EMPLOYMENT TRIBUNALS

Claimants: **(1) John Husbands**
(2) Andrew Shutt
(3) Chris Donnelly
(4) Jamie Lotherington
(5) Phillip Shutt
(6) Stephen Senior
(7) Craig Donnelly
(8) Andrew Fewkes

Respondent: **Cemex UK Operations Limited**

Heard at: **Leeds by CVP** **On: 19 November 2021**

Before: **Employment Judge Maidment**

Representation
Claimant: **Mr M Brien, Counsel**
Respondents: **Mr A Sendall, Counsel**

JUDGMENT AS TO REMEDY having been sent to the parties on 3 December 2021 and written reasons having been requested by the claimants in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Remedy issues and evidence

1. This was a remedy hearing to determine the issue of reinstatement (no alternative job was identified in the context of a re-engagement) and/or awards of compensation to the claimants consequential on their successful unfair dismissal complaints in a Reserved Judgment sent to the parties on 27 May 2021. This arose out of a determination that the claimants did not transfer pursuant to TUPE from the respondent to Breedon, to whom the respondent had sold part of its business on 31 July 2020. These reasons should be read together with that Reserved Judgment and Written Reasons as to liability.

2. The tribunal was told at the outset that the level of the basic awards payable to the claimants had been agreed. Additional schedules of earnings enjoyed with the respondent and earnings since they had been employed by Breedon were also said to be close to agreement with a slight wrinkle for the parties to resolve regarding a payment made for an underpayment of holidays over a preceding period. The schedules of earnings produced by the parties enabled a figure for monthly average earnings with the respondent in the 12 month period prior to the end of July 2020 to be ascertained. This could then be compared to the monthly average earnings with Breedon in the 12 month period from the beginning of August 2020 until the end of July 2021.

3. The tribunal had before it an agreed bundle of documents numbering 223 pages. It heard evidence firstly from Mr John Husbands, whose evidence was adopted by all of the other claimants in circumstances where there was no request on behalf of the respondent that they be separately cross-examined.

Facts

4. Mr Husbands explained that he was still in Breedon's employment, but would leave as soon as practical if he was reinstated with the respondent. When asked what work the claimants would do if reinstated, he said that they would continue to do the work they used to do, but now the operation had reduced to from 3 to 2 paving gangs, he knew that the work was not there anymore for 3 gangs. As he thought should have happened originally, there would be the opportunity to take a redundancy payment or someone else would leave instead. He confirmed that he was not suggesting that someone else should be made redundant to make room for him. He expressed the view that it was clearly not right for his team to be reinstated and another team made redundant. Mr Husbands said that he did not feel comfortable with that morally. On further questioning, he said that, being honest, he did not think it was possible or practicable to be reinstated but he believed that his was the gang which would have been made redundant in July 2020, so they would expect redundancy monies. There were, however, now no guarantees and they would take their chances in a redundancy process. He accepted that there was no certainty as to who would be made redundant if a fair process was followed.

5. Breedon had honoured the claimants terms and conditions of employment, but there was no guarantee of any particular level of unsociable hours. Most of the claimants' work with the respondent had been on nights attracting unsociable hours payments as a lot of the work was for local authorities, which had to be done at night. Breedon, however, did not have those type of contracts. He believed that the 2 asphalt plants in the area which the respondent had retained could have been utilised to concentrate the respondent's internal resources to supply 2 gangs every shift on nights. He considered that the respondent had the capability of getting more work if they chased it, but that he did not think that would happen. The claimants,

he said, had still been able to achieve additional earnings with Breedon by working overtime, particularly on Saturdays and Sundays, but to get additional payments up to the level they enjoyed with the respondent required them to work more hours than they had previously.

6. Mr Scott Jones had been employed by the respondent for 10 years with responsibility for 6 asphalt plants and its paving business since November 2020.

7. He said that if the claimants were to be reinstated or re-engaged by the respondent now there would likely to be an immediate redundancy situation as since November 2020 the paving solutions business had been shaped into a 2 gang operation. They are currently bidding for work in the first quarter of 2022 for 2 gangs, so, if they suddenly had to accommodate 3 gangs, he estimated it would be 3 – 6 months before they could find any work for the third gang. The respondent had no equipment for a third gang to work with as this had been transferred to Breedon as well. There was a 12 month lead time to acquire any new plant and machinery. One gang could be periodically stood down at significant cost to the respondent or more likely a redundancy situation would have to be initiated. The tribunal accepts this as an accurate summary of the present position.

8. In a reinstatement situation, he said that it was difficult to predict the effect on night work available as additional work tendered for now would be likely to be small pieces of work for smaller clients which would be completed within day times. It would not be possible to share work across 3 gangs so that unsociable hours were reduced evenly across the board.

9. He had had no involvement in the sale of part of the business to Breedon on 31 July 2020. He described volumes of work as unpredictable, the busier period tending to be from March to October each year. At the time he started in his role, the plan was to ensure designating one gang to each of the asphalt plants in Selby and Lincoln, although at times two gangs could take asphalt from a single plant. In November 2020 the paving business had been very busy as the commercial team had tendered for work against a background of uncertainty as to the effects of the sale to Breedon – they had assumed the need to keep 3 gangs busy. This resulted in a short-term need to contract the paving gang comprised of the claimants back from Breedon as described in the tribunal's liability decision. The current position is, however, that they rarely needed to hire in additional labour.

10. Had 3 gangs been retained following the sale to Breedon, he said that there would have come a time when there would have been a lot of downtime and insufficient work for 3 gangs. There was a desire to ensure that there was sufficient volume of asphalt for the business's external customers rather than to concentrate supply on the internal paving operation, thus then reducing the amount of asphalt available to supply externally. He said that

if the claimants had remained employed by the respondent after the sale, they would have had to consider very carefully how they could have made the business profitable. This might have included making redundancies by amalgamating three gangs into two, but he said that this would have required a proper redundancy process, the outcome of which was very uncertain. He said it was far from clear that such a redundancy process would have resulted in the redundancy of one of the three teams in its entirety and, if it did, which team that would have been.

11. He described that in the last 12 months they had aggressively bid for night work and a large proportion of work undertaken had been on nights. The pipeline of work for 2022 had not yet been released but the strategy was to obtain an amount of night work as that was the most efficient and profitable to complete. He confirmed that demand had increased with the expansion of infrastructure projects. If a tender for work failed, then the commercial team tended to be more aggressive in tendering for the next job available.

Applicable law and discussion

12. When considering whether to make an order for reinstatement or re-engagement, tribunals have a duty under Section 116 of the Employment Rights Act 1996 to consider firstly whether the employee wants an order to be made, secondly whether it is practicable for the employer to comply and thirdly whether it would be just to make an order where the employee's conduct caused or contributed to some extent to his dismissal. The second limb relating to practicability is the only one in dispute and relevant to this case.

13. Tribunals are directed at this first stage of enquiry not to engage in any over analysis, but to take a broad common sense view. It is only at a later stage, where an employer refuses to comply with a re-employment order, that a final determination is required and an onus arises on the employer to show that it was not practicable for it to comply with an order. Nevertheless, practicable means more than merely possible, but rather "capable of being carried into effect with success" – see Coleman v Magnet Joinery Ltd 1975 ICR 46 CA.

14. The date at which practicability is to be considered is when such re-engagement would take effect, not therefore at the earlier point when the employee was dismissed. According to Freemans Plc v Flynn 1984 ICR 874 EAT, reinstating a dismissed employee should never necessitate redundancies or significant overstaffing. In Cold Drawn Tubes Ltd v Middleton 1992 ICR 318 EAT it was said that "it would be contrary to the spirit of the legislation to compel redundancies, and it will be contrary to common sense and justice to enforce overmanning". It is been recognised, however, that this is not intended to be an absolute rule.

15. Mr Brien accepted on behalf of the claimants that they had a hurdle to overcome in seeking reinstatement. He posited that this might, however, be a rare case where the tribunal might consider the most just outcome to be to award reinstatement to see if the respondent's assertion of lack of practicability could be justified.

16. In assessing any compensatory award, tribunals are directed by Section 123(1) of the 1996 Act to award such amount as they considers just and equitable in all the circumstances having regard to the loss sustained by the employee. In some cases, it will be possible to assess compensation with a high degree of accuracy. However, that is not always the case and an actuarial assessment is not necessary. Nevertheless, tribunals must exercise their discretion on a principled basis with regard to the facts they are able to find.

17. Mr Brien asserts as his primary argument that, if the tribunal is assessing compensation, the consequence of dismissal in these cases was that the claimants lost out on their enhanced redundancy pay. In all likelihood, they would have been dismissed as redundant. He pointed to the respondent's defence on liability and witness statement evidence asserting the likelihood of the claimant's gang being made redundant. He referred to a feeling of uneasiness if the respondent was able to benefit financially in saving redundancy costs by wrongly considering the claimants' gang as transferring out pursuant to TUPE.

18. Mr Sendall described this as a bold submission. Firstly, the claimants had no right to a contractual redundancy payment because they had not been dismissed by reason of redundancy. The tribunal in its liability decision (at paragraph 80) had rejected any assessment of the chance of the claimant' dismissal in any event. Mr Husbands' own evidence was that a proper process would have been required. The fate of the claimants was speculative

19. Otherwise, if the tribunal was looking purely at compensation for loss of earnings, Mr Brien urged the tribunal to look to award losses up to the date of this hearing and asked that a reasonable period of future loss to be assessed would be the period of 26 weeks thereafter.

20. Mr Sendall pointed out that the claimants had been employed by Breedon on the same terms and conditions of employment. There never been any guarantee of additional payments for night work and he cautioned against a comparison of earnings with Breedon and what had been enjoyed with the respondent given the changed nature of the business and balance of work. As asphalt plants and equipment had been sold, the claimants he says would not have been fully occupied. The tribunal notes, however, that Breedon was seeking to acquire a gang and equipment as a package and would not have wanted one without the other. The claimants were said by

Mr Sendall to have fully mitigated their losses. The future was uncertain and indeed Breedon might acquire additional work.

Conclusions

21. The tribunal declines to make any order for reinstatement. It is agreed that the key issue here is one of practicability. The tribunal is required to make an assessment as at today's date. Whilst there may be exceptions, the authorities do not support it being practicable to reinstate employees if that would produce overstaffing or necessitate redundancies. Reinstating the claimants now would produce significant overstaffing. There is currently only work and equipment for 2 paving gangs. That situation could be changed by the respondent but not overnight, nor for a period of some months. There would be a significant likelihood of a redundancy exercise. Both Mr Husbands and Mr Jones have given to the tribunal very straightforward and unembellished evidence. Mr Husbands does not think that the respondent could or would continue a 3 gang operation. Reinstatement is not practicable.

22. The tribunal is then asked to consider as compensation, the payment to the claimants of their contractual entitlements had they been made redundant. That can only be argued on the basis of what would have happened had there been no attempt to shoehorn the claimants into a TUPE transfer. The claimants were not dismissed by reason of redundancy and therefore have no contractual entitlement.

23. Had the claimants not been transferred at the end of July 2020 with the equipment they used, the respondent would not have dismissed them at that point in time. Their dismissals were driven by the sale and there was plenty of work within the respondent for them at least up to November 2020. The tribunal was unwilling to speculate as to the chances that they would have been dismissed by reason of redundancy. Indeed, it would have been an exercise in pure speculation. Had the respondent later decided to reduce its paving business, this would not have likely become effective until early 2021 and there is still no evidence based way of determining that they would have been made redundant or with any ability for the tribunal to ascertain a particular degree of probability. There would have to have been a process which would not necessarily have involved the selection of a whole gang of pavers. It is far from inconceivable that some of the claimant would have benefited from their longer service in being retained or, looking at it another way, deprived of a substantial payment by the respondent. There was alternatively available paving work to tender for and the respondent's commercial team was able to adapt its strategy as to the type and volume of work it sought to obtain.

24. The appropriate remedy in this case involves solely a consideration of loss of earnings. The principle the tribunal must apply is to assess compensation on a just and equitable basis based on what the claimants would reasonably have expected to receive if they had not been unfairly dismissed.

25. The claimants used to receive substantial payments for unsociable night working. Those have virtually ceased with Breedon. The respondent is fortunate that the claimants have mitigated a significant part of that loss by weekend working, though the consequence for the claimants is that they have to work more hours to replace their lost income.

26. It cannot be said with exactitude what the claimants would have earned had they stayed with the respondent. However, had the respondent not decided to transfer them, it would have done all it could to ensure that they were busy and therefore economically viable. The respondent would have bid for and in all likelihood obtained more work if it had had three gangs. Mr Jones confirmed in evidence that they had only bid for work which reflected the smaller operation.

27. A third gang could have taken additional asphalt out of the Selby and Lincoln plants. The respondent's strategy was to seek night work, that being the most efficient and profitable for it to undertake. Clearly, it is capable commercially of more aggressive tendering if that is necessary to obtain work.

28. The amount of night work had increased in 2021 - 90% of work carried out was on nights. Available work had also increased due to a growth in infrastructure projects, particularly related to additional public sector investment. Whilst the level of work could not be scaled up easily for 3 gangs now, it could have been achieved if planned for from July 2020. The respondent did not divest itself of work to Breedon. It was not limited to sourcing asphalt from its own plants.

29. In the circumstances, it is not just and equitable to apply a notional and arbitrary reduction to the claimants' likely wages if they had stayed with the respondent. The tribunal cannot say that with 3 gangs, the claimants would, for instance, have worked on one third fewer nights or had periods of downtime. Again, the respondent would have sought not have allowed that situation to develop.

30. As compensation for loss of earnings, it is therefore just and equitable to deduct from the claimants' past average earnings with the respondent, their average earnings with Breedon. Loss to date would represent a period of almost 16 months post dismissal.

31. The inevitable uncertainty as to the future militates against the tribunal looking at a further considerable period of continuing loss. On the other hand, there is no evidence that the claimant's average earnings with Breedon are about to change or the situation within the respondent. The tribunal considers it just and equitable to award continuing loss over a 4 month period by which time new pipelines of work may have opened up at

the commencement of a (seasonally) busier period for paving work generally. As regards loss of statutory rights, the tribunal considers that a nominal sum of £200 per claimant would be appropriate given their period of service in permanent and stable employment effectively engineered by the respondent.

32. The tribunal allowed for an adjournment for the parties to work out each claimant's individual losses calculated in accordance with the tribunal's aforementioned decision and Judgment was then subsequently issued in the agreed amounts.

Employment Judge Maidment

Date 12 January 2022