EMPLOYMENT TRIBUNALS

Claimant: Mr J Harrower

Respondent: DP Cold Planing Ltd

Heard at: Manchester **On:** 17 February 2020

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: Ms J Ferrario, Counsel
Respondent: Mr M Cameron, Consultant

REMEDY JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The respondent must pay to the claimant a basic award for unfair dismissal of **£1,524** within 14 days of the date of this Judgment.

2. The respondent shall pay to the claimant a compensatory award of **£33,339.81** as compensation for unfair dismissal, within 14 days of the date of this Judgment.

3. By consent, the respondent must pay to the claimant the sum of **£1,016** for failure to provide written reasons, within 14 days of the date of this Judgment.

REASONS

Introduction

1. The claimant was employed by the respondent as an HGV driver. He was employed from 23 January 2017 until his dismissal on 23 January 2019.

2. In a Judgment sent to the parties on 5 December 2019, following a liability hearing heard on 27 September and 15 November 2019, the Tribunal found that the claimant had been unfairly dismissed by the respondent. The Tribunal also found that the respondent had failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures and concluded that it was just and equitable

to increase any award by 10%. This hearing was to determine the remedy payable to the claimant.

The Issues

3. For the remedy hearing a Schedule of Loss and a counter schedule had been prepared.

4. Some elements had been agreed, including the amount of the basic award and that the respondent should pay to the claimant an award for failure to provide written reasons (together with the amount due).

5. The net amount of a week's pay which the claimant had received when employed by the respondent was agreed as being £752.36. That was agreed during the hearing and therefore was not the figure relied upon in the schedule prepared in advance of the hearing, but it was accepted as being correct by the claimant in his evidence.

6. The issues to be determined in the remedy hearing related to the compensatory award for unfair dismissal and, in particular:

(1) Whether the claimant had taken reasonable steps to mitigate his loss;

(2) The period for which the claimant should be compensated for loss; and

(3) How loss should be calculated – this was made more complicated by the fact that the claimant has undertaken work on a self-employed basis since the end of his employment with the respondent.

7. There was some considerable gap between what the parties believed should be the compensatory award. The claimant's schedule of loss claimed the maximum compensatory award available when the statutory cap is applied, which the claimant contended should be £54,117.96. The respondent contended that the compensatory award should only be £4,875.54 (including the 10% uplift).

8. The claimant contended that he should receive his losses to the date of the hearing, together with four years future loss from the date of hearing. That is until the date at which he could retire in accordance with the statutory retirement age. The respondent contended that the claimant should have obtained an equivalent paid job in less than 12 weeks, given the shortage of skilled drivers with the claimant's experience, and therefore that his award should be limited to the losses which accrued during that 12 week period.

The Hearing

9. The claimant was represented by Ms Ferrario, counsel, and the respondent was represented by Mr Cameron, a consultant.

10. The Tribunal heard oral evidence from the claimant and from Mr Gareth Watkins, the respondent's General Manager. Each witness was cross examined by the other party's representative. A supplemental bundle of documents containing 100 pages had been prepared for the remedy hearing, and the witnesses were also

referred to some documents contained in the original hearing bundle which were relevant to remedy.

11. Following the evidence, each of the parties representatives made oral submissions. At the end of the hearing it was agreed with the parties that Judgment would be reserved.

Findings of Fact

12. The claimant was dismissed by the respondent on 23 January 2019. He was paid one week in lieu of notice.

13. It was agreed that, based upon his age and length of service, the claimant's entitlement to a basic award was £1,524.

14. The parties agreed that the claimant's net weekly income from the respondent had been £752.36.

15. The schedules prepared in advance of the hearing recorded slightly different amounts for the claimant's gross annual pay with the respondent. The evidence of Mr Watkins, which was not challenged, was that the claimant's average gross weekly pay was £1,017.39. That means that the claimant's gross annual pay (that is his week's pay multiplied by 52) was £52,904.28.

16. As at the termination of his employment, the claimant was entitled to contributions from the respondent to a pension scheme made on his behalf at 2% of his gross pay. At that time, it meant that the annual figure for such contributions would have been £1,058.09. If that figure is added to the gross annual pay, the total pay for 52 weeks was £53,962.37.

17. The claimant's evidence was that the respondent's pension contributions would have increased to 3% per annum from 6 April 2019. The respondent did not dispute the claimant's evidence about pension contributions or the figures for loss claimed in the claimant's schedule of loss.

18. The claimant gave evidence that he had sought to obtain new employment immediately after his employment with the respondent had ceased. He had created an Indeed account. He made telephone calls to agencies and people he knew.

19. The respondent provided to the Tribunal lists of available jobs, including one from the job-site Indeed showing local vacancies in January 2020. The information provided showed a number of jobs being available in the industry and undertaking work that the claimant was qualified to fulfil. The respondent's evidence (which is found by the Tribunal to be true and accurate) was that there was a significant shortage of HGV drivers in the industry generally and that there were many jobs available close to the claimant's home. They produced lists of available jobs. For the list from Indeed which records the amount available for the roles on offer, all of the local jobs that it highlighted (bar one) offer a salary in the range £24,000 to £32,240. That is a salary considerably less than that which the claimant received with the respondent. The job adverts do not record whether overtime would be available and what might be earned from such overtime. The one role with higher pay was an HGV Driver class 1 job with T W Bowler Ltd which offers £925 per week, that is £48,100 per annum, being a figure much closer to the claimant's gross pay with the

respondent (the claimant's evidence was that he had not seen this role advertised, but even if he had he would not apply to work for that company as a result of his view of its reputation as an employer).

20. The claimant commenced new work on 4 February 2019. That is one and a half weeks after he was summarily dismissed by the respondent. Between 4 February and 11 March 2019 he worked for an agency earning a total of £2,732 gross (the invoices show the claimant being paid £675 gross per week). The claimant gave evidence that he decided to seek and obtain work as a self-employed contractor because he found that more work was available and he believed that he would receive higher pay. Accordingly this role, and all subsequent roles, were untaken by the claimant on an independent contractor basis. The claimant left this role because the he described the pay as not being great.

21. From the middle of March 2019 until the end of June 2019 the claimant worked for GES Services. The invoices for this period range from £550 to £818.13 per week (gross). He left because he found a better paid role. From 8 July 2019 the claimant worked for D & C Wrenall. This engagement lasted from 8 July until early August 2019. This job involved transporting waste. This was the highest paid role which the claimant has undertaken (the invoices range from £884.50 to £1,007.75 gross per week). In one week the claimant appears to have received earnings which are broadly comparable to the amount he received from the respondent, although this is difficult to compare due to the differences in the different types of engagement. In other weeks he earned less, but still more than he had received from his other engagements. The claimant's evidence was that this job was not for him he was afraid, as it involved travelling with waste which he described as "hot and smelly" in the summer.

22. After leaving that role, the claimant had a short period out of work, took a holiday in Cornwall, and undertook some agency work (for which invoices were provided). In October 2019 the claimant started working with Rowarth Civils Limited, which is the work which he continues to undertake. Whereas the other roles undertaken by the claimant had fluctuating hours each week, this current role has consistent hours worked during a Monday to Friday and the claimant is paid at a relatively fixed rate (with minor variation) of £950 per week gross. He works mainly in Sheffield and Nottingham and stays away during the week, primarily sleeping in his cab (although he did give evidence that he also occasionally slept in cheaper accommodation). The claimant's evidence was that his net income after all expenses is around £600 per week in the current role (that is £31,200 net, being significantly higher than the net amount he would have received from the roles listed and highlighted in the Indeed list, but being significantly less than he earned with the respondent).

23. The Tribunal was presented with invoices for the work undertaken. It was also provided with two documents prepared by the claimant's accountant which provided an estimate of his trading position for two periods. This did make more difficult any comparison between the actual earnings in these roles and either: the claimant's earnings with the respondent; or his potential earnings from other employment available.

24. The accountant's statements record the deductions made from the gross income and the amount that was actually paid to the claimant for the work

undertaken either as director's fees or as dividends. The statements included a number of deductions for things such as subsistence, accountancy expenses and tax. The claimant in his evidence emphasised that the additional cost of subsistence and travel were a necessary part of the role he fulfilled and it cost him more to eat when he lived away from home. He accepted in evidence that the mobile phone costs claimed were not additional costs to him. The statements also deduct from the earnings an amount for the use of the claimant's home as an office, which the Tribunal finds is not an additional cost the claimant has incurred (or at least there was no evidence that it was).

25. The tribunal finds that the claimant's net pay is the amount recorded in the statements, save that it should be increased to include the deductions made for mobile phone and home office use. Using the figures contained in the claimant's schedule of loss, that means that in the period 4 February 2019 to 6 February 2020, the claimant earned £33,545 gross and £22,316.24 net (including directors fees, dividends, surplus funds and the deductions for phone costs and the use of the home office). The latter net figure equates to £429.16 per week for the entire period.

26. The Employment Tribunal heard evidence from Mr Watkins that there is a dire shortage of drivers available and a severe ongoing national shortage of HGV/LGV drivers (the headline driver shortage figures being in excess of 50,000). The respondent had provided to the Tribunal evidence from the Freight Transport Association and the Road Hauliers Association as well as an industry report, all of which identified that there was a significant shortage of drivers. The reports provided demonstrated two other notable things: there is a demographic challenge in the industry with 56% of LGV drivers being aged 45 and over (page 34); and that low wages are one of the causes for the driver shortage (50)

27. The claimant accepted that there were plenty of vacancies available for drivers such as himself and he accepted that there was a national shortage of drivers. His position however was that it was very difficult for him to get a job at the same salary as that which he had enjoyed with the respondent.

28. The claimant's evidence was that he will keep working until at least 2024 and he was claiming four years' future loss. His answers to questions were a little contradictory in relation to his current role and whether he was seeking work, however his evidence was that he was quite happy in his current job. He said that he was always looking for other work and would continue to seek to find other work whilst in his current role. In the time since he has commenced his current role the claimant's evidence was that he had applied for seven other jobs.

29. The claimant has neither claimed nor received any benefits since his dismissal.

The Law and submissions

30. In terms of the compensatory award, this is governed by sections 123 and 124 of the Employment Rights Act 1996. The amount of the award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the respondent. The basic function of compensation is to compensate for the loss actually suffered, not to penalise the employer for his actions, nor to give a gratuitous benefit to the employee. The

overriding duty imposed on the Tribunal is to award what is just and equitable in the circumstances.

31. A question for the Tribunal is whether the claimant has acted unreasonably in not taking an opportunity to mitigate his loss. The onus of showing a failure to mitigate lies on the respondent as the party who is alleging that the claimant has failed to mitigate his loss. A question for the Tribunal is whether the claimant's conduct in taking or refusing a particular source of income was reasonable on the facts of the case. In terms of future loss, the Tribunal needs to consider whether it can identify a date upon which the claimant should have secured the same or better paid employment as that which he received from the respondent, and if at that point his losses should stop.

32. The parties each made submissions and what they said has been considered by the Tribunal even where it is not expressly referred to in this judgment. Neither party in their submissions relied upon any specific case law.

33. In her submissions some of the key issues emphasised by the claimant's representative were:

- The claimant's strong work ethic and the fact that he is very money driven, evidenced by the amount of work he has undertaken both for the respondent and since his employment ended;
- The fact that within two weeks of an on-the-spot dismissal, the claimant had obtained new work;
- That the claimant had kept moving between roles in order to find better paid work; and
- That four years' future loss took the claimant to state retirement age and was, in her view an entirely reasonable period.

34. In his submissions some of the key issues emphasised by the respondent's representative were:

- That the claimant made his own decision to be self-employed and in the respondent's view he should have obtained employment;
- That there was, in the respondent's view, limited evidence available to the Tribunal of an active job search undertaken by the claimant;
- That the respondent did not accept some of the things claimed as costs of being self-employed, including the claimant's office costs, phone calls and petrol;
- That the claimant could have obtained a job more local to his location which would have had lower expenses;
- The respondent believed that the claimant could have obtained jobs which paid him higher than the amount he had actually received by being self-employed;

- That the evidence around the seven jobs which the claimant said he had applied for since he had taken his current role was very vague and this was in any event not very many;

- That the Tribunal should not award the claimant any losses beyond: 12 weeks; October 2019; or, at the latest, the date of the Tribunal hearing; and/or

- That there was a difficulty in comparing self-employed income with employment income.

Findings

35. The Tribunal finds that the claimant has taken reasonable steps to mitigate his loss. He obtained new work very quickly after being dismissed and has continued to seek and obtain new roles rather than remaining in a lower paid role.

36. A direct comparison of the claimant's net pay since dismissal and the gross pay he could have received from the jobs advertised (as was proposed by the respondent's representative) was somewhat misleading as it does not factor in any time for obtaining that employment or the likelihood of the claimant obtaining those roles (and the claimant's evidence was that he did apply for some roles). The roles available pay significantly less than the claimant received from the respondent. The role he is in now pays at least comparably (if not more highly) than the employed roles available. The claimant has undertaken a number of jobs on a self-employed basis paying him at a reasonable level and has moved between roles to obtain higher pay.

37. The respondent's evidence is accepted about the availability of jobs for HGV/LGV drivers. Had the claimant remained out of work for any significant period he would not have been taking reasonable steps to mitigate his loss. However the availability of many roles, does not evidence that there are roles available which pay the claimant at the level of pay he received with the respondent, or at the rate than he currently receives. Save for a very small number of weeks, the claimant has worked since he was dismissed. The respondent has not demonstrated that the claimant has earned less by taking self-employed roles than he could have earned if he had sought only employment.

38. The job adverts highlighted by the respondent are particularly persuasive evidence. They show that the majority of employed roles pay significantly less than the claimant received with the respondent. An advert cannot show exactly what the claimant would have earned in any single job if he had obtained the role and undertaken extensive overtime (as he did with the respondent), but there was no evidence which showed that such extensive overtime would have been routinely available. The pay the claimant received from the respondent appears to have been significantly higher than the pay currently available in most other roles. Accordingly, whilst it is found that in order to mitigate his loss the claimant did need to have undertaken work, the Tribunal does not find that the claimant could or should have obtained alternative employment at either a higher pay level than he has, or at the same salary level as that he received from the respondent.

39. The Tribunal finds that the claimant failing to see an advert for one highly paid role and having a particular reason for not working for that organisation does not

demonstrate that he has failed to mitigate his loss. The Tribunal also finds that it was not unreasonable for the claimant to leave the waste disposal role undertaken for D & C Wrenall for the reasons given after he had undertaken it for a short period (and where that role involved waste, which was not something he had driven before or for the respondent). The claimant leaving that role and obtaining an alternative engagement a few weeks thereafter does not mean that subsequent losses do not still follow from the claimant's dismissal and/or that he has failed to take reasonable steps to mitigate his loss.

40. In terms of future loss, the Tribunal does not find that it is appropriate to award the claimant four years' future loss in addition to 54 weeks' loss to the date of the hearing. Whilst the identification of an appropriate period of future loss is inevitably always somewhat speculative, the Tribunal does find that the claimant is likely to obtain alternative employment at a salary (or self-employed payment) level comparable to that the claimant received with the respondent by 52 weeks after the date of hearing. At that time, the claimant will have ceased to be employed by the respondent for over two years. As the claimant continues to apply for roles and in the light of the strength of the labour market, the Tribunal does find that the claimant is likely to find such alternative employment, even though finding a role at the same pay level as that which the claimant achieved with the respondent is challenging. As support for this finding the Tribunal does take account of: the seven roles for which the claimant has applied from his current role; the fact that the claimant has already obtained an alternative role in which the earnings approached that which he received from the respondent – even though he gave up that role; the role advertised which the claimant had not seen (and did not wish to apply for); and the general shortage of drivers.

41. The Tribunal did hear evidence and submissions that the claimant's age would have an adverse impact upon his ability to find work. The Tribunal accepts that to an extent that may be the case, however the statistics shown to the Tribunal about the demographic breakdown of those in the industry do not suggest that the claimant's age will make it particularly difficult for him to obtain work.

Remedy

42. The claimant's lost earnings based upon 54 weeks' pay at the agreed figure of £752.36, total £40,627.44. In addition, the claimant has lost pension contributions of £1,587.66 (using the figures claimed in the schedule which were not disputed). Taken together those make lost earnings to date (without taking into account what the claimant has earned) of £42,215.10.

43. As recorded at paragraph 25 above, the claimant's net earnings in the period to 6 February 2020 are £22,316.24. As the hearing was on 17 February and the lost earnings were calculated in the schedule as being to the date of hearing, a further week's earnings needs to be taken into account which (using the £600 net figure in the schedule), increases this figure to £22,916.24

44. Deducting the earnings to date (£22,916.24) from the earnings which the claimant would have received from the respondent (£42,215.10), means the claimant's losses to date are **£19,298.86**.

45. In respect of future losses, the claimant's representative accepted that the right figure for ongoing future loss of net income was £152.36 per week. The

claimant is also claiming ongoing pension loss of £31.22 per week, meaning that his losses accrue at the rate of £183.58 per week. As recorded above, this is awarded for 12 months from the date of hearing. That makes a total future loss figure of **£9,546.16**.

46. The parties agreed that the claimant would be entitled to **£500** for loss of statutory rights.

47. Adding together these three figures, the claimant's total potential compensatory award is therefore **£29,345.02**. This is uplifted by 10% in accordance with the liability Judgment and section 124A of the Employment Rights Act 1996, taking the total to **£32,279.52**.

48. As the total amount awarded exceeds £30,000, tax will be payable on a proportion of the compensatory award. As the amount by which the total awards would exceed £30,000 (without grossing up) would be £4,819.52, the compensatory award is grossed up by 22% of that amount (£1,060.29) – there was no evidence provided to the Tribunal which would lead to grossing up being undertaken at a higher rate - to result in a total compensatory award of **£33,339.81**.

49. As this figure falls below the statutory cap (in this case £53,962.37), the provisions of section 124 of the Employment Rights Act 1996 do not reduce the award. The recoupment provisions do not apply. The basic award and award for failure to provide written reasons are made as agreed by the parties.

Employment Judge Phil Allen

Date: 20 February 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

25 February 2020

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2404934/2019**

Name of case: **Mr J Harrower** v **DP Cold Planing Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **25 February 2020**

"the calculation day" is: **26 February 2020**

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office