RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Nolan**

Respondent: **XPO Bulk UK Limited**

Heard at: **East London Hearing Centre**

On: **30 July 2018**

Before: **Employment Judge G Tobin**

Members: **Miss S Campbell**
Mrs B Saund

Representation

Claimant: Ms A Chute (counsel)

Respondent: Mr S MacNaughton (solicitor)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **We order the respondent to reinstate the claimant to his former position as a LGV Category C & E Driver.**

2. **We order the respondent to pay the claimant the sum of £25,805.18.**

3. **The respondent must comply with this reinstatement order by 24 September 2018.**

REASONS

The case

1. The claimant was successful in his complaint of unfair dismissal. We (i.e. the Tribunal) made a deduction in respect of contributory conduct – pursuant to

s123(6) Employment Rights Act 1996 ("ERA") – to the extent of 15%, because we determined that the claimant was culpable or blameworthy conduct in not reading the ullage correctly on a delivery and this caused a spillage which, although relatively small, had some potential to cause a serious incident. Mr Vince Jaques, the appeal officer, presided over a delay of 6 months in determining the claimant's appeal and thereafter largely ignored claimant's grounds of appeal, proceeding on his own agenda to justify Mr Ian Champion's decision to dismiss. We awarded the claimant and uplift of 5% – under s207A(2) Trade Union & Labour Relations (Consolidation) Act 1992 – for the respondent's failures to follow the ACAS Code of Practice.

2. As preparation for this hearing we re-read all of the witness statements and certain documents from the original hearing bundle. The claimant provided a further witness statement, which we considered before hearing "live" evidence. The respondent did not provide any witness evidence, instead relying upon submissions from Mr MacNaughton. The claimant provided 2 schedules of loss and the respondent provided a counter-schedule of loss. The claimant provided a joint bundle of documents.

3. We made previous Judgments in respect of a breach of contract for pension contributions and the shortfall in the claimant's holiday pay. These payments totalled £1,640 and those claims had been conceded by the respondent. These debts had not been paid to the claimant by the remedy hearing and Mr McNaughton could proffer no explanation as to why. Nevertheless, he assured us that these payments would be actioned by the respondent without further delay.

4. Ms Chute applied for the claimant's costs for purported failures by the respondent, which led to inconvenience and unnecessary costs incurred. Mr MacNaughton opposed this application and mooted the likelihood of raising a counter-application for costs. We read Ms Chute's skeleton argument and briefly heard representations. This was not a matter in which we were prepared to exercise our discretion. The Tribunal could have occupied a great deal of time with allegations and counter-allegations between the parties. This appeared to us to be nothing more than a dispute over the rough-and-tumble of litigation. We are particularly surprised that the claimant's representative made such an application, as they provided one schedule of loss initially and then sought to substitute this at a late stage, with evidence disclosed for the first time at the remedy hearing. A party that asks the Tribunal to exercise its discretion in their favour and award costs against another party really ought to first put their own house in order. In view of the indications received from the Tribunal, neither party pursued an application for cost, and we confined ourselves to more relevant matters.

5. At the outset of the hearing Ms Chute reiterated that the claimant wished to pursue possible reinstatement or re-engagement with the respondent (under s114 and s115 ERA respectively).

Order of considering remedies for unfair dismissal

6. There is a strict order in which Tribunals should consider remedies when a claim of unfair dismissal is determined to be well-founded. Under s111 ERA these are:

    1) Reinstatement – i.e. an order that the employee be reinstated to his old job with no financial loss; then

    2) Re-engagement – i.e. an order the employee be re-engaged in a job comparable to that, from which he was dismissed, or in other suitable employment; and then, if the tribunal does not make an order for re-employment,

    3) Compensation, i.e. a monetary award to the employee, calculated in accordance with ss118-126 ERA.

Reinstatement

7. Re-employment is the primary remedy to be considered: *Telcon Metals Ltd v Henry EAT 287/87.* Under s114(1) ERA, a reinstatement order effectively requires the employer to treat the claimant as if he had not been dismissed. Consequently, he must be returned, in all respects, to his pre-dismissal contractual position with the employer, save that any increases in pay or benefits must be applied on reinstatement, see *McBride v Scottish Police Services Authority 2013 IRLR 297, Ct Sess (Inner House)*.

8. In assessing reinstatement, we gave weight to the claimant's Claim Form. The claimant indicated from the outset that he wanted his old job back, i.e. reinstatement and he raised this at the liability hearing. So, the claimant has been consistent throughout with his request for reinstatement.

9. Our previous determination made it clear that we regarded the claimant's conduct as culpable or blameworthy. He had made a mistake – through carelessness or a lack of concentration. Nevertheless, he had every right to expect fair treatment from his employer, which was not, in our determination, shown. We determined that the claimant's dismissal was substantively unfair as he would not have been dismissed by a reasonable employer for the misreading of the ullage at the petrol station delivery.

10. The claimant's dismissal was, in itself, a significant detriment or penalty. The claimant was dismissed for a gross misconduct health and safety offence that, in our judgement, made it difficult for him to secure employment in his field. He lost a stable and responsible position, which was reasonably long-standing, and this caused him considerable upset. The circumstances of his dismissal cast a shadow over his future and he was only able to get a lower paid job when a friend vouched for him. At the hearing, the claimant apologised for his error and we were convinced that he had shown significant insight into the potentially serious implication of his one-off error. We were satisfied that the claimant had learned his lesson for the future.

11. The claimant is reasonably settled in his new job. The pay is significantly lower, and he is concerned that there is not the strict attention to detail and adherence to rules that he enjoyed in his previous employment. The claimant is a former soldier and we accept that he preferred a more structured regime.

12. We considered whether it is practical for the respondent to comply with reinstatement. We note the Employment Appeal Tribunal's guidance that when assessing practicality, we, as an "industrial jury", should take a "broad, common sense view": *Meridian Ltd v Gomersall & another 1977 ICR 597*.

13. We do not accept that reinstating the claimant will necessitate redundancies or significant overstaffing. In his evidence, the claimant said that he keeps in contact with some former work colleagues, whom he regards as friends, and he was aware that the respondent was going through a recruitment process for tanker drivers. Mr MacNaughton confirmed that the respondent was currently recruiting and although most appointments have been made, the intake had not closed. He submitted that there was currently one vacancy remaining which was likely to be filled by a candidate from a bank or pool of casual tanker drivers. Unfortunately, he could not provide any further details or any evidence of this.

14. In any event, s116(5) and (6) ERA requires that we ignore the respondent's employment of a replacement because, we determine, the respondent could and should have relied upon a non-permanent replacement. The respondent went through a number of months without replacing the claimant. The respondent knew the claimant was pressing for reinstatement by the time they started the recent recruitment exercise for tanker drivers. We do not accept that reinstating the claimant will lead to significant overstaffing. Even if there were to be some degree of overstaffing, this would be the consequence of the respondent's unfair dismissal.

15. The interpersonal relationship between the claimant and his former colleagues is clearly a relevant factor that will affect the question of the practicality of reinstatement and the way that we exercise our discretion. Mr MacNaughton argued that relationships between the claimant and his former colleagues had irretrievably soured. The respondent was unable to proffer any witnesses to attest directly that they would not work with the claimant. We note that Mr Chris Smith and his son, Mr Jay Smith, have both left the company. It was the Smiths that the claimant had his grievance with. Mr Champion (the dismissal officer) and Mr Jacques (the appeal officer) are also no longer employed by the respondent. The claimant keeps in contact with some of his old work colleagues, whom he regarded as friends. The claimant said that he knew the name of the respondent's new depot manager and he said that he had heard positive things about this manager. We were convinced that, if the claimant was to return to work, there would be no animosity on his side. We could not see how reinstatement would cause any difficulties to any employee of the respondent.

16. Under the circumstances, we consider that it would be just and equitable, and entirely appropriate, to make the order of reinstatement sought by the claimant.

Re-engagement

17. It is only if we decide that reinstatement is not a suitable remedy that we should go on to consider the alternative remedy of re-engagement. The claimant accepted that re-engagement was not an appropriate remedy in this case. He currently had a job as a tanker driver and wanted to be reinstated as a tanker driver. Re-engagement to a position in a non-tanker driving job was not appropriate to the circumstances of this case.

Unfair dismissal basic award

18. The claimant is not entitled to a basic award because as we order reinstatement these particular aspects of compensation are mutually exclusive remedies: See s112 and s116 ERA and *Oxford Health NHS Foundation Trust v Laakkonen & Others EAT 0536/12*.

Loss of earnings

19. The claimant is entitled to an award under s114(2)(a) ERA of:

> 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), the period between the date of termination of employment and the date of reinstatement.

20. We accept that the claimant has made reasonable efforts to mitigate his losses. He obtained another job relatively soon, although at less pay. The claimant has still pursued other job opportunities. That said, any sums awarded under s114(2) ERA, cannot be reduced on the grounds that the claimant has failed to mitigate his loss: *City and Hackney Health Authority v Crisp 1990 ICR 95 EAT*.

21. The award we make is intended to reflect the actual loss that the claimant suffered as a consequence of being unfairly dismissed. We remind ourselves that the compensatory award is limited to making good the employee's financial loss. We should not bring into our calculation any consideration of what might be "just" in order to reflect any disapproval of the respondent's behaviour. The purpose of the compensatory award is confined to compensating only proven financial loss and is not in any sense to be used to penalise the employer: see *Morgans v Alpha Plus Security Ltd 2005 IRLR 234 EAT*.

<u>Loss of earnings quantification</u>

22. The claimant's effective date of termination was 18 December 2015. He was then unemployed, looking for employment, and he obtained another job relatively quickly, which he started on 22 February 2016. Given the circumstances of his dismissal, this is reasonable mitigation of the type of employment gained and the pay and remuneration available. The claimant received some Social Security benefit during his period of unemployment.

23. The claimant was paid 5 weeks' notice pay. He started work 9 weeks after his dismissal. So his loss of earnings until he started another job amount to 4 weeks x £641 = **£2,564.00**.

24. So far as the claimant's current employment, we worked out the claimant's net weekly pay from the payslips that were available at the hearing, and we averaged this to be £527.19 per week. This gave a net weekly loss of earnings of £113.81. The claimant's losses from his commencement at work until the date of the hearing represented 126 weeks x £113.81 = **£14,340.06**.

25. The claimant claimed the loss of a training allowance of £15 gross per week. This allowance was not paid at the time of his termination and, following a dispute with Mr Smith, the claimant had not undertaken training for 19 months. Under the circumstances we decided not to compensate the claimant for this aspect of his claim.

26. The claimant's second schedule of loss claimed an uplift in employment based on various pay increases, he said he would have achieved had he remained in the respondent's employment. Mr McNaughton objected to these figures. He said that he believed they were not accurate and that they had been produced very late and not in accordance with the case management orders. Our discretion is wide and flexible, and based on the equity of the situation. If the claimant wanted to pursue this line then his solicitors should have made it clear in his original schedule of loss or within sufficient time for the respondent to adequately prepare a response. We have some sympathy with the respondent's difficulties in responding to "shifting sands". There is a lack of corroborative evidence to support this loss and, in this instance, we are not going to exercise our discretion to increase compensation to reflect these small percentage increases.

27. The claimant also claimed a shortfall of his travel expenses for his new job. He said that his journey was 70 miles more per week and this resulted in a £10 per week loss. No documentary evidence was provided to support this claim, and we decided against exercising our discretion to award such compensation in this circumstance.

28. There is also a claim in respect of holiday pay. Evidence in respect of accrued and untaken holidays was not included in the claimant's witness statement but appeared in his second schedule of loss. There was no claim proffered in respect of outstanding holidays and there was no outstanding wages or Working Time Regulations claim to underpin the contended non-payment of outstanding holidays. Accordingly, we dismissed this claim for compensation.

29. We ordered the claimant is reinstated by 28 September 2018. This is 8 weeks from the date of the hearing and will allow the parties to make the appropriate arrangements. If the respondent complies with the order for reinstatement in advance of this date, then the compensation may well be reduced accordingly. Otherwise, the claimant is entitled to compensation for future loss of earnings from the date of the hearing until the claimant recommences work, currently 8 weeks at £113.81 = **£910.48**.

30. The amount we award is subject to the Employment Protection (Recoupment of Job Seekers Allowance & Income Support) Regulations 1996 so the respondent should defer payment of the compensation identified at paragraph 23 above only

until the Compensation Recovery Unit issue a certificate or statement of recoupment.

Loss of statutory rights

31. We make no award in respect of the loss of the claimant's statutory right to claim unfair dismissal because we order reinstatement.

Expenses in looking for alternative employment

32. The claimant sought expenses in looking for new work in respect of petrol only. He assessed this at £30, which we regard as reasonable. Accordingly, we award **£30**.

Loss of pension rights

33. In his original schedule of loss, the claimant's original claim for future loss of pension was not properly quantified. An amount of £5,494.36 was claimed without quantification. The claimant's second schedule of loss recalculated this amount with a pay increase uplift. We stated above that this schedule of loss was served late on the respondent and we rejected the uplift for the loss of earnings figures so accordingly we reject the uplift for the pension increase. For this head of compensation, we award a shortfall of 133 weeks at £56.35 = **£7,494.55**.

Summary

34. In summary, we make the following award.

		£
Loss of earnings –	£ 2,564.00	
	£14,340.06	
	£910.48	
		17, 814.54
Expenses in looking for alternative employment –		30.00
Loss of pension rights –		7,494.55
		25,339.09
Less deduction for claimant's contributory conduct and		(3,800.86)
Plus uplift for respondent's failure to follow ACAS Code of Practice		1,266.95
		22,805.18

35. On the basis that our order for reinstatement is complied with, we award the claimant the sum of **£22,805.18**

Statement of recoupment

Grand total - £22,805.18
Prescribed element - £2,564.00
Period of prescribed element - from 18.12.2015 to 22.02.2016
Excess of grand total over prescribed element - £20,241.18

The total sum awarded to the claimant is £22,805.18

Employment Judge Tobin

28 August 2018