
Less earnings from other employment	-£1725.00
TOTAL compensatory award	**£11070.10**

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Employment Judge Milner-Moore

Date: ……8 /1/2018……..

Sent to the parties on: .....

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For the Tribunals Office