Case Number: 2201335/2014

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT (sitting alone)**

BETWEEN:

Mr P Choksi

Claimant

AND

Royal Mail Group Ltd

Respondent

ON: **20 and 21 March 2019**

Appearances:

For the Claimant: **Mr J Crozier, counsel**
For the Respondent: **Mr S Peacock, solicitor**

WRITTEN REASONS

1. This decision was delivered orally on 21 March 2019 and the Judgment was sent to the parties on 22 March 2019. By a letter dated 22 March 2019 the claimant requested written reasons.

2. By a judgment delivered orally on 11 December 2018 and with reasons sent to the parties on 12 December 2018, the claimant succeeded on his claim for unfair dismissal.

3. This hearing was to deal with remedy and the costs of the postponement on 11 December 2018 at a remitted hearing.

Documents

4. I had three bundles for the remedy hearing, a core bundle which included the statements and previous judgments and some of the job roles in which the claimant is interested. Bundle 2 was the original hearing bundle from 2015. Bundle 3 was the remedy bundle before the tribunal in December 2018. There was around 850 pages of documents. I also had a schedule of costs from the claimant.

5. The tribunal heard from the claimant. From the respondent the tribunal heard from Mr Ricky McAulay, the Service Delivery Director for the South Region and from Mr Joe Miranda, an Independent Casework Manager within HR services for the South Region. He was also the appeals officer in connection with the claimant's dismissal.

6. I had a written submission from the claimant with some authorities. I had oral submissions only from the respondent. All submissions and authorities referred to were fully considered even if not expressly referred to below.

The issues

7. The primary issue for this hearing was whether the tribunal should order reinstatement or reengagement of the claimant. At the outset counsel for the claimant said that the claimant no longer sought reinstatement as he accepted that his original role was discontinued in November 2014. The issue was therefore whether the tribunal should order reengagement.

8. In the event that this was not ordered, the respondent accepted that it was liable to the claimant for the statutory maximum amount of compensation.

9. The Schedule of Loss produced a sum of over half a million pounds, capped at £43,692 (bundle page 253).

10. There was a finding at the last hearing that there should be no reduction for contributory fault. This is therefore not in issue.

11. It was also an issue for this hearing as to the amount of costs payable by the respondent under Rule 76(3) being the costs incurred by the adjournment of this remedy hearing on 11 December 2018. The reasons for this are set out in the Case Management Order of that date.

12. Essentially there was no evidence from the respondent on 11 December 2018 as to what had happened to the claimant's job since his dismissal, or what other vacancies might exist into which he might be reemployed and no evidence as to what the respondent had to say on practicability. I made Orders for disclosure of documents and witness evidence on these issues.

Findings on remedy

13. The claimant said that in his view the respondent could easily find him a role on the same terms as he was on at the date of dismissal. He said that after his dismissal he tried to find suitable alternative employment but was unable to find a job that matched his previous role. He started a new job on 12 June 2017 with Metroline as a bus driver.

14. The respondent's witnesses said that the claimant's view of Royal Mail as a business has changed substantially since he was dismissed in on 19

March 2014 because of privatisation five months prior to that in October 2013. I find on a balance of probabilities that because of privatisation, the respondent's evidence is to be accepted and I find that the business has gone through radical change in the last five and a half years. It is a more streamlined commercial organisation. Roles have been reduced and rationalised. I accept and find that post-privatisation the respondent is a different organisation to the one the claimant worked in some five years ago. This does not mean that it does not have vacancies arising throughout its extensive workforce.

Jobs sought by the claimant for reengagement

15. The respondent is an organisation of about 130,000 employees. The workforce in the South Region, managed by Mr McAulay, who gave evidence to the tribunal, is about 37,000.

16. There were seven job roles in which the claimant expressed interest. They were numbered (a) to (g) and are set out below. Because of his caring responsibilities the claimant ideally requires an early shift, from 6am to 2pm but is prepared to be flexible on occasions when needed as he had been during his employment with the respondent. The preference for the claimant is in the order as listed below.

    a. Production Demand Manager at Greenford. The claimant accepted during evidence that this was a role filled by another person some years ago. I find it is not an available vacancy.

    b. Early Shift Manager at EL1 grade, based at Greenford. This is a grade above the role that the claimant held. The relevant email was at page 82 from Ms Julie Forde in HR who said it was grade EL1. The claimant did this role briefly on a temporary basis but did not secure the substantive role at this grade (page 82). It was submitted that he could be reengaged in this role on his MS2 grade. I reject that submission for three reasons. Firstly he was not previously successful in gaining the substantive role which indicates a lack of suitability for that role. Secondly it is a higher graded role. Thirdly I consider it most unattractive and undesirable to order reengagement in a role at EL1 grade on MS2 terms. The claimant submitted that notwithstanding the ***Rank Xerox*** case (below) there is no obstacle to appointment in that the tribunal can set out the terms of the reengagement. I find that it would create an obvious equal pay problem if there was an opposite sex comparator and this sort of disparity ought not, on my view, to be created by tribunal Orders even accepting that the tribunal has some flexibility in terms of what it can order. For these reasons I consider that it is not a suitable role for an order for reengagement and in any event I consider that the ***Rank Xerox*** case prohibits this.

    c. Projects Manager also known as Deployment Leads or Deployment Managers at grade MS2 and MS4, respectively, at locations across the UK. I saw an email in the bundle from a Recruitment Manager in

HR (bundle page 74) which said that the business case for these roles had been rejected and the respondent was no longer recruiting to these roles. I find that these are not vacancies available to the claimant. The claimant identified this role, it was not identified by the respondent in their search or through their disclosure as it should have been. I saw an email from the respondent dated 6 March 2019 (page 71) stating that the project was on hold, the roles were no longer confirmed and the expected start date, once approved was October 2019. The email stressed that it was still to be confirmed. By 13 March 2019 in an email from a recruitment manager to the claimant (page 74) he was told in a detailed email that the business case had been rejected. I find that there is no available vacancy.

d. Traffic Office Manager at ML3/4 grade (being one or two grades below the claimant's previous role), based in the Hanger Lane area close to the claimant's home. The respondent said that an original role in the Heathrow area had since been filled (p.70AA-71). However, a further Traffic Office Manager role in the Hanger Lane area was advertised two days before this hearing, on 18 March 2019, working an early shift and commencing on 8 April 2019 (page 110). The respondent said it is a specialist role requiring experience of managing a transport function and the respondent said the claimant does not have that experience. The claimant was not doing this in his pre-dismissal role. He has had some limited relevant experience in 2008 and 2012 but not aligned to this particular role in leading a transport and distribution function. The claimant is currently a bus driver and said this gave him relevant experience. I find that being a bus driver this gives him some relevant knowledge of transport regulatory issues but he is not managing a transport and distribution function. I agree with the respondent and find that this is not a suitable vacancy for an order for reengagement.

e. Operations Manager – this is also at ML4 grade, lower than the claimant's previous role. It is based in north London (pages 104-107). According to the most recent information from the respondent this role is in the process of being recruited to and is available (page 70AAA). The claimant said it fitted his skill set and experience. It is a Cover Manager role. The respondent said that other than 6 months experience in 2012 and some brief managerial experience in 2008 the claimant's past work bore no resemblance to front line service delivery. He was working in a stand-alone technical role as an Automation Performance and Sortplan Manager at middle management level. The claimant set out in his remedy witness statement at paragraph 4 what his job entailed and I find that it was not a service delivery role. He was not an operational manager. This is not a suitable role for an order for reengagement.

f. Office Manager / Executive Assistant in the Pension Trustees' office – the exact grade was unknown but as it was around the claimant's salary, Mr Miranda thought it was likely to be equivalent. I find on a

balance of probabilities that the grade is equivalent. The claimant's evidence was that he had spent four to five months in 2010 working as an executive assistant and PA to a Senior Plant Manager and a Late Shift Manager where he did some of the relevant tasks, including keeping diaries, organising meetings and taking minutes. The roles of Senior Plant Manager and Late Shift Manager are below Executive Level and this is a role working with those at Executive Level. The job description was at page 112-113. It required "*extensive experience*" supporting senior executives and it required working as a team with sensitive information. I find that 4 – 5 months experience of a lesser role nine years ago is not "*extensive experience*" as envisaged by that job description and it is also not extensive experience supporting senior executives. The claimant's experience was supporting those below executive level. The respondent also submitted that there was a concern about the claimant working with sensitive information. I find that this was a legitimate concern given the admission the claimant made about his password and storage of personal material on his work account. I find that this is not a suitable vacancy for an order for reengagement.

g. The claimant's case was that as a catch-all he could be employed via the respondent's redeployment pool for employees displaced from their roles under the respondent's Managing the Surplus Framework known as MTSF. It was not in dispute that it acted to preserve an employee's pay, grade and conditions whilst they wents through a process that could lead to one of three outcome: voluntary redundancy, compulsory redundancy or redeployment. The respondent had a profit warning in September 2018 and has to make a head count reduction of 20-25% to improve its financial position. Based on Mr McAulay's evidence I find that MTSF does not represent a role for anyone. It is a holding position pending one of the three outcomes mentioned above. It is does not represent a vacant role into which reengagement can or should be ordered. It is a temporary holding position for those who are at risk of redundancy.

Practicability

<u>The trust and confidence issue</u>

17. If I am wrong in relation to any of the above vacancies I go on to deal with the issues of practicability. The main issue on practicability is the respondent's case that the trust and confidence in the claimant has broken down irreparably. This is a material consideration on the question of practicability. Mr Miranda gave evidence at this hearing and he was also the appeal officer in relation to the claimant's dismissal. He saw the offending material on the claimant's password protected NetApp account. It left a lasting impression on him and the police were involved. Mr Miranda's evidence was that if the claimant was in any way responsible for that material being on his Royal Mail account, then he was not suitable for employment in their business.

18. It is not in dispute that the offending material was of extreme sexualised nature which the claimant agreed was "*at the extreme end of appalling*" and in the case of one image, amounted to a criminal offence. The claimant accepted the Technical Report (original hearing bundle page 72) said that the images were there as a result of deliberate activity on his account. The claimant accepted in evidence that the respondent was entitled to have serious regard to this.

19. At the time of the appeal and as at the date of this remedy hearing, Mr Miranda believes the claimant to have been responsible for that material being there. He says that the offending material could only have been placed there with the claimant's authorised user identity and password. Mr Miranda said that the claimant knew he had to protect his password to maintain the integrity of the respondent's business information security.

20. Mr Miranda said that to use the claimant's password, another person would need to know his user name and password, store the material there and leave it there whilst risking their own employment and possible criminal sanctions. He considers that it was the claimant who was responsible.

21. It is not in dispute that the respondent has not canvassed the "views on the ground" of the employees who might have to work with the claimant if he were reemployed. This would be difficult for the respondent, not knowing where the claimant might be placed. Seven potential job roles were identified. The claimant's position was that as with the ***Oasis*** case, there were unlikely to be difficulties with those with whom he would have a regular working relationship.

22. Mr McAulay's evidence was that given the nature of the issue, it would be a "*highly risk thing to do*" to engage in conversations with the claimant's peers whom he considered would have mixed views on the matter. I agree and find that it was not incumbent on the respondent to go canvassing the views of employees in different work locations and explain to them the issues with the claimant's case, given the nature of those issues. I accepted Mr McAulay's evidence that the case had been quite high profile with the involvement of the police and an arrest at work.

23. The factual scenario in the ***Oasis*** case and the opposition to reengagement was on the basis that the claimant had engaged in aggressive correspondence with some senior members of staff which was regarded as harassing and he had made complaints about the respondent to regulatory authorities. The EAT upheld the tribunal's reengagement order. That claimant would be working at a different school and not with the individuals with whom he had engaged in the aggressive correspondence. The EAT found that the tribunal's view of reengagement was rather more favourable than generally found, but it did not amount to an error of law. The EAT said that no general conclusion should be drawn from their decision about the readiness with which reinstatement or reengagement orders should be made. It remains a question of fact.

24. Employment Judge Professor Neal found (paragraph 11(26)) that the presence of the offending material on the claimant's account was likely to be attributable to deliberate activity on the account and the account was password protected in the name of the claimant. That finding stands.

25. He also found that warnings with regard to passwords were given on a regular basis to all users when they logged on and those warnings spelt out in graphic detail the seriousness of not complying with the acceptable use policy and indicated the sanction that would follow. Judge Neal found that the claimant accepted he was given the warnings. He found (paragraph 11(31)) that the claimant had "*effectively confessed his misconduct*".

26. The Technical Report does not show that the claimant downloaded the offending material but neither does it exonerate him. Mr Miranda considered that although Mr O'Donovan would not have dismissed for password sharing alone, he, Mr Miranda, considered it gross misconduct.

27. In cross-examination the claimant revisited with the respondent's witnesses the issue regarding an alleged "custom and practice" of password sharing. I decline to revisit this issue when there are findings of fact from Judge Neal on the matter having heard from the relevant witnesses (judgment paragraph 4). He found (paragraph 11(31) that the claimant effectively confessed his misconduct.

28. The claimant also admitted that he used his work account for backup and downloading of his personal material which he should not have done.

29. Mr McAulay's oral evidence to the tribunal on the trust and confidence issue was: "*I have significant concerns, about the findings in the case, so whilst the Technical Report did not identify that the claimant downloaded these images, neither did it exonerate him and there is real concern, either through password sharing which is a significant breach and loss of confidence, there is also the concern that those images were downloaded so one way or another he is responsible for those. One was of a criminal nature*".

The relevant law

30. Under section 112 ERA where a tribunal finds the complaint of unfair dismissal to be well-founded it shall explain to the claimant what orders can be made under section 113 – namely reinstatement or re-engagement. The claimant has been advised as to this.

31. Reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed. All his contractual rights on matters such as pay, holidays, pensions and seniority must be restored to him, including any improvement in terms and conditions.

32. Reengagement is a more flexible remedy. It can be to a different job provided that job is comparable to that from which he was dismissed, or other suitable employment. The Order must specify (i) the identity of the employer; (ii) the nature of the employment; (iii) the remuneration; (iv) the amount payable in respect of any benefit which the claimant might reasonably have had but for the dismissal, including arrears of pay for the period between dismissal and re-engagement; (v) any rights and privileges, including seniority and pension rights to be restored to the claimant; and (vi) the date by which the order must be complied with.

33. The tribunal cannot order reengagement on more favourable terms - ***Rank Xerox (UK) Ltd v Stryczek 1995 IRLR 568.***

34. In exercising the discretion to order reinstatement re-engagement, the tribunal must take into account the matters set out in section 116 ERA. The factors are:

> *(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.*

35. Practicability is probably the most important factor to take into account when considering whether or not make an order for re-employment and it is a question of fact for the tribunal.

36. The initial decision on practicability is provisional. The EAT in ***Timex Corp v Thomson 1981 IRLR 522*** said that the stage when the order to re-engage is being made, it is not necessary for the tribunal, looking at future possible events, to make a definite finding that the order for re-engagement is practicable. They must have regard to the question of

practicability and if they are satisfied that it is unlikely to be effective, they will no doubt not make an order. The only strict requirement is that they should have regard to practicability. This approach was approved by the Court of Appeal in ***Port of London Authority v Payne 1994 IRLR 9*** who went on to say "*The final conclusion as to practicability is made when the employer finds whether he can comply with the order within the period provided for reinstatement or re-engagement. At this second stage the burden of proof rests firmly on the employer*." This approach was approved more recently by the Supreme Court in ***McBride v Scottish Police Authority 2016 ICR 788*** at paragraph 37.

37. Practicability does not mean what is possible. The tribunal has to consider the industrial relations realities of the situation. It means more than merely possible but "cap*able of being carried into effect with success*" - ***Coleman v Magnet Joinery Ltd 1974 IRLR 343.*** The employer does not have to create a job for the displaced employee.

38. A breakdown in mutual trust and confidence is material to the issue of practicability. The tribunal must not substitute its own assessment of that issue for that of the employer. The question of trust and confidence has to be tested between the parties to decide whether an order for re-engagement is practicable, whether it is capable of being carried into effect with success, and whether it could work. An employer may have reached a conclusion as to the employee's honesty by an impermissible route in its dismissal decision or might have drawn an incorrect inference, but the tribunal still has to ask, as at the date of the remedy hearing, whether it is practicable or just to order this employer to re-engage the employee – see ***Central and North West London NHS Foundation Trust v Abimbola 2009 All ER (D) 188 (EAT).***

39. It is the employer's view of trust and confidence, appropriately tested by the tribunal as to whether it was genuine and founded on a rational basis, that matters, not the tribunal's view – see ***United Lincolnshire Hospitals NHS Foundations Trust* v *Farren 2017 ICR 513*, *EAT***, Eady J. The threshold for threshold for determining whether the respondent lacks adequate trust and confidence was set out by the EAT in this case. Any such belief must be genuinely held and have some rational underpinning [40]) and the impact of the respondent's alleged loss of trust and confidence on the practicability of reengagement must be measured against the likelihood that the relationship could not be repaired at [42]).

40. As stated in section 116 ERA, an order for reinstatement or reengagement is within the tribunal's discretion taking into account the factors in that section. It is not to be treated as the primary remedy unless it can be shown to be impracticable – see Underhill J (as he then was) in ***Oasis Community Learning v Wolff EAT/0364/12*** (paragraph 33). In ***Oasis*** the claimant was a teacher dismissed as a result of allegations regarding his style in dealing with difficult pupils, which was said to have been too confrontational. He made allegations of misconduct against the respondent as an organisation and against members of the HR

department. The EAT said that this was not a case where working relationships that would have to continue had been irreparably damaged. They considered it inherently unlikely that any difficulties outside the sphere of those with whom he would have a regular working relationship would be such as to render his reengagement impracticable. In that case the real issue was with two individuals, one who had left and the other, was someone with whom he would not have to deal. The practicability issue is one for a factual assessment.

Costs

41. Rule 76(3) of the Employment Tribunal Rules of Procedure 2013 says that where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if: (a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and (b) the postponement of that hearing has been caused by the respondent's failure, without special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed, or of comparable or suitable employment. No special reasons were put forward at the last hearing and an Order for costs was justified.

Findings and conclusions

42. In making my decision on whether to order reengagement I took account of one of the more recent authorities from the EAT, from Eady J in ***Farren.*** She said that where an employer was relying on a breakdown in trust and confidence as making re-engagement impracticable, the tribunal had to be satisfied not only that the employer genuinely believed that trust and confidence had broken down but also that its belief in that respect was not irrational; that the issue of trust and confidence had to be tested in order to determine whether a re-engagement order was capable of being successfully carried into effect by the parties.

43. In ***Farren*** Eady J took the view that the tribunal had relied on its own assessment of the claimant's record and professional commitment in concluding that she could be trusted in a different department, whereas it should have asked whether the employer genuinely believed that the claimant had been dishonest, whether that belief was rationally held, and whether the employer had made good its case that confidence could not be repaired. I reminded myself that it was not for me to substitute my view for that of the respondent in this case.

44. This is not a case where the trust and confidence issue goes to a breakdown of relationships between specific individuals. It is not, as in ***Oasis***, a case in which the claimant had sent harassing emails to particular individuals, with whom, upon reengagement he would not have to work. The trust and confidence issue for the respondent was of a different nature. The claimant had admitted to misconduct in the way that he used

his password. He was a middle manager. He knew about the warnings. On his own admission he used his work account inappropriately to back up his personal materials. This included photographs, music and other personal files. He should not have done this on any basis. He shared his password in breach of IT security policies that he knew about and his account was severely compromised. It represents a risk to the integrity of the respondent's IT security. It is a wider concern about trustworthiness and a lack of confidence in the claimant which I find is not irrational and is a genuinely held belief.

45. Mr Miranda's view was that if the claimant was "in any way responsible" for the offending material being in his account, he would not be considered suitable for reemployment. His account was password protected and access to the account could only be with his user identity and individual password. He knew he was required to protect that information. Mr Miranda heard the appeal in which the claimant did not put forward to him any credible or compelling reason why he needed to share his password other than on one occasion to a member of IT as part of a pilot programme. Mr Miranda did not consider the claimant credible in his explanations and considered him untruthful. Mr Miranda was concerned about the claimant's practice of storing his personal music, photographs and other personal files on his work account when there was, in his words, "*no logical reason for doing so*". I find that Mr Miranda's belief was not irrational.

46. I find that even if there was a suitable vacancy into which the claimant could be reengaged, it is not practicable to do so and I decline to order this.

The award

47. The claimant is entitled to compensation at the statutory maximum agreed between the parties at £43,692 for the compensatory award. In addition I award the basic award at £9,450.

48. The claimant sought an uplift of 10% because the ACAS Code said that the an appeal should never be used as an opportunity to punish the employee for appealing the decision. I asked that the parties check that it was the Code or the Guide that said this. I was reminded that it was the Guide and not the Code and this was dealt with at the remitted hearing before me and in my decision at paragraph 41. The claimant shifted the argument to the Code and paragraph 22 "A decision to dismiss should should only be taken by a manager who ahs the authority to do so". The claimant says that because Mr Miranda "upped" the penalty, he breached paragraph 22. The claimant said paragraph 22 does not say this. It says that the decision to dismiss, made by Mr O'Donovan, had authority.

49. I find that the respondent complied with paragraph 22 and that the dismissing officer had authority to dismiss. There was no breach, let alone an unreasonable failure to follow the Code. I did not agree to apply any uplift to the award.

The costs application

50. The decision to award costs was made at the last hearing as the situation fell squarely within Rule 76(3). I had a schedule of costs from the claimant. The hourly rate and grade of fee earner (grade A) was agreed by the respondent. VAT is payable as the claimant is not VAT registered. The schedule of costs produced a grand total of £10,944.

51. Mr Peacock for the respondent took the tribunal through the schedule and identified the items which the respondent considered were too high. The respondent also disputed the amount of counsel's fee at £4,500. Counsel is 10 years call and this was a case which had been to the EAT and had some complexity. I find that counsel's fee was proportionate and reasonable and I allow it in full.

52. On the itemised schedule, the I allow attendances on the claimant and attendances on the respondent at 4.2 hours. Attendances on counsel are disallowed in part as this should be taken as being included within the brief fee and I agree the respondent's position at 2.4 hours for attendances on counsel. This makes a total of 6.6 hours.

53. In the schedule of work done on documents I disallow the following: 1 hour for perusing the claimant's schedule of loss, half an hour for considering the early shift manager role as this was a very short email, 1 hour for considering the case management order, this was short and the parties had been present and knew its contents in any event and an hour and a half for reading the judgment of the remitted hearing and reasons. For those combined items I allow a total of 1.5 hours. The schedule of work on documents produces 8.4 hours to which is added the 6.6 hours, gives a total of £3,300 at the hourly rate of £220 + counsel's fee and VAT.

54. The parties agree on the mathematical calculation based on my findings that the award of costs is therefore in the sum of **£9,360** to include VAT.

_____

Employment Judge Elliott
Date: 1 April 2019

Sent to the parties and entered in the Register on: 3 April 2019.
_____ for the Tribunals