EMPLOYMENT TRIBUNALS

Claimant: Mr T Overington

Respondent: Pentalver Transport Limited

Heard at: Southampton Employment Tribunal

On: 3 May 2018

Before: **Employment Judge Craft**

Members: **Mrs R Rose**
Mr D A Stewart

Representation

Claimant: Mr J Heard, Counsel

Respondent: Mr C Harries, Counsel

UNANIMOUS JUDGMENT ON REMEDY

1. The Respondent shall pay the Claimant damages for wrongful dismissal in the sum of £1,352.

2. The Respondent shall pay a basic award to the Claimant of £958.

3. The Respondent shall pay a compensatory award to the Claimant as follows:

a.	Loss of earnings	£19,522.93
b.	Loss of employer pension contributions	£263.64
c.	Expenses	£253.00
d.	Loss of statutory rights	£350.00
		£20,389.57
	Less 50% reduction for the Claimant's contributory fault:	£10,194.78
	Total compensatory award	**£10,194.79**

4. The Recoupment Regulations apply to this compensatory award. The period of the prescribed element runs from 1 August 2016 to 30 April 2017. The prescribed

element is £9,761.46. The grand total is £10,194.78. The grand total exceeds the prescribed element by £433.33.

REASONS

1. The Claimant sought an order for reinstatement in accordance with s.114 Employment Rights Act 1996 ("the Act") or, alternatively, an order for re-engagement in accordance with s.115 of the Act. The Employment Tribunal was provided with remedy bundles by the Claimant and Respondent: Exhibits C4 and R5 respectively. Further documents were added to the Claimant's bundle at the start of the hearing with the agreement of the Respondent. The Employment Tribunal received evidence from the Claimant who gave evidence in chief by way of a written statement (Exhibit C5). It also received evidence from Mr Parker, the Respondent's group HR Group Manager, who gave evidence in chief by way of a written statement (Exhibit R6). The Employment Tribunal was referred to two authorities:

   Port of London Authority v Payne and others [1994 IRLA 9]

   Lincolnshire County Council v Lupton [2016 IRLA 576]

   The Claimant had also provided an updated schedule of loss to the Respondent and the Employment Tribunal in advance of the hearing.

2. The Employment Tribunal referred to, and applied, s.116 of the Act which states as follows:

   (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.

   (2) If the tribunal decided not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

   (3) In so doing the tribunal shall take into account –

      (a) any wish expressed by the claimant as to the nature of the order to be made,

      (b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

      (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

> *(4) Except in a case where the tribunal takes into account contributory fault under sub-section (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement."*

3. The Employment Tribunal made the following findings of fact having considered the oral and documentary evidence submitted to it and the submissions made on behalf of the parties at the conclusion of the hearing.

4. In his evidence the Claimant expressed a preference for reinstatement or re-engagement. He told the Tribunal that he thought there had been a number of vacancies for Multi-Skilled Operatives (MSO) in the Respondent's businesses at various sites in the period under consideration and that the Respondents could save costs by appointing him, with his experience, to such a position rather than someone new to it.

5. The Tribunal was told that the main tasks of an MSO are checking containers on arrival and lane control on loading. There was also the position of a yard assistant who will sweep out empty containers. In those jobs there is no requirement to drive a CHE machine as there would be if the Claimant was reinstated as a CHE Operator or Shunter.

6. In dealing with the application for reinstatement or re-engagement Mr Parker referred to the Claimant's performance record as described in the Employment Tribunal's previous Reasons and the type of concerns that had been raised with him during his employment with the Respondent as well as the contribution he made to the accident which led to his dismissal. It was his view that these proceedings demonstrated that the Respondent could have no trust and confidence in the Claimant's work in an inherently dangerous environment where safety was paramount whether as a CHE Operator or an MSO.

7. Mr Parker's evidence to the Tribunal as to vacancies, which it accepted was that there were no vacancies for MSOs at present either at Southampton or at other sites and that if the Respondent re-engaged the Claimant that would be at the expense of an existing staff member. He also informed the Tribunal that the Respondent closed its Tilbury site in January 2018 with seven redundancies arising from that and that there was a full complement of staff at its London Gateway site. He also confirmed there had been no further recruitment of an MSO to Southampton since an appointment in March 2018 in which an existing employee had been transferred from another job to that position.

8. The Claimant told the Employment Tribunal that he was actively seeking work and submitting job applications from August 2016 to September 2017. He secured intermittent work in short-lived jobs in that period but undertook no work from 19 December 2016 to 8 September 2017 when he secured employment as a labourer on a building site with Forestside Construction where he worked until December 2017. Subsequently he left that job to join Liam Smyth in February 2018 where he can work full-time on a self-employed basis as a labourer and hod carrier in which work he earns £100 per day net

which substantially, if not wholly, mitigates his loss of earnings from the Respondent.

9. Notwithstanding the Claimant's evidence he provided documentary evidence of only seven job applications made between November 2016 and November 2017. There was no documentary evidence of the Claimant making any applications at all in October 2016 and in February, April, May, June, August, September and October 2017. The Claimant failed to particularise any other applications or to produce copies of the emails that he told the Tribunal had accompanied some of the applications which he had made. He also failed to particularise the jobs for which he had applied, for example, by reference to industry sectors or the name of companies he had approached etc.

10. The Employment Tribunal found this evidence to be inadequate and unsatisfactory. The Claimant's inability to identify the many jobs he told the Tribunal he had applied for was in stark contrast to the evidence provided to the Employment Tribunal by Mr Parker. This was information obtained from agencies which identified in general terms that there had been a large number of vacancies potentially suited to the Claimant's qualifications and experience in a buoyant local job market.

11. After his dismissal the Claimant continued to perform with "The Rising" a rock band in which he is the lead vocalist and which is able to charge for the concerts which they perform. Mr Harries questioned the Claimant extensively as to his involvement with this band. The Employment Tribunal accept that this is a hobby which the Claimant had pursued before and during his employment with the Respondent. The Employment Tribunal found that although the band has a following which provides it with the opportunity to perform reasonably frequently and achieve a profile for its music the Claimant and his colleagues earn little if any income from either the performances or a record which they have made. The Claimant's dismissal and lack of employment may have given him more time to devote to this hobby but the Employment Tribunal is satisfied that his income from it was not relevant to the issues before the Tribunal and that his involvement in it would not have prevented him actively seeking full-time employment, as he has said he did.

12. There was an unresolved dispute between the parties as to the Claimant's hours of work, the terms of his contract at the end of his employment and, in particular, whether he was guaranteed 15 or 20 hours overtime. In the course of the hearing Counsel were able to agree the following: the Claimant was paid £676 gross per week, £520.90 net by the Respondent; he was entitled to a basic award of £958 and damages for wrongful dismissal of £1,352; and a compensatory award in his case was capped at £35,152. Mr Harries also agreed to the helpful schedule of earnings prepared by Mr Heath during an adjournment which confirmed all of the Claimant's earnings from the date of his dismissal to the hearing and was included within Exhibit C4. This helpful approach by both Counsel meant that the Employment Tribunal did not have to make any findings of fact in this contentious area.

13. Mr Harries submitted that the Tribunal should apply commonsense to the application for reinstatement or re-engagement. The Tribunal has found that the Claimant was blameworthy and contributed substantially to his dismissal. His employment history, also referred to by the Employment Tribunal in its previous findings demonstrates that the Respondent had ongoing concerns as to the Claimant's performance in matters of safety.

14. Mr Harries accepted that contributory fault is not a bar to an application for reinstatement or re-engagement but submits that on the facts of this case the trust and confidence that is necessary for an employer to reinstate or re-engage an employee has gone and that Mr Parker's evidence made this very clear. Mr Parker had also made it clear that if the Claimant was reinstated or re-engaged that would be at the expense of an existing employee of the Respondent. Questions put to Mr Parker also confirmed that any such step as far as re-engagement was concerned would involve a substantial rearrangement of duties for a large number of people to accommodate the Claimant's re-engagement which was entirely impracticable in this work environment with its safety constraints.

15. Mr Harries also submitted that the Claimant had failed to mitigate his loss as he should have done. He relies on Mr Parker's evidence of the many vacancies in the Southampton area and the fact that the Claimant provided documentary evidence of only six or seven applications in a period of over 12 months.

16. Finally, in respect of the claim pursued by the Claimant under s.12A Employment Tribunals Act 1996 he asked the Tribunal to take account of the fact that this was a finely balanced case. It is clear that the Tribunal found that the Respondent had acted in good faith throughout with many facts agreed and few in dispute. There were no aggravating features in the Respondent's conduct that could support such a penalty.

17. Mr Heard submitted that the Claimant's previous record of recorded concerns was not relevant to safety or, if it was, was only of limited relevance and that only the error on the day of the accident can be relevant for the Tribunal to consider and that this error was not sufficient to make it impracticable for the Claimant to return to his job. The jobs to which he had sought re-engagement were all jobs which he could do and it would practical for him to return to them with any elements of driving removed to remove any relevant concerns in respect of safety from those jobs. In the alternative, Mr Heard submitted that the Claimant had taken all reasonable steps to mitigate his loss until this hearing. In making this submission he relied on the Claimant's evidence of the applications he has made and submitted that the Employment Tribunal should accept his evidence that he made many more applications than those documented in the Claimant's bundle. He submits that the Respondent's evidence as to the local job market did not provide specific details of jobs to demonstrate that the Claimant could have applied for them. Mr Heard submitted that the Claimant continues to suffer loss of earnings and that in these circumstances any compensatory award should provide him with a sum for future loss to June 2018. Finally, he submitted that the finding that the

Respondent had not completed its investigation into the accident was sufficient to engage s.12A Employment Tribunals Act 1996.

18. The EAT held in **Lincolnshire County Council v Lupton** as follows:

> *"The statute and the guidance in the authorities require a broad, commonsense approach to the question of practicability. "Practicable" in this context means more than merely possible but "capable of being carried into effect with success" (**Coleman and Stephenson v Magnet Joinery Ltd**). Re-engagement is not to be used as means of imposing a duty to search for and find a generally suitable place within the ranks where a dismissed employee irrespective of actual vacancies. That put the duty too high. An employer does not necessarily have a duty to create space for a dismissed employee to be re-engaged. The question at the end of the day is one of fact and degree by reference to what is capable of being carried into effect with success. The question of practicability is a mandatory consideration".*

19. The Claimant gave no evidence to support his claim for reinstatement to his previous job. Mr Heard's submissions to the Employment Tribunal focused entirely on re-engagement as an MSO. The Claimant has put forward no viable argument to support his application for reinstatement to the job for which he was dismissed.

20. In any event, the Employment Tribunal has found that the Claimant's failures as a CHE Operator at the time of the accident were serious and blameworthy. It also sees no merit in Mr Heard's submissions that previous concerns about his performance are irrelevant as to safety issues.

21. The Employment Tribunal has to consider all the evidence placed before it in this case both at the merits hearing and this hearing. As well as his contribution to the accident this must also include the fact that the Claimant made a serious allegation of bad faith against the Respondent's management. He asserted that he was subject to performance sanctions and dismissal for his trade union activities. This allegation was found to have no merit. However such an unjust allegation is bound to undermine the Respondent's trust and confidence in the Claimant and is another factor relevant to the practicability of re-engagement.

22. The Tribunal has also had the benefit of Mr Parker's evidence. This confirms that there are no current vacancies for MSOs in the Respondent's business whether at Southampton or elsewhere. It also demonstrated that because of the inherent dangers of the Respondent's sites any re-engagement of the Claimant would involve an existing member of staff losing their job and some substantial rearrangement of duties for other employees. The Tribunal find that it is impracticable in the circumstances of the employer's business at the relevant time, and taking account of the fact of the Claimant's contribution to his dismissal to order the Respondent to reinstate or re-engage the Claimant for all these compelling reasons.

23. As to the compensatory award the Tribunal has found as follows. Firstly, on the basis of the evidence from the Claimant himself, and the evidence as to the buoyant jobs market at the relevant time he did not take all reasonable steps to mitigate his loss. Secondly, doing the best it can with the evidence placed before it the Employment Tribunal conclude that the Claimant should have been in a position fully mitigate his losses by the end of April 2017, that is, a period of 39 weeks after his dismissal. It finds there would have been opportunities for him to have substantially and wholly mitigated his loss prior to taking up the job with Forestside in September 2017 and also find that since 2018 the Claimant's earnings of £100 per day net with Liam Smyth have given him the opportunity to fully mitigate his loss of earnings.

24. The Employment Tribunal calculate that the Claimant's loss of earning in that 39 week period amounted to £20,351.10. He earned £828.17 in that period. Therefore, his loss of earnings amounted to £19,522.93. It is also accepted that he had loss employer's pension contributions in that period of £263.64, incurred expenses duly recoverable from the Respondent of £253 and should be compensated for a loss of statutory rights in the sum of £350. The Tribunal then had to apply a reduction of 50% due to the Claimant's contributory fault. This results in a total compensatory award to the Claimant of £10,184.79. The relevant recoupment calculation was then undertaken.

25. This leaves the application made by the Claimant under s.12A Employment Tribunals Act 1996. After careful consideration the Employment Tribunal taking account of all relevant factors, including the Claimant's claim which was dismissed the Employment Tribunal, have not found an aggravating feature within the Respondent's internal procedures such as to justify imposing a penalty within the terms of s.12A and this application is refused.

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Employment Judge Craft

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS