EMPLOYMENT TRIBUNALS

Claimant Mr. M. O'Connor

Respondent James Taylor Construction Ltd

v

Heard at: Watford **On**: 6 and 7 November 2017

Before: Employment Judge Heal

Appearances

For the Claimant: Ms J. Smeaton, counsel
For the Respondent: Ms. M. Stanley, counsel

JUDGMENT

1. The complaint of unfair dismissal is well founded.
2. There shall be a basic award, which the respondent shall pay to the claimant, of £10,777.50 less 15% = **£9,160.88.**
3. There shall be a compensatory award to be paid by the respondent to the claimant which comprises:

   Loss of statutory rights: **£400**

   Loss of earnings:
   19.12.16 – 10.2.17
   7.71 weeks @ £425 per week = **£3276.75**

   11.2.17- 31.7.17
   8 weeks at SSP rate £88.45 = **£707.60**
   16.29 weeks at SSP rate £89.35 = **£1455.51**

   31.7.17 – 14.9.17
   6.57 weeks at 80% of full pay = £2233.80
   And 20% of SSP at £89.35 = £117.41
   Less £2018.95 earned = **£332.26**

   15.9.17 – end of SSP entitlement
   3.71 weeks remaining x 89.35 = **£331.49**

Pension loss agreed: **£742.23**

Less 25% on compensatory award:

Total compensatory award : £7245.84 less 25% = **£5434.38**

Total (basic plus compensatory) monetary award to be paid to the claimant: ***£14,595.26***

(all calculations agreed by the parties)

4. Recoupment does not apply.

REASONS

1. By a claim form presented on 24 February 2017 the claimant brought a complaint of unfair dismissal or alternatively constructive unfair dismissal.

2. I have had the benefit of a bundle running to 295 pages which apart from one document was agreed.

3. I have heard oral evidence from the following witnesses in this order:

Mr. Michael O'Connor, the claimant;
Mr. Geoffrey Brickwood, Site Manager and former employee of the respondent;
Mr Martin Shotton, Operations Director; and
Mr. Gezim Seitllari, Labourer (known as 'Jimmy').

4. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement which I read before the witness was called and then each witness was cross examined and re-examined in the usual way.

5. I have also been provided with witness statements by the claimant of Michael Johnson, Ely Nunes de Paiva, Rusianas Anukas and Neil Thomson. Those witnesses were not called to give oral evidence. Ms Stanley did not object to my admitting their evidence subject to the weight that was appropriate, given that the evidence was not tested in cross-examination.

6. I set a timetable for the hearing of evidence using time estimates given by counsel. I am grateful to both counsel for their discipline in adhering efficiently to that timetable.

Issues

7. I identified the issues in this case at a preliminary hearing on 18 May 2017. They are as follows:

Unfair dismissal claim

7.1 Did the claimant resign in the course of his conversation with Mr. Shotton on 16 December 2016 or was he dismissed?

7.2 In determining whether the claimant resigned or was dismissed:
7.2.1 did the claimant use ambiguous or unambiguous words during the conversation? The claimant maintains that he told Mr. Shotton that he could 'stick his job' and that he should 'collect his van'. The respondent maintains that the claimant said that he was resigning.
7.2.2 if ambiguous words are used, what is the correct test of whether the contract has been terminated? (NB the analysis in Harvey, Unfair Dismissal, Division D1, 2. C.(2)(b) paragraphs 229-230);
7.2.3 if unambiguous words of resignation were used, and understood by the respondent as words of resignation, was there a 'special circumstances' exception to the general rule that a resignation has effect according to the ordinary interpretation of its terms?
7.2.3.1 was there anything in the context of the exchange which should cause the tribunal to conclude that, notwithstanding appearances, there was no real resignation?
7.2.3.2 was there anything in the circumstances in which the resignation was given that should have required Mr Shotton to satisfy himself that the claimant did in fact intend what he had apparently said and to allow a reasonable time to expire before accepting the resignation? If so,
7.2.3.3 did the respondent fail to allow a reasonable time to expire and/or fail to investigate the matter further, before accepting the resignation, such that the tribunal ought to find that there was no resignation? (N B the analysis in Harvey, Unfair Dismissal, Division D 1,2. C. (2)(c) paragraphs 231-247).

7.3 if the claimant is found to have resigned:

7.3.1 On 16 December 2016, did Mr Shotton tell the claimant to go up on a roof using a ladder, when he had not had any relevant health and safety training and/or without providing another employee of the respondent to assist?
7.3.2 If so, did such an instruction breach the implied term of trust and confidence?
If so,
7.3.3 did that breach entitle the claimant to resign and claim constructive dismissal?
7.3.3.1 did the claimant resign in response to that fundamental breach?
7.3.3.2 did the claimant delay in resigning and so affirm the contract?

7.4 Alternatively:

7.4.1 did the respondent accept the claimant's withdrawal of the resignation on 20 December 2016 so that the contract continued?
7.4.2 Did the respondent subsequently indicate to the claimant that if he returned to work for the respondent he would have to work in a different role to that which he had been doing up to 16 December 2016?
7.4.3 Was such a position a fundamental breach of the claimant's contract entitling him to resign and claim constructive dismissal?
7.4.4 Did the claimant resign in response to that fundamental breach?

7.4.5 Is the claimant delay in resigning and so affirm the breach?

7.5 If the claimant was dismissed:

7.5.1 was the claimant dismissed for a potentially fair reason? (The respondent accepts that if the facts found fall within 4.3 above there will not be a potentially fair reason for the dismissal. If the facts found fall within 4.4 above then the reasons relied upon will be 'some other substantial reason' or conduct).
7.5.2 Did the respondent follow a fair procedure?
7.5.3 Was the dismissal fair in all the circumstances of the case?

7.6 If the claimant was unfairly dismissed, what compensation if any is he entitled to?
7.7 If the claimant is awarded compensation, should the basic and/or the contributory awards be reduced in accordance with sections 122 (2) and/or 123 (6) of the Employment Rights Act 1996?
7.8 Would the claimant have been fairly dismissed had a fair procedure been followed such that the tribunal should make a 'Polkey' reduction?
7.9 Should compensation be increased or reduced on account of an unreasonable failure by either party to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?

7.10 At the outset of this hearing counsel agreed that the correct test to applied to the question whether the contract had been terminated was an objective test. That is, what would a reasonable objective observer conclude had taken place.

7.11 The parties also confirmed that this was not a case about dismissal on health and safety grounds. Accordingly, although this case was originally listed before a full panel, with the consent of counsel I released the tribunal members. I therefore continued to hear this case sitting alone.

Facts

8. I have made the following findings of fact on the balance of probability. What that means is this. This is a case where there are very substantial disputes about who said and did what. It is not possible in a tribunal hearing many months after the events in question to make perfect findings about what actually took place. Therefore, what I have to do is to listen to and read the evidence placed before me by the parties and to decide on the basis of that evidence only what is more likely to have happened than not.

9. The respondent is a construction company. It does not have a permanent construction site of its own but due to the nature of its business it operates at sites belonging to its customers. One practical effect of this is that construction materials and plant need to be delivered by some means to the sites.

10. The claimant was born in 1966 and began work for the respondent on 25 November 1998. It is common ground that he had an unblemished disciplinary record and was a loyal worker. At the time his employment ended, he had worked for the respondent for an unbroken 18 years.

11. There is a contract of employment for the claimant in my bundle which, from its context, must have been produced and agreed about or after 1 May 2000. That contract described the claimant as a Building Trade Operative.

12. In reality, by the time of the events about which I have been hearing, the claimant's role had evolved into that of a driver. The respondent accepts that he spent at least 70% of his time driving, while the claimant put this at 90%. The exact percentage is probably unmeasurable and may be somewhere between the 2 estimates. However, that may be, it is plain that the claimant spent the majority of his time driving the company van in order to collect and deliver materials. The remainder of his time he spent labouring. His driving role had become so embedded that he took the company van home in the evening and parked it at his home.

13. I accept, indeed it is not possible for the claimant to challenge it, that the respondent had become dissatisfied with this situation. It was possible to have the majority of materials and plants delivered by suppliers free of charge directly to site. This would have been less expensive than the respondent devoting the work of one of its employees to do those deliveries. In Mr. Shotton's mind therefore, at the time of the events I have been hearing about, was an idea that he would like to change the delivery arrangements. I have been shown no documents however giving evidence that a decision had been made or that any steps had yet been taken to put it in place. Certainly, nothing had been said to the claimant yet and no process of consultation or re-organisation had been commenced. So, I find that at the time the claimant's contract ended, this was an idea in Mr. Shotton's mind but its implementation was not imminent.

14. I find that the claimant had never had specific training about health and safety in relation to the use of ladders. I have been shown a training record but find it difficult to trust its reliability given that it records the claimant being given training at a time when he was not employed by the respondent (November 1992). In any event, that record simply gives headings: COSHH, general safety awareness, and manual handling without specifying what those subjects encompassed. General safety awareness might have included the use of ladders but there is nothing to confirm that. So, I accept the claimant's evidence that he did not have health and safety training in relation to the use of ladders.

15. However, after his long experience in the building trade, the claimant had learnt the dangers of using a ladder single-handed. He knew not to use a ladder without some means of 'footing' it.

16. On 16 December 2016, Geoff True gave the claimant instructions verbally to do a job in Downshire Hill in Hampstead. The claimant was told that the job involved moving a bed, cleaning flat roofs, fixing wire balloons, sweeping up the leaves in the garden and jet-washing the front and back of the house. The claimant considered that this was always likely to involve using a ladder to gain access to the upper story and the roof. The claimant expected Jimmy to accompany him. Jimmy had been employed by the respondent for 10 years and the claimant knew him to be reliable. The claimant felt safe with Jimmy to hold his ladder.

17. However, it turned out that Jimmy was told to stay on his existing job. He passed on the message to the claimant that he should use a painter, not employed by the respondent, who would be on the site at Downshire Hill. The claimant did not know the painter, was not told his name and did not feel satisfied that he would be reliable.

18. Accordingly, he telephoned Geoff True to tell him that he was not happy that Jimmy had been removed from his job because he needed Jimmy to hold the ladder and the claimant was not happy to ask someone who he did not know to foot the ladder for him.

19. After some complications, Mr. Shotton rang the claimant and told him that he was not to go and get Jimmy (which is what Mr. True had told him to do) but that he was to use the painter to hold the ladder.

20. So far, I accept the claimant's account of events, not having heard evidence to the contrary from Mr.True.

21. I now move on to findings about the central dispute on fact, that is the conversation on the telephone between the claimant and Mr Shotton on 16 December 2016. I stress that I make these findings on the balance of probability. I have to find what is more likely to have happened than not given the evidence I have before me.

22. On balance, I prefer the claimant's account of the events. I do so cautiously and for these reasons. Mr. Shotton told me in evidence that after the claimant had told him to stick his job he asked the claimant whether he was resigning and did so twice. He said that he did so in order to defuse the situation. I find this unconvincing. To ask someone whether they are resigning is an attempt to achieve clarity and in particular, legal clarity. It is an unlikely approach to choose if one is seeking to stop a heated situation from exploding. I have wondered whether Mr. Shotton asked the claimant if he was resigning perhaps because this would have been a convenient solution to the problem I have outlined above. However, he denied this. I did not feel able to rely on Mr. Shotton's account.

23. I have also been impressed by the claimant's own frankness. He has frankly admitted to some robust personal abuse, to bad language and to doing something which he subsequently regretted. He was quick to attempt to apologise. He has admitted to saying that the respondent could collect the van and that he told Jimmy immediately afterwards that he had resigned, none of which – to a non lawyer - is likely to help his case. So, on balance, I do prefer the claimant's account.

24. Therefore, I find that on 16 December 2016 Mr. Shotton told the claimant that he was not to fetch Jimmy but that he was to use the painter who would be on site to foot the ladder. The claimant told him that he was not happy to have someone else hold the ladder. There was no discussion about who the painter was or how reliable he might have been. In the claimant's mind, he might have been an inexperienced 16-year-old, however he did not articulate this particular fear. Mr. Shotton knew and believed that the painter was someone experienced and reliable however he did not spell this out. Instead, Mr. Shotton said, 'if you don't like it, Mick, you know what you

can do.' This upset the claimant who therefore told Mr. Shotton to stick his job and collect the van. Being precise, he accepts that he says, 'stick your job up your arse.'

25. I find that Mr. Shotton did not ask him whether he was resigning and nor did the claimant use or accept that expression. The claimant does accept however that he did intend to resign.

26. The claimant did then return the van to the hire company and he told Jimmy that he had just resigned.

27. As soon as the claimant arrived home, he regretted what he had done. He was very upset and his wife advised him to telephone Mr. Shotton. He attempted to call Mr. Shotton 3 times over the weekend but received no response. There was no message system available on Mr. Shotton's mobile telephone.

28. Meanwhile, the claimant also telephoned Andy Zaidi of the respondent and told him that he had been trying to telephone Mr. Shotton. There is a dispute about precisely what Mr. Zaidi said to the claimant. Whatever exactly was said, he attempted to give the claimant some reassurance and said that he would tell Mr. Shotton that the claimant was trying to contact him.

29. The claimant spoke to Mr. Zaidi again on the Monday and Mr. Zaidi told the claimant that he would tell Mr. Shotton he was trying to contact him.

30. The claimant also spoke to Michael Coaph the accountant, in the respondent's office. Mr. Coaph told the claimant that he would be called into the office after some time to cool off.

31. On the Tuesday, the claimant had fallen asleep in the evening when Mr. Shotton telephoned him at home. Insofar as it is relevant I think it more likely that the claimant was sleepy rather than drunk. More importantly, he apologised to Mr. Shotton and asked if he could come back. Mr. Shotton said that he accepted the claimant's apology and then asked if the claimant had received a letter. The claimant said that he had not received a letter and Mr. Shotton said that there was one in the post. He asked the claimant to call him again once he had received the letter. He did not say what were the contents of the letter.

32. The claimant received the letter on the following day, Wednesday. That letter is dated 19 December (i.e. the Monday) and said so far as is relevant:

'*Dear Mick,*

Further to telephone conversation between yourself and the undersigned on Friday, 16 December 2016 whereupon you resigned from your position, we confirm acceptance of your resignation with immediate effect.'

33. It is signed by Mr Shotton.

34. Having taken advice, the claimant then spoke to Mr. Shotton again and asked for his old job back. Mr. Shotton said that he could not have his old job but he could

have an alternative job in Slough or West Molesey as a labourer without the van. The claimant did not possess a car and believed that Mr Shotton knew this. He therefore drew the conclusion that this was not a genuine offer and he declined it.

35. The claimant replied by letter dated 26 January saying,

'*I wish to make it absolutely clear that I have not resigned and wish to return to my normal role immediately.*

36. He recounted events, and says that he took the words '*you know what to do'* as meaning that he should resign and he says, '*in haste I did'*.

37. He goes on,

'*I immediately apologised after the weekend break and you accepted my apology but I am now being told that I can only return in a different role. I was told that a letter was on its way and subsequently received a letter of 19 December 2016*.'

Concise Statement of the Law

38. Sometimes it is unclear whether and if so how an employment relationship has ended. The vital question however is always:

"Who *really* ended the contract of employment?"

39. The parties in this case agree that when the language used is ambiguous, the correct approach is to concentrate on how a reasonable listener would have understood the words uttered, not on the actual intentions of the parties. This is the 'objective approach'.

40. That approach does not always resolve matters however. Although it will normally be reasonable for a listener to assume that unambiguous words spoken by the speaker reflect the speaker's conscious, rational decision; if the circumstances in which the words are spoken cast doubt upon that, those words should not always be construed at face value.

41. Such 'special circumstances' include but are not limited to, circumstances where words are spoken in the heat of a moment, temper, or intense pressure. In such circumstances, the employer should allow a reasonable time to elapse to see if the employee did intend what he said. A wise employer will investigate the matter and if he fails to do so, a tribunal might conclude that there was a dismissal.

42.In *Willoughby v CF Capital Ltd [2011] IRLR 985,* Rimer LJ put it like this at paragraph 37:

''The "rule" is that a notice of resignation or dismissal (whether oral or in writing) has effect according to the ordinary interpretation of its terms. Moreover, once such a notice is given it cannot be withdrawn except by consent. The "special circumstances" exception as explained and illustrated in the authorities is, I

consider, not strictly a true exception to the rule. It is rather in the nature of a cautionary reminder to the recipient of the notice that, before accepting or otherwise acting upon it, the circumstances in which it is given may require him first to satisfy himself that the giver of the notice did in fact really intend what he had apparently said by it. In other words, he must be satisfied that the giver really did intend to give a notice of resignation or dismissal, as the case may be."

43.If there is a dismissal, first, the employer must establish the principal reason for the dismissal and show that it falls within the category of reasons which the law specifies as being potentially valid reasons. As Cairns LJ said in *Abernethy v Mott Hay and Anderson [1974] ICR 323*,

"*A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'*.'

44.Second, it is necessary for the tribunal to be satisfied that in the circumstances the employer acted reasonably in treating the reason as a sufficient ground for dismissing the employee. He will not be able to do this if the reason in fact relied upon is neither established in fact nor believed to be true on reasonable grounds.

45.The list of potentially fair reasons is that set out in the ERA 1996 s 98.

Analysis

46. I consider that, taken on their own, the words, '*you can stick your job*' are on their face ambiguous. 'Job' could mean the single job at Downton Hill or it could mean the entire employment relationship.

47. However, when those words are coupled with the return of a van which the claimant has kept habitually at his home overnight and had use of for a driving role which formed the majority of his employment, I consider that an objective observer would conclude that the claimant had unambiguously resigned. In reaching this conclusion I leave aside entirely the intent of and understanding of the parties, which at this stage is irrelevant.

48. Without more, a simple contractual analysis would lead me to conclude that the claimant had resigned unambiguously and the respondent had equally unambiguously accepted that resignation, so bringing the contract to an end. That would then take me into an analysis of whether the claimant had been constructively dismissed.

49. [For what it is worth and although it is academic now I consider that the conversation of 16 December amounted to a fundamental breach of contract. The legal context is that an employer has a duty to provide competent work colleagues. I can make no findings as to whether the painter was in fact safe or reliable. I do not suggest that the respondent failed in his duty of care, but it sets the context. The risks involved in climbing a ladder to a roof, 2 stories up, in order to work there are obvious. The need to have some means of footing a ladder is also obvious. The claimant's concern was entirely rational. Instead of setting out to allay his concern

Mr. Shotton gave the claimant a stark choice of accepting the situation about which he had rational fears or leaving. That to my mind evinces an intention no longer to be bound by the duties of the contract of employment and breaches the implied term of trust and confidence in that it was calculated or likely to undermine the relationship of trust and confidence without reasonable and proper cause. There was no need for Mr. Shotton to take such a robust and absolute approach: he could have taken time to describe the painter and his reliability, or he could have found other means, such as ensuring Jimmy's attendance, to ensure that the claimant was not only safe but knew that his safety was provided for and not left to risk and chance. If the claimant resigned, he did so in response to this breach.]

50. That however is academic. I have been taken with care through a line of authority which provides for what is sometimes called an exception to the rule that notice of resignation of dismissal once given, cannot be withdrawn except by consent.

51. The need for that so-called exception will almost invariably (but not always) arise in cases in which the purported notice has been given orally in the heat of the moment using words which may be quickly regretted. It seems to me that it is not a legal test that that should be the case; it is simply that as a matter of fact that is a circumstance in which the exception will commonly arise. It happens that this is such a case. It does not follow that if those facts exist I must find that the exception applies. Each case must turn on its own facts and circumstances. I think Ms Stanley is right when she says that a tribunal should be slow to find that special circumstances exist. Therefore, I approach this situation with caution.

52. However that may be, this is a case of an unambiguous resignation made orally in the heat of the moment by words which were quickly regretted. There were special circumstances which ought to have indicated to the respondent that the resignation was not really intended or at least put Mr. Shotton on his guard and cause him to realise that the words or acts should not be taken at face value.

53. The circumstances were these. The claimant had worked for the respondent for 18 years. He had a good record as an employee and was known to be loyal. He was 50 and might therefore find it difficult to replace his employment. There were reasons therefore - which Mr. Shotton would know- which would tell him that the claimant would not be likely to readily throw away his employment. Mr. Shotton knew from the context of the discussion that the claimant was very upset. He knew that the claimant had reason to be upset because he was afraid for his safety and the language he used demonstrated that he was upset.

54. The claimant then acted quickly to try to recover the situation. Representatives of the respondent knew that he was trying to do this. As soon as the claimant spoke to Mr. Shotton, he apologised and tried to put the situation right.

55. It seems to me more likely than not that during this period Mr. Shotton was taking legal advice and therefore refrained from speaking to the claimant until he had decided on a course of action. He did not investigate the situation to discover whether in the special circumstances the claimant really intended to resign before acting himself to terminate the contract. It seems more likely than not that in taking

this approach Mr. Shotton was influenced by the commercial sense of moving away from having a dedicated driver. The primary reason however was that the claimant had appeared to resign and the respondent took the opportunity of accepting it.

56. That analysis leads me to conclude that although on the face of it the claimant resigned and his resignation was accepted, special circumstances do exist which show that that resignation did not have effect according to the ordinary interpretation of its terms. In acting as he did in sending a letter accepting the resignation, it was therefore Mr. Shotton who terminated the contract.

57. Therefore, the respondent did dismiss the claimant.

58. I consider that the respondent did not have a fair reason for that dismissal. The reason or the principal reason for the dismissal was that Mr. Shotton believed that the claimant had resigned. Although the potential for 'some other substantial reason' or possibly even redundancy lay in the background, the respondent has not shown or even asserted that either of these was its principal reason for acting as it did at this point of the chronology.

59. The dismissal is therefore unfair, but it would have been unfair in any event because of the lack of process.

60. The burden of showing that a fair dismissal would or might have taken place in any event lies upon the respondent. I do not consider that the respondent has discharged this burden. Although it is possible that within a few weeks or months the claimant would have stopped being mainly a van driver I do not consider it possible to conclude that if this change had been discussed with him fairly, calmly and carefully he would not have accepted a change to a labourer's position. This is particularly the case given his age and his awareness of the difficulty of finding other work on the open labour market. If handled fairly, I consider the claimant would have remained in employment with the respondent.

61. Ms Smeaton suggests that if I find that special circumstances exist, it would not be logical to conclude that there should be a deduction for contributory fault. I do not agree. The claimant must accept some responsibility for the heated situation on 16 December. Had he not become so heated, had he explained more carefully and persistently the source of his fears, it might have been that the conversation would have had a satisfactory outcome. I think he must accept some responsibility and I place that responsibility at 25%. Therefore, any compensation must be reduced by 25%.

62. I turn to the question of section 122(1). This applies only to the basic award. I do not consider that the offer of work at Slough or West Molesey would have had the effect of reinstating the claimant in his employment in all respects as if he had not been dismissed. 122(1) is not limited to reinstatement on the same terms and conditions. Notwithstanding his contractual title which would encompass the work at Slough or West Molesey, the offer was one which involved the claimant returning to work as a labourer and not mainly as a driver. Had the events of 16 December not taken place I consider that on the following Monday the claimant would have

continued with work as mainly a driver. The changes envisaged by Mr. Shotton were not going to take place so quickly. Section 122 (1) does not apply therefore.

Remedies

63. After I had delivered judgment on liability, after a short break, we turned to remedies.

64. Counsel identified the points of principle which remained in dispute between them. These are set out below in bold. The claimant was recalled to give evidence.

Should the same reduction be made to the basic award as for the compensatory award? If not, what should be the reduction to the basic award?

65. I was taken to a passage in Harvey: Section D1,15.D.6. Both counsel also agreed that the wording which allowed a reduction to be made for contributory fault under section 123(6) of the 1996 Act was different to the wording of section 122(2). The former allows a reduction for contributory fault by such proportion as is just and equitable where a tribunal finds that a dismissal was to any extent caused or contributed to by any action of the complainant. The latter allows a reduction where a tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent then there shall be such a reduction.

66. It usually follows that the compensatory and the basic award are reduced by the same amount. I suspect that that is in part because parties are not often represented by counsel who draw the tribunal's attention to the distinction between the 2 different subsections. I note that the qualifier in each subsection is justice and equity but that is applied to different wording. In section 123(6) the reduction is because the claimant has caused or contributed to any extent to his dismissal, while in section 122 (2) it applies to any conduct of the claimant before his dismissal.

67. I read the transcript of the EAT's judgment in *Montracon Ltd v Hardcastle UKEAT/0307/12.* In that case, the EAT held that it is potentially a reason not to award the same amount if a claimant has long unblemished service. Each case turns on its own facts. It does not follow that I must award a different reduction where there is long, unblemished service.

68. However, in this case the claimant does have 18 years loyal service without a disciplinary record. He also made quick and strenuous attempts to apologise and to do so frankly. I consider that those are factors to take into account and that it is appropriate to make a different reduction to the basic award therefore. A nil reduction would not be just or equitable. The claimant's conduct in the heated exchange must still be taken into account but there are also other factors which are not under consideration under section 123(6). Accordingly, I reduce the basic award by 15%.

Has the claimant taken such steps as were reasonable to mitigate his loss in failing to accept the Slough/West Molesey offer and then failing to pursue it?

69. No. The claimant has a duty to take such steps as are reasonable to mitigate his loss. It does not lie in the mouth of the employer who created his situation, to be overly nice about the steps it requires him to take in mitigation. The claimant has to do what is reasonable.

70. It was not unreasonable of him to refuse a job which was so different in practical terms from the one he actually did from day to day. Had he accepted it, he would then almost certainly have lost his chance to recover the job he had previously and wanted to do.

71. I do not think it unreasonable of him not to pursue that Slough/West Molesey job. This is especially so in circumstances when it was not offered again. He would have had no reason to believe that the job was still open and after a particular point it had been filled in any event.

During the period 31 July to 14 September 2017 would the claimant have returned to work even though he was sick, had he been working for the respondent?

72. The claimant's last day of work was 16 December 2016. Between that day and 3 February 2017, he focused his efforts on trying to resolve the situation with the respondent and to return to work with them. He did not do any work between the date of his dismissal and 3 February 2017.

73. The claimant has a back condition which became steadily worse until in February 2017 he was in too much pain to drive. He has damage to a disc which presses on his sciatic nerve. Another disc has collapsed. A nerve root injection in May 2017 gave little relief.

74. He embarked upon the process of obtaining an HGV licence and passed the final driving test on 6 July 2017.

75. In July, the claimant contacted a driving agency who found him work driving an HGV lorry for Greggs on night shifts. He carried out that work for 2 weeks. Unfortunately, a manager saw that he was struggling with his back and told him that their insurance would not cover him. Therefore, the claimant was not permitted to continue with that work.

76. The claimant tried a second agency who found him a job delivering supplies to NHS hospitals and clinics. This did not involve heavy lifting. The claimant continued in that role for 4 weeks but unbearable pain forced him to stop.

77. Thereafter the claimant did not look for further work because he was not fit for work. He had an operation on his back on 13 October 2017, is currently unfit for work and the prognosis is that he will be unlikely to be fit for approximately 6 months.

78. What is the percentage chance that the claimant would have carried on working during this period had he remained with the respondent? The claimant says that it does not follow that just because the manager in the agency role sent him away that the respondent would have done. The claimant says from his experience of working for the respondent that they would not send him away.

79. I consider that there is an 80% chance that the claimant would have continued working for the respondent during this period. I cannot say that it is 100% certain because he was suffering from pain. He was however a loyal employee of the respondent. He did habitually struggle on when he worked for them. He knows their culture and their approach to such things. Taking all those matters into account I assess the chance at 80%.

What sum should be awarded for loss of statutory rights?

80. The claimant's schedule of loss claims £500 for loss of statutory rights on the basis that this head of claim should reflect one week's pay. I am aware of no authority that confirms that and his counsel was unable to refer me to one. I consider £500 too high. On the other hand, the claimant was a long serving employee with full statutory rights which he has completely lost and may never recover. I award £400.

81. Once those points of principle had been resolved, I was able to work through the remaining calculations with counsel and agree with them the figures which are set out in the judgment above. I am grateful to them both for their good sense and help.

82. The claimant has not claimed benefits and recoupment does not apply.

_____
Employment Judge Heal

Date: ……14/11/2017……..

Sent to the parties on: .....

.....
For the Tribunal Office