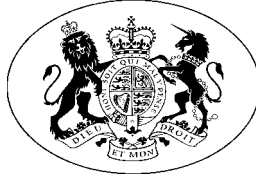


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EMPLOYMENT TRIBUNALS

Claimant: Mr S Jugroop

Respondent: London Underground Limited

Heard at: East London Hearing Centre

On: 11 January 2019

Before: Employment Judge M Hallen, Sitting alone

Representation

Claimant: Ms R Tuck (Counsel)

Respondent: Ms J Shepherd (Counsel)

RESERVED REMEDY JUDGMENT

The judgment of the Tribunal is that:-

1. It is reasonably practicable for the Respondent to reinstate the Claimant to his position of CSS2 and such statement must be within 21 days of the date of promulgation of this judgment;
2. The reinstatement in respect of the CSS2 position is to be at a weekly rate of pay of £876.30 gross for the period 14 July 2017 to 31 March 2018 and at a rate of £909.99 gross per week from 1 April 2018 until the date of reinstatement.
3. The Respondent will be liable for any tax payable on the back pay.
4. The back pay will be subject to the following deductions:

£9,419 paid in lieu of notice

£25,200.94 bound by way of mitigation.
5. The Claimant shall be restored to the Respondent's pension scheme with continuity from 26 August 2003.

REASONS

Background

1 By reason of a reserved judgment sent to the parties on 28 September 2018, the Tribunal had adjudged that the Claimant was substantively and procedurally unfairly dismissed from his employment and the case was listed for a remedy hearing on 11 January 2019.

2 At the hearing on 11 January 2019, the Claimant indicated to the Tribunal that he wished to be reinstated which remedy he sought in his claim form at paragraph 24 in the grounds in support where he confirmed that he sought reinstatement for unfair dismissal. In respect of today's hearing, the parties agreed that the issue for the remedies hearing on 11 January 2019 was to determine the question of whether it was practicable for the Respondent to comply with an order for reinstatement given the fact that the Claimant wished to be reinstated and that there was no determination in respect of the liability judgment that the Claimant had caused or contributed to his dismissal. The Respondent asserted that it was not reasonably practicable for the Claimant to be reinstated to his substantive position of Customer Service Supervisor 2 (CSS2) in respect of his contract of employment with London Underground Limited within any of its station within the London network. The reason for this was because the Respondent argued that there was a breakdown in trust and confidence due to: -

- 2.1 The Claimant sharing the written judgment of the Employment Tribunal with another member of staff within London Underground Limited not involved in the Tribunal proceedings, attaching a copy of the judgment and stating that Ms Borjatti (dismissing officer) unfairly dismissing him. The Respondent asserted that the sharing of the judgment demonstrated that the Claimant was unable to put the process behind him and the Respondent would be concerned about the impact this would have on the business going forward.
- 2.2 The Respondent was aware that since leaving the employment of London Underground Limited, the Claimant had been employed by Stagecoach as a bus driver and that his employment was summarily terminated by Stagecoach on 6 December 2018. The Respondent asserted that the Claimant had misled the Respondent and in the Tribunal in failing to be open about the circumstances surrounding his dismissal from Stagecoach which the Respondent asserted was for misconduct in his failure to follow accidents reporting procedures. It was asserted by the Respondent that this misconduct was a safety critical issue and meant that the Respondent lost trust and confidence in the Claimant.

3 The Tribunal had to determine whether it was reasonably practicable for the Respondent to comply with an Order for reinstatement on the basis of the alleged breach of trust and confidence as asserted by the Respondent. In this regard, the Tribunal had in mind the test set out by JJH Eady in the case of United Lincolnshire Hospitals NHS

Foundations Trust v Farren [2017] ICR 513. In this case, HHJ Eady stated that it was the employer's view of trust and confidence (appropriately tested by the Tribunal as to whether it was genuine and found it on a rational basis) that matters, not the Tribunal's view. Relevant factors may include:-

- 3.1 Whether the parties were able to trust each other;
- 3.2 Whether the nature of the allegations made it impossible for the employee and the subjects of the allegations to work together again;
- 3.3 Whether the industrial atmosphere had been poisoned against the employee and may lead to strife.

4 The Tribunal had in front of it an agreed bundle of documents made up of 445 pages albeit the relevant documents referred to the Tribunal were less than 20. In addition, the Tribunal had witness statements from the Claimant and his witness, Mr Eamon Lynch, and RMT Level 2 representative negotiator. In addition, the Respondent produced a witness statement from Sheila Fearon-McCaulsky employed as a senior people management advice manager with the Respondent.

Facts

5 The Claimant was born on 12 July 1972 and commenced work with the Respondent on 1 August 2003 and was dismissed on 14 July 2017. He was employed as Customer Service Supervisor 2 (CSS2) in the Leytonstone and Mile End Group of underground station on the central line and up to the termination of his employment he had a clean disciplinary record. The Respondent prior to the Claimant dismissal had no concerns about the Claimant's honesty, integrity or reliability. The Claimant's confirmation of appointment to the position of CSS2 was at page 287 of the bundle of documents and the Claimant confirmed that this role related to all such positions within the London Underground Limited network.

6 Following the Claimant's dismissal by the Respondent on 14 July 2017, the Claimant was offered the position of bus driver by Stagecoach which was a company owned by East London Bus and Coach Company Limited and he was based at the Leyton Depot. The Claimant was paid less in respect of this role than the income he received with the Respondent and the pension terms were inferior. Nevertheless, in order to regain an income, the Claimant accepted work and commenced a probation period of one year with the new employer on 6 November 2017.

7 While working for Stagecoach, the Claimant was involved in a few minor accidents which did not involved injury to anyone. He received warnings for these infractions from Stagecoach. In November 2018 he was told to take a driving retest by Stagecoach or face dismissal from his employment with them. He took the retest but failed this and due to his previous warnings in respect of prior accidents, his employment was terminated. As part of these proceedings, the Claimant disclosed documentation contained at pages 436 -445 of the bundle of documents that was personal to his dismissal from Stagecoach. At page 437 of the bundle was a letter dated 26 November 2018 to the Claimant scheduling a disciplinary hearing for 3 December 2018 to consider matters which Stagecoach

deemed to be very serious in nature. It was asserted “under the company’s policies and procedures I am obliged to inform you that should the charge be found proven and due to existing live formal disciplinary sanctions the range of penalties open to the Chair of this hearing include dismissal/summary dismissal. If you have any further information that you feel the Chair should be aware of before a decision is made, you should provide the information as soon as possible.” The charges in respect of the disciplinary hearing were poor driving standards in respect of damage to a mirror on the Claimant’s bus on 16 November 2018, the Claimant’s failure to report the accident contrary to the Stagecoach’s reporting procedures and the running late of the bus on 17 November 2018. As a consequence of the disciplinary hearing held on 3 December 2018, the Claimant was on 6 December 2018 dismissed from his position as a driver with Stagecoach. At the Tribunal hearing, the Respondent asserted that the Claimant’s failure to provide full discovery of his dismissal from Stagecoach for what amounted to a summary dismissal was a breach of trust and confidence and that the Respondent could no longer trust the Claimant if the Tribunal deemed it practicable for the Claimant to be reinstated into the position of CSS2. However, the evidence presented by the Respondent’s witness as to the alleged breach of trust and confidence was not persuasive. At the time the Respondent’s witnesses drafted her witness statement she could only state “he was summarily dismissed from Stagecoach on 6 December 2018. A copy of the formal leaving notice from Stagecoach can be seen at page 433 of the bundle”. The witness could not give any evidence over and above this assertion and could not further elucidate upon whether the parties were able to trust each other in respect of the termination of employment by Stagecoach of the Claimant. Furthermore, she could not adduce any evidence as to whether the nature of the allegations made it impossible for the parties to work together again nor did she go as far as to assert that the industrial atmosphere had been poisoned against the employee and would lead to strife in respect of the Claimant’s termination of his employment from Stagecoach. It was asserted that the CSS2 position was safety critical as was the role of bus driver but no further evidence apart from this statement was adduced by the Respondent to support such a contention.

8 Following the Claimant’s termination of employment with Stagecoach on 6 December 2018 he is currently out of work and looking for employment again. Because he had less than two years’ service and was aware that he could not pursue a claim for unfair dismissal he chose not to appeal it against Stagecoach’s decision to dismiss him. He has applied for two positions since his dismissal from Stagecoach, one on 8 December 2018 for an assistant project manager with the Respondent and another on 3 January 2019 as an administrative officer with the Court of Justice in Romford. He has not obtained alternative employment as at the date of this hearing.

9 The Claimant was dismissed for capability reasons based upon his health following an attack upon him in the workplace. He was not dismissed for misconduct or reason which undermine mutual trust and confidence that must exist between employer and employee. He was dismissed by Claudia Borjatti the dismissing officer who was still the Respondent’s area manager responsible for Leytonstone and Loughton Group Stations. She was the Claimant’s area manager since April 2016 and prior to this the Claimant had another manager. The Claimant gave evidence which was accepted by the Tribunal that he could quite happily worked with Ms Borjatti again. The appeal officer in respect of the Claimant’s dismissal was Mr Frank Ibe, the head of line operations. The Claimant only and frequently saw Mr Ibe. He gave evidence which was accepted by the Tribunal that he could quite happily work with Mr Ibe if reinstated. The Respondent did not call Ms Borjatti or Mr Ibe to give evidence to the effect that the relationship between

the Claimant and those two managers had irretrievably broken down.

10 The Respondent witness gave evidence to the Tribunal that the Claimant had by way of an email dated 21 October 2018 written to another member of staff within its operation but not involved in the Tribunal proceedings attaching a copy of the judgment and stating that Ms Borjatti unfairly dismissed him. The witness gave evidence to the effect that the sharing of this judgment demonstrated that the Claimant was unable to put the Tribunal process behind him and she would be concerned about the impact this would have on the business going forward. The email stated: “dear ... thank you for all your support on the day I was assaulted. Here is a copy of the Tribunal decision. Claudia dismissed me unfairly. I am now having to sell my flat as I can’t afford the mortgage anymore. Have a nice weekend. Sharma” the Respondent’s position to the Tribunal was that this email demonstrated that it had lost trust and confidence in the Claimant and therefore a reinstatement order was not practicable. The Respondent’s witness was cross-examined on this issue and was unable to satisfactorily answer why the sharing of a public document would lead to the breakdown of the implied term of trust and confidence between the parties.

11 The Respondent gave evidence to the Tribunal that there were six current vacancies at CSS2 level within London Underground and this was at page 435 of the bundle of documents. These vacancies included vacancies at Acton Town, Amersham, Ealing Common, Harrow on the Hill, and in Central Ladbroke Grove. The Claimant gave evidence to the Tribunal which was accepted that he would prefer to be employed within the Leytonstone and Loughton area on the Central Line if the Tribunal concluded that it was practicable to reinstate the Claimant to CSS2 level. However, he indicated that pursuant to his terms and conditions of employment he would be prepared to work elsewhere on the London Underground network as a CSS2.

Law

12 Sections 112 – 116 of the Employment Rights Act 1996 (“ERA”) provide that where an employee has been unfairly dismissed and wishes to be reinstated or re-engaged, the Tribunal must first consider whether to make such an order and should only make a compensatory award when it has made a positive decision against reinstatement or re-engagement.

13 Section 114 provides:

“(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.

(2) on making an order for reinstatement the Tribunal shall specify –

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement;

(b) any rights and privileges (including seniority and pension rights) which

must be restored to be employed; and

(c) the date by which the order must be complied with

(3) if the complainant would have benefitted from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefitted from the improvement from the date on which he would have done so but for being dismissed.

(4) in calculation for the purposes of subsection (2)(a) any amount payable by the employer, the Tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of -

(a) wages in lieu of notice of ex-gratia payment paid by the employer, or

(b) remuneration paid in respect of employment with another employer, and such other benefits as the Tribunal thinks appropriate in the circumstances."

14 Section 116 Employment Rights Act 1996 requires the Tribunal in exercising its description to order reinstatement or re-engagement, to take into account

"(a) whether the complainant wishes to be reinstated;

(b) whether it is practicable for the employer to comply with the order;

(c) whether the complainant has caused or contributed to his dismissal and whether it would be just to order his reinstatement.

15 In respect of the case of the Scottish Police Authority [2016] IRLR 633, the Supreme Court said that at the first stage when a complainant who has been found to have been unfairly dismissed has confirmed his wish to be reinstated, the Tribunal's judgment on the practicability of the employer's compliance with the order is only a provisional determination.

16 Lack of trust and confidence by the employer and the employee they make it unpracticable to order reinstatement. In the case of United Lincolnshire Hospitals NHS Foundation v Farren [2017] ICR 513, HHJ Eady stated that it was the employer's view of trust and confidence (appropriately tested by the Tribunal as to whether it was genuine and found it on a rational basis) that matters, not the Tribunal's view. Relevant factors may include:-

(1) Whether the parties were able to trust each other;

(2) Whether the nature of the allegations made it impossible for the employee and the subjects of the allegations to work together again;

- (3) Whether the industrial atmosphere had been poisoned against the employee and may lead to strife.

Tribunal's Conclusions

17 During the Respondent's closing submission, counsel confirmed that the Respondent was not producing an argument in respect of Section 116(5)(6) of the Employment Rights Act 1996 in respect of the appointment of a permanent placement for Claimant. The remaining issue for the Tribunal was to ascertain whether it was practicable for the Respondent to comply with an order for reinstatement.

18 With regard to the arguments made by the Respondent, it was asserted that it was not practicable to reinstate the Claimant because there was a breach in trust and confidence and therefore it was unpracticable to reinstate the Claimant. The Respondent firstly asserted that the Claimant's sharing of the judgment with an employee of the Respondent by email on 6 October 2018 following a successful claim for unfair dismissal in the Tribunal amounted to such breach. The Respondent's witness asserted that this demonstrated that the Claimant was unable to put the process behind him and the Respondent was concerned about the impact this could have on the business going forward. The Respondent's witness was asked on a number of occasions how the sharing of a public document on one occasion amounted to a breach of trust and confidence but was unable to do so. All that she could say was that she did not believe the Claimant should have shared the judgment with this one individual. The evidence adduced by the Respondent in this regard did not fulfil the test set out by HHJ Eady in the United Lincolnshire Hospitals case requiring the Tribunal to assess whether the Respondent genuinely believed that trust and confidence had broken down and that its belief in that respect was not irrational. The Tribunal was not satisfied that the Respondent had reached a rational conclusion that the sharing of the public document meant that the parties were unable to trust each other. Therefore, the Tribunal did not accept the Respondent's evidence in this regard.

19 The second matter that the Respondent asserted made it unpracticable for the Tribunal to order the Respondent to reinstate the Claimant was the circumstances surrounding the Claimant's dismissal with Stagecoach. It should be noted that the Respondent readily accepted that prior to the Claimant's dismissal he had no prior disciplinary record nor were his credentials in respect of honesty, integrity and reliability in question. The Respondent asserted that the circumstances surrounding the Claimant's dismissal from Stagecoach for summary dismissal for misconduct were misleading to the Tribunal and to the Respondent. Therefore, the Respondent had lost trust and confidence in the Claimant. However, the Respondent was unable to produce any satisfactory evidence to the Tribunal that it genuinely believed that this particular issue led to a breakdown in trust and confidence and/or that its belief in this respect but was not irrational. The Respondent's witness statement only stated that "I note however, that he was summarily dismissed from Stagecoach on 6 December 2018."

20 In cross-examination, the Respondent's witness adduced no evidence over and above this assertion to persuade the Tribunal that the fact that the Claimant's dismissal from Stagecoach amounted to a breach of trust and confidence and/or that that such belief was rationally held. It was also asserted that the Claimant's role as CSS2 with the Respondent was a safety critical role as was the role with Stagecoach as a bus driver.

However, over and above such assertion, no satisfactory additional evidence was produced to the Tribunal in this regard. The evidence adduced by the Tribunal could not substantiate the test set out in the United Lincolnshire Hospitals case namely whether the employer genuinely believed that the Claimant had been dishonest, whether that belief was irrationally held, and whether the employer had made good his case that confidence could not be repaired. In such circumstances, the Tribunal determined that it was reasonably practicable for the Respondent to reinstate the Claimant to a role at the CSS2 level within 21 days from the date of the promulgation of this judgment as set out at the beginning of this judgment.

Employment Judge M Hallen

Dated: 31 January 2019