



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Downey

**Respondent:** Resource Management Solutions (North East) Limited

**Heard at:** Manchester (by CVP)

**On:** 6 January 2023  
1 February 2023 (in chambers)

**Before:** Judge Cowx (sitting alone)

## REPRESENTATION:

**Claimant:** Mr Jonathan Heath Solicitor

**Respondent:** Mr Anthony Willis Solicitor

# RESERVED REMEDY JUDGMENT

1. The claimant's application for reinstatement in accordance with Section 114 of the Employment Rights Act 1996 is refused.
2. For the claimant's claim to compensation for unfair dismissal, no basic award is made but the respondent is ordered to pay the claimant the compensatory award of **£13,868.00**.
3. The recoupment regulations do not apply to the above compensatory award.

# REASONS

4. This was a remedy hearing conducted remotely by CVP on 6 January 2023. The parties did not object to the case being heard remotely.
5. I indicated to the parties at the close of the hearing that I would provide a written judgment.

6. The claimant's claim of unfair dismissal was successful. At the liability hearing the claimant indicated that he was seeking reinstatement to his role as a Vehicle Handling Operative (VHO) at the Jaguar Land Rover ('JLR') plant at Halewood.
7. Prior to the remedy hearing I was provided with a bundle of documents running to 77 pages which include the claimant's schedule of loss and the respondent's response to that schedule of loss.
8. Before hearing evidence, Mr Willis told me that his client, the respondent, Resource Management Solutions (North East) Limited ('RMS'), had been in talks the day before with representatives from its client, CAT UK, which in turn provides services to its client, JLR, at its Halewood site and at other sites.
9. Mr Willis told me that those talks confirmed that according to JLR and/or CAT UK, there was currently no vacancy for a VHO at the Halewood site. Furthermore, there is insufficient work available for those VHOs currently employed at Halewood to meet their contracted hours. Mr Willis went on to tell me that the respondent, after discussion with its client, had identified two alternative posts which they would offer the claimant. One of those posts was in the same VHO role as the claimant previously held at Halewood, but was at JLR's Stone site in Staffordshire. The other role was a quality checking role in Crewe, which is nearer to the claimant's home.
10. Mr Willis also told me that the respondent no longer contended that reinstatement was impracticable on the basis of a breakdown in trust and confidence. He indicated that the respondent was willing to put any dispute with the claimant behind it and was content to re-employ him but was unable to do so at Halewood at the present time because of a restriction on production.
11. I allowed Mr Heath as much time as he needed to discuss the offer of re-engagement with the claimant and to discuss the associated terms and conditions with Mr Willis. After an adjournment the hearing was reconvened, and I was informed by the parties that the claimant had rejected the offer of re-engagement at the Stone and Crewe sites.

## **SUBMISSIONS & EVIDENCE**

12. I will summarise the submissions made on behalf of the parties and the evidence relied upon which was relevant to those submissions.
13. In submissions, Mr Heath confirmed that the claimant did not seek re-engagement, only reinstatement at Halewood, in the same role as before and on the same terms and conditions of service. If he could not be reinstated, then he sought compensation.
14. Mr Heath submitted that the Tribunal should not accept the respondent's assertion that JLR was "overmanned" with VHOs. He submitted that any downturn in production at the Halewood site was temporary and that the forecast for future production output was not as gloomy as the respondent asserted. Mr Willis

suggested that JLR has a strong order book, and that production of vehicles must therefore increase, which in turn would mean more work for VHOs.

15. Mr Heath referred to a VHO who was recruited by the respondent to work at Halewood after the claimant was made redundant and that in accordance with Section 116(5) of the Employment Rights Act 1996 (the 'ERA') the tribunal should not take that VHO into account when determining whether reinstatement of the claimant it is practicable.

16. Mr Heath submitted that the respondent's assertion that reinstatement is not practicable, on the basis of insufficient work for VHOs at Halewood, can be tested by the tribunal by making an order of reinstatement which would not come into effect until 1 April 2023. Mr Heath submitted that delaying the effective date of the order would provide time to show an improvement in output at Halewood. If production does not improve, as JLR and CAT UK forecast it will not in that time period, then the respondent will have an opportunity at the enforcement stage to have the reinstatement order set aside.

17. Mr Heath relied upon the case of **Port of London Authority v Payne and Others** [1993] 11 WLUK 35 as the authority for his contention that a final assessment of practicability can be made at a later enforcement hearing. He submitted that the respondent can remake its overmanning argument at a later date if it refuses to comply with a reinstatement order in April 2023. By that time, Mr Heath suggests the Halewood site is likely to have increased productivity and will have more work for VHOs.

18. Mr Willis also relied on the case of **Port of London Authority v Payne and Others**, in particular the test for reinstatement or re-engagement laid down in that case, which is to determine *practicability* not *possibility*, and that the tribunal must give due consideration to the commercial judgement of management in this regard.

19. Mr Willis submitted that the most reliable evidence about the current situation at Halewood was produced by the respondent in the form of oral evidence from Mr Carl Woodward, the CAT UK Compound Manager at the JLR Halewood site. Mr Willis submitted that at the present time it was not practicable to reinstate the claimant because there was insufficient work for those VHOs currently employed at Halewood, even if one disregards the recently engaged VHO in accordance with Section 116(5) of the ERA.

20. Mr Willis submitted that by asking the tribunal to order reinstatement which does not take effect until April 2023 is evidence that the claimant acknowledges there is no work for him at Halewood at the present time. By making such an order, when reinstatement is currently impracticable but in the hope of improved productivity, the respondent will unreasonably incur additional costs.

21. The claimant provided a witness statement and was cross examined by Mr Willis. He acknowledged that he had not been on site at Halewood since October 2021. The claimant relied upon online articles on the worldwide shortage of semiconductors and its impact on automotive supply chains. The articles were adduced to support the claimant's assertion that supply chain problems are likely to

improve as semiconductor production increases. One article suggested this would be towards late 2022, but the same article stated that one leading car manufacturer predicts that semiconductor supply is unlikely to meet automotive demand until 2024.

22. The claimant also relied upon respondent job adverts for VHOs at Halewood and Solihull in 2022.

23. The claimant also said that VHOs who could not make up their contracted hours at Halewood did so by supporting colleagues at the Stone site and so it was practicable for him to be reinstated at Halewood as he too could be bussed to Solihull or other sites if required.

24. Mr Woodward gave evidence for the respondent. He explained in detail how CAT UK determine how many VHOs are required and how many hours per year they are required to work, based on a number of different factors such as the number of vehicles produced.

25. Mr Woodward told the tribunal that prior to the Covid pandemic, Halewood was operating a 3-shift production pattern, 5 days per week. At the height of the pandemic a 2-shift pattern was adopted. Then in September 2022, Halewood was forced to adopt a single shift system, 5 days per week, because of decreased demand and supply chain issues which included the semiconductor shortage.

26. Mr Woodward agreed that JLR has a strong order book, but strongest demand may not be for vehicles coming off the Halewood production line and semiconductor shortage meant demand cannot be met.

27. Mr Woodward opined that he did not see Halewood returning to a 2-shift pattern until 2024.

28. Mr Woodward said that Halewood VHOs had not been used at the Stone site for some time. At the present time there was insufficient output at Halewood for the VHOs assigned there to work their agreed hours.

29. Mrs Tooke gave evidence for the respondent. She confirmed that a temporary member of staff was appointed to a VHO vacancy in July 2022 and is still employed at Halewood. She also confirmed that another VHO was on long term sickness absence but was expected to return to work shortly.

30. Mrs Tooke said the last time Halewood VHOs were bussed to the Stone site was in September 2022.

31. Mrs Tooke said that if the claimant was reinstated, the respondent, and not CAT UK or JLR, would have to pay his salary, even if there was no or little work for him to do at Halewood.

## **THE FACTS**

32. The issue the tribunal has to decide in this case is whether or not it is practicable to reinstate the claimant.

33. I find the following facts are relevant to that issue.

34. The respondent was the claimant's former employer and unfairly dismissed the claimant as part of a redundancy exercise.

35. The respondent is responsible for supplying its client CAT UK with personnel. In turn, CAT UK provide the same for its client, JLR.

36. CAT UK and JLR are better placed than the claimant to know whether there is sufficient work at the Halewood site to keep the claimant gainfully employed. At the time of the hearing, production of cars at the plant was much reduced from pre-pandemic levels and continues to be limited because of a worldwide shortage of semiconductors. The supply of semiconductors is unlikely to meet the automotive industry's demand until 2024.

37. The Halewood plant currently employs 9 VHOs, but there is currently insufficient work for them at the site and they cannot fulfil their contracted hours. In simple terms they are being paid to stay at home for much of the time and are building up an increasing debt of hours owed to the respondent, which the respondent accepts are unlikely to recouped.

38. If the claimant was reinstated at the present time he would re-join the current pool of underemployed VHOs and would be unable to fulfil his contractual obligation to work the set number of hours per month.

39. If the claimant was reinstated, the VHO pool would be increased to 10 which means there would be even fewer working hours to be shared amongst the other VHOs.

40. If the claimant was reinstated, the respondent would have to pay his salary and would be unable to charge this to its client CAT UK.

41. I accept that Mr Woodward is best placed to provide a prognosis on when there is likely to be a greater demand for the services of VHOs at Halewood because he is in a management position at the site, with access to more information than the claimant who has not worked at Halewood since October 2021.

## THE LAW

42. The relevant law is to be found in the ERA at:

Section 113 **The orders.**

*An order under this section may be—*

- (a) an order for reinstatement (in accordance with section 114), or*
- (b) an order for re-engagement (in accordance with section 115),*  
*as the tribunal may decide.*

Section 114 **Order for reinstatement.**

- (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.*

Section 116 **Choice of order and its terms.**

- (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 decides 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 complainant 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 subsection (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.*

- (5) 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 (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.*

- (6) Subsection (5) does not apply where the employer shows—*

(a) *that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or*

(b) *that—*

*(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and*

*(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.*

43. The tribunal also had regard to the case of **Port of London Authority v Payne and Others** [1993] 11 WLUK 35, in that the test to be applied when reinstatement or re-engagement are sought is not whether it is *possible* to reinstate or to re-engage the claimant, but whether it is *practicable* to do so. When considering whether reinstatement or re-engagement are practicable, the tribunal must give due consideration to the commercial judgement of the respondent.

#### **APPLYING THE FACTS TO THE LAW**

44. The claimant does not wish to be re-engaged. That is to say, he only wishes to be re-employed at the Halewood site in his old job and on the same terms and conditions as before. I am therefore not required to determine whether re-engagement is practicable.

45. It is for the respondent to satisfy the tribunal that reinstatement is not practicable in the claimant's case.

46. The claimant did not work directly for the respondent i.e. at its company offices. The claimant was employed by the respondent to provide his labour to JLR at its Halewood site, via an intermediary company, CAT UK, which was the respondent's client.

47. In this case it is the commercial judgment of JLR and CAT UK which is most relevant as those companies are best placed to know what the current situation is at Halewood and what the forecast is for the future.

48. I accept the evidence adduced by or on behalf of the respondent, and principally that of Mr Woodward, which is that there is currently no work for the claimant at the Halewood site. I reach that conclusion even after disregarding the VHO who was engaged in July 2022, as I must, in accordance with Section 116(5) of the ERA.

49. I find that in asking me to make an order for reinstatement which defers his start date at Halewood until April 2023 is an acceptance by the claimant that the

respondent has provided an accurate picture of the current situation at Halewood and that there is not enough work at the site to occupy a full complement of VHOs at the present time.

50. I reject Mr Heath's suggestion that the appropriate way to approach the question of reinstatement is to defer the claimant's start date, and if the situation at Halewood remains unchanged then the respondents can have "a second bite of the cherry" if they refuse to reinstate him in April 2023 when the claimant would return to the tribunal to seek enforcement of the order. I find that to be an unattractive proposition because it is in everyone's interests to have finality in litigation rather than delay the resolution on an artificial and speculative basis.

51. I have seen and heard nothing which causes me to believe the respondent's position will be any different in April 2023. The issue of remedy is important but there is no complexity to that issue in this case, which is whether to reinstate or not. To delay resolution, for the reason given by Mr Heath, is not proportionate and would incur further delay and expense which cannot be justified.

52. I have to decide whether it is practicable to reinstate the claimant at the date of the hearing, based on evidence presented to me at that time. I must also not replace the commercial judgment of the respondent, CAT UK and JLR management with my own.

53. I do give greater weight to the commercial judgment of the respondent, CAT UK and JLR management than I do to the claimant's contention, because they know better than the claimant what the current situation is at Halewood and when the situation is likely to improve. I accept the respondent's evidence that VHOs are unlikely to return to pre-pandemic working patterns for some considerable time, which may not be before 2024.

54. If the claimant was reinstated there would be no or very little work for him to do. In that case the respondent, not CAT UK or JLR, will have to pay the claimant's wage bill for an indeterminate length of time. That scenario is not commercially viable, and therefore I find it is not practicable to reinstate the claimant.

## **REMEDY**

55. In the alternative to reinstatement the claimant sought a compensatory award of £14,218, as set out in his schedule of loss. The respondent agreed with that sum, save for the amount claimed for the loss of statutory rights. The claimant claimed the appropriate sum is £750. The respondent submits the correct award for loss of statutory rights is £250.

56. Neither party gave reasons for the sum each proposed as appropriate for loss of statutory rights. In my judgement the sum of £400 is the appropriate nominal sum which reflects the loss of such rights on the facts of this case where the claimant did not contribute to his own dismissal.

57. The claimant makes no application for payment of a basic award because such award has been entirely offset by the redundancy payment made to the claimant.

58. For the claimant's claim to compensation for unfair dismissal, the respondent is to pay the claimant the sum of **£13,868.00**.

Judge C J Cowx

7 February 2023

REASONS SENT TO THE PARTIES ON

10 February 2023

FOR THE TRIBUNAL OFFICE



## NOTICE

### THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2401584/2022**

Name of case: **P Downey** v **Resource Management  
Solutions (North East)  
Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

**the relevant decision day** in this case is: 10 February 2023

**the calculation day** in this case is: 11 February 2023

**the stipulated rate of interest** is: **8% per annum**.

For the Employment Tribunal Office