EMPLOYMENT TRIBUNALS

Claimant: **Mr Stephen Campbell**

Respondent: **Castle Freight Limited**

Heard at: **Leicester**

On: **14 and 15 September 2017**

Before: **Employment Judge Ahmed (sitting alone)**

Representation
For the Claimant: **In person**
For the Respondent: **Ms J Smeaton of Counsel**

RESERVED JUDGMENT ON REMEDY

The judgment of the Tribunal is that:

1. The Respondent is ordered to pay to the Claimant £1,396.36 (net) as damages for breach of contract.

2. The Respondent is ordered to pay to the Claimant £2,565.52 (net) as compensation for unfair dismissal.

3. The Recoupment Regulations do not apply.

REASONS

1. This was a hearing on remedy the Tribunal having found earlier that the Claimant was unfairly dismissed and in breach of contract. The complaint of an unlawful deduction of wages in respect of holiday pay was dismissed. The issue of remedy as to both unfair dismissal and breach of contract was adjourned to 14 September 2017.

2. At this remedy hearing the Claimant once again represented himself but the Respondents were on this occasion represented by Ms Smeaton of Counsel.

3. Despite the fact that regrettably neither the written record of the judgment nor reasons were available to the Respondents at the time of this hearing, Ms Smeaton confirmed that she was content to proceed on the basis that any issues relating to **Polkey** (*Polkey v AD Dayton Services Ltd* [1987] IRLR 503,

and contributory conduct remained live, which indeed they were. Reference was made to the possibility of a **Polkey** deduction in the oral judgment on the previous occasion so that the parties may wish to seek advice and address the tribunal on the issue.

4. At this remedy hearing I took sworn evidence from the Claimant and Mr Stewart Matthews from the Respondent, the latter having represented the Respondent at the liability hearing. In coming to my decision I take into consideration all of the oral evidence and the submissions made.

5. The issues were as follows:-

5.1 what was the Claimant's actual gross and net pay?

5.2 whether the basic and compensatory awards should be reduced because of contributory conduct on the part of the Claimant?

5.3. whether any deduction should be made under **Polkey**, that is what was the percentage chance if any, of the Claimant being fairly dismissed in any event?

5.4 whether the Claimant had properly mitigated his losses following dismissal?

5.5 whether an uplift should be applied to the compensatory award for breach of the ACAS Code of Practice and if so to what extent?

6. The facts so far as they are relevant to the remedy issue are not disputed save as to whether the Claimant was at fault for a road accident which occurred on 15 November 2016 whilst he was at work and in failing to make vehicle defect checks. After an adjournment to allow the Claimant to view footage of video evidence which had been disclosed earlier (but which the Claimant could not view) the Claimant accepted that he was indeed at fault for the aforementioned accident. Furthermore, the Claimant accepted that in September 2016 he failed to carry out daily accident defect checks as he should have done.

7. Mr Campbell had been employed by the Respondents as a Lorry Driver since 2013. The Respondents are a relatively small business with approximately 20 employees, of which 10 are Drivers. Their annual turnover is in the region of £1.2 - 1.3 million. Last year the total profit was in the region of £45,000.

8. Mr Campbell was initially employed to drive a 7.5 tonne vehicle. I accept that he was unhappy with moving up to a 26 tonne vehicle in February 2016 but nevertheless he took his HGV test for the heavier vehicle in January and his updated contract of employment of April 2016 reflected both the additional responsibility and remuneration commensurate with the role. Following the termination of his employment the Claimant says that he was unable to pay the rent on his mobile home and as a result he went to live with his mother in Scotland though he does have family ties in Leicestershire. He found some temporary work with L and G's Limited in Paisley at the end of December 2016 but worked significantly fewer hours than he had with the Respondent. On 8 May 2017, he joined Berendsen Healthcare Limited, who are based in Basingstoke, as an HGV driver. He continues to be employed by them. There are no continuing losses after joining Berendsen.

9. During his employment with the Respondent Mr Campbell has had a history of road accidents. I am satisfied that he was wholly or largely responsible

for the accidents which are attributed to him. Some accidents may have gone unreported as one at least one occasion the Claimant attempted to come to a private mutual arrangement.

10. Between March 2014 and September 2016 Mr Campbell was responsible for at least five accidents at work on the following dates:-

- 18 March 2014
- 5 June 2014
- 15 July 2015
- 26 February 2016
- 2 September 2016

11. Mr Campbell also has a record of other misconduct namely removing a tachograph, failing to carry out daily vehicle defect checks, dangerous driving on 16 October 2016 and failure to comply with the Respondent's absence from work policy.

12. There was a dispute at the previous hearing as to whether the Claimant was given an oral warning on 15 September in relation to unaccounted driving (that is driving a vehicle with the card removed from the tachograph), driving without due care and attention and failing to comply with the company absence policy. The dispute was resolved in the Respondent's favour. The Claimant admitted that there was a discussion on 15 September but no warning was given. The Respondent's position was that the oral warning was given but only confirmed in a letter which was stapled to one of the Claimant's payslips. The Claimant accepts that he received the warning letter but it was only attached to his final payslip and he did not see it until he picked up his final pay slip. Whether the warning letter was seen before or after termination of employment is immaterial – the oral warning had been had in fact been given.

13. The accident on 2 September 2016 involved the Claimant changing lanes on a motorway. Some two months later, on 15 November 2016, the Claimant was involved in another accident, also involving a change of lanes, this time involving a Vauxhall Corsa vehicle. The Claimant having seen the lorry camera footage now accepts that it was his fault for the accident. He did not immediately report the accident to his employer but did offer to pay the driver from his own pocket. In relation to that accident Mr Matthews gave evidence that upon reviewing the camera footage, as the Respondents routinely do, they noticed that the Claimant had been involved in an accident which they were unaware of. Whilst the camera footage was being checked on 16 November Mr Campbell came into the office and told Mr Matthews about the accident and that it was "nothing to worry about". The Respondents say that the Claimant only admitted to the accident and purported to 'report' it once he saw Mr Matthews viewing the footage.

14. The November accident was the sixth accident the Claimant had been involved in since March 2014. The Claimant had been issued with a first and final written warning in 2013 but that had now expired and the only extant warning at the time of the dismissal was the oral warning issued on or around 15 September 2016.

15. The Tribunal had found on the previous occasion that the Claimant had been dismissed without notice and in breach of the procedures recommended by the ACAS Code of Practice.

THE LAW

16. Section 122(2) of the Employment Rights Act 1996 ('ERA 1996') states:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

17. Section 123(1) and (6) ERA 1996 state:

"(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

18. Sections 221(1) and (2) ERA state:

"(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week."

19. Both the basic and compensatory awards may therefore be reduced under sections 122 and 123 ERA 1996 by reason of contributory conduct on the part of the employee. In **University of Sunderland v Drossou** (UKEAT/0341/16) the EAT has recently made it clear that whilst the statutory provisions for the reduction of the basic and the compensatory awards are slightly different, the percentage reduction should generally be the same. **Drossou** also makes it clear that any employer's pension contributions should be included in the calculation of a week's pay.

20. A Tribunal may also reduce the amount of compensation, by the appropriate percentage, to reflect the possibility that the employee might have been dismissed fairly in any event even if procedurally unfair – the so-called '**Polkey'** principle. Such a reduction is only applicable to the compensatory award. There is no reason why an award may not be reduced for *both* **Polkey** and contributory conduct (see **Robert Whiting Designs Limited v Lamb** [1978] ICR 89).

21. Pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, a compensatory award may also be increased by a maximum of 25% for failure to comply with the ACAS Code of Practice.

CONCLUSIONS

22. As I explained to the Claimant at the remedy hearing, the Tribunal has no power to make an award (as claimed) for expenses incurred by the Claimant's family members for the cost of his support whilst unemployed, for loss of pay for income in attending the tribunal hearings or consequential losses for the loss of his home, depression or any health related issues arising out of the unfair dismissal, all of which are claimed. Whilst the Tribunal does have power to make

an award of consequential loss under section 24(2) ERA 1996, that is confined to complaints in respect of an unlawful deduction of wages, not unfair dismissal. The complaint of an unlawful deduction was dismissed but even if it was not, the losses claimed are not consequential on the unlawful deduction of wages but on dismissal.

Gross and net pay weekly pay

23. The Respondent was not able to produce the Claimant's payslips for the hearing. Once a payslip is issued by the Respondents there is no photocopy or duplicate kept. What the Respondent has produced however, the accuracy of which is not in dispute, is a printout of a record of wages and deductions made to the Claimant during his employment by the Respondent. I will refer to this as the 'schedule'. The schedule shows the Claimant's gross weekly pay, deduction of income tax and any other deductions and the number of hours overtime undertaken.

24. Unfortunately, whilst it was possible to calculate the gross weekly wage from the schedule it does not indicate the net weekly wage paid and the Claimant has only produced a few payslips. There is a significant amount of overtime. The Respondents invite me to apply the following figures – with which I agree – namely £349.09 by way of gross weekly pay to which £4.35 must be added for the employer's pension contributions making a gross weekly pay of £353.44. By definition the contractual net pay cannot exceed the weekly gross pay.

25. The overtime undertaken varied and so therefore did overtime pay. The amount of overtime undertaken by the Claimant is set out on the schedule. In the last 12 weeks of the Claimant's employment the total overtime pay was £565.75 which equates to an average of 10.89 hours per week. I shall round that up to 11 hours. The overtime rate was paid at the same as basic rate pay of £9.63 per hour.

26. For the purposes of calculating the gross weekly wage in relation to the basic award, I accept Ms Smeaton's submission that since this is a case where the Claimant had 'normal working hours' the relevant applicable provision must be section 221(2) ERA 1996. That means that the Claimant's remuneration must be determined according to his contract of employment which requires the Claimant to work 36¼ hours per week. The overtime is relevant only to the lost opportunity of working overtime in connection with the compensatory award and not for the purposes of calculating a week's pay.

Polkey

27. Ms Smeaton argues that having regard to the Claimant's previous accident history, his admission that he failed to carry out daily vehicle defect checks and his admission that he was at fault for the November accident, the Claimant in all probability would have been dismissed for gross misconduct at the 29 November disciplinary hearing if it had gone ahead. On that basis, the Claimant having been paid up to 25 November 2016 the compensation to which the Claimant is entitled should be limited, in her submission, to no more than 4 days.

28. In coming to my decision on the **Polkey** issue, I take into account the following factors:-

28.1 That despite his previous accident history, including tachograph and

other breaches, but with the exception of the most recent accident, the Claimant's misconduct had until very recently been deemed worthy of nothing more than an oral warning;

28.2 The Respondent clearly did not regard the existence of the November accident as well as the failure to report as a matter of gross misconduct because it did not deem it as such. The proposed notice of the disciplinary hearing for 29 November did not identify it as gross misconduct and the Claimant was not suspended until some 9 days after the accident had come to light.

29. I do not therefore accept Ms Smeaton's primary submission that it was inevitable the Claimant would have been summarily dismissed for gross misconduct on 29 November 2016. I do accept however that there was a chance that he might be dismissed. The Claimant had an extant oral warning, the latest accident bore a close resemblance to the previous accident only a month earlier and the cost of insurance premiums was rising because of the most recent accident.

30. In all of the circumstances I consider that there was a 50% chance of dismissal at the proposed disciplinary hearing on 29 November, if that had taken place. I will therefore make a 50% Polkey reduction.

Contributory conduct

31. I am invited by Ms Smeaton to reduce the Claimant's basic and compensatory awards under the provisions of section 122(2) and 123(6) ERA 1996 to take into account the Claimant's conduct before dismissal. It is submitted that the contribution should be 100%.

32. Road accidents in the line of work undertaken by the Claimant are not uncommon. 100% reductions for contributory conduct on the other hand are extremely rare. The Claimant was not the only driver with the Respondent who had experienced accidents though his record was possibly worse than others.

33. The Claimant was issued with an oral warning on 15 September. Having now seen the recording of the footage of the November accident, the Claimant also accepts that he was at fault for that accident too. I am satisfied he failed to report it until he saw the footage being viewed. He also accepts that he failed to carry out daily defect vehicle checks in September.

34. However, I note that the Claimant received nothing more than an oral warning for five of his previous accidents up to September 2016. The failure to carry out defect checks was not even an item on the proposed agenda for the disciplinary hearing and should not therefore have a relevant factor in deciding whether to dismiss. A failure to comply with company policy in respect of a failure to report (amongst other things) had in the past only been dealt with by an oral warning. The issue of increasing insurance premiums was not an item on the agenda for the proposed disciplinary hearing though I accept there were concerns about the cost of continuing to employ the Claimant.

35. In **Hollier v Plysu Limited** [1983] IRLR 260, the EAT suggested that the level of contribution should be assessed broadly and generally fall within the following categories:-

- Wholly to blame for misconduct:100%
- Largely to blame:75%
- Employer and employee equally to blame: 50%

- Slightly to blame: 25%

36. In my judgment this case falls within the 'equally to blame' category having regard to the Claimant's past history, the overall circumstances of the case, the degree to which misconduct in the past has been treated and what is just and equitable. The Claimant's contributory conduct in my view justifies a 50% reduction of the basic and compensatory awards.

ACAS uplift

37. There is no doubt that there was a wholesale breach of the ACAS Code of Practice. Whilst the Respondent *intended* to give the Claimant a proposed notice of the disciplinary hearing it did not actually do so. Consequently, there was no notice of a disciplinary hearing actually given, no disciplinary hearing and no opportunity to appeal.

38. I appreciate that whenever there is a significant dispute as to whether the employee has resigned or been dismissed, there is always the likelihood that there will be significant breaches of the ACAS Code of Practice but that is a danger inherent in relying on a resignation which is found not to be so. Ms Smeaton submits that the Respondent had certainly intended to comply and any failure was not wilful. The ACAS Code of Practice is not however concerned with what the Respondent intended to do but what it actually did. Good intentions are irrelevant. In my view the maximum uplift of 25% is appropriate.

Mitigation of Loss

39. Ms Smeaton argues that the Claimant has failed to mitigate his loss in that:-

39.1 he could have worked or obtained work with more hours following his dismissal.

392 that the Claimant has failed to produce evidence of the hours he was working for L & G's Limited and/or failed to produce copies of all of his payslips, his P11Ds and P45 with L & G's despite several requests,

39.3 that the Claimant could easily have obtained work as a Driver particularly in the busy Christmas 2016 period. The Respondents rely on an e-mail from an agency indicating that they had their busiest period for 11 years in November/December 2016.

40. I have no reason to doubt the Claimant's evidence that following the loss of his job he did his best, in the face of losing his home, in looking for other work. He is not on the basis of his past work record, a malingerer. He was earning significant sums of money with the Respondents, usually in the region of £400.00 a week and he would have wanted to maintain that if he could. He has family ties in Leicestershire and it is therefore unlikely he would have moved to Scotland to live with his mother unless it was absolutely necessary.

41. I consider that it was reasonable for the Claimant to leap to the first job available. The agency he registered with found him a job with L & G's Ltd and he was paid by them on 30 December. He last received pay from them on 10 February. He began with Berendsen on 8 May 2017. The Claimant has not supplied his P45 but it is clear from the payslips we do have what his total gross pay with L & G was. As at 10 February 2017 his total pay from that employment was £655.90. It is possible, though unlikely, that the Claimant suddenly went

from working an average of 15 to 20 hours per week to anything significantly more between February and May. Although hampered therefore by the absence of the P45 it does not make too much difference in the end.

42. Whilst I also accept that in principle the Claimant was making efforts to return to work in England, it is not clear why that process took as long as it did given that the Claimant accepts that opportunities for employment as a lorry driver in this country are better.

43. Having regard to all of the circumstances, which include the personal circumstances of the Claimant in which he found himself after losing his job, the loss of his home, the forced move to Scotland to live with his mother and efforts to put his life back on track, I consider that a reasonable period of time in which the Claimant ought to have found comparably paid employment should have been no more than three months (that is 13 weeks) from the time the notice period would have expired. His losses shall be assessed accordingly.

44. As there are a number of different reductions, I have attempted to follow the order of adjustments set out in **Digital Equipment Company Limited v Clements (No 2)** [1997] ICR 237 and the provisions of sections 124A ERA1996.

45. The final award is therefore as follows:-

Breach of contract

4 weeks x £349.09	-	£1,396.36

Unfair dismissal compensation

(a) Basic Award

4.5 x £353.44	-	£1590.48
Less 50% contribution	-	£795.24
Total basic award	-	£795.24

(b) Compensatory award

Loss of earnings, 13 weeks x £353.44	-	£4,594.72
Loss of overtime opportunity, 13 weeks x £105.93	-	£1,377.09
Loss of statutory rights	-	£349.00
sub-total	-	£6,320.81
Less received from L & G's	-	£655.90
Total Compensatory Award	-	£5,664.91
Less Polkey reduction – 50%	-	£2,832.45
sub-total	-	£2,832.45

Add 25% uplift for failure to comply with ACAS Code	-	£708.11
sub-total	-	£3,540.56
Less 50% contribution	-	£1,770.28
Total Compensatory Award	-	£1,770.28
Add Basic Award	-	£795.24
Total award for unfair dismissal	-	£2,565.52

46. The Recoupment Regulations do not apply.

Employment Judge Ahmed
Date: 20 October 2017

JUDGMENT SENT TO THE PARTIES ON

11 November 2017

FOR THE TRIBUNAL OFFICE