Case No: 1400340/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Finn**

Respondent: **British Telecommunications plc**

Heard at: **Bristol** **On:** **16 and 17 May 2019**

Before: **Employment Judge Livesey**
Mr H Launder
Ms S Maidment

Representation
Claimant: Mr Cooper, trade union representative
Respondent: Ms Maher, solicitor

JUDGMENT

1. The Respondent shall re-engage the Claimant under s. 115 of the Employment Rights Act. The following particulars apply in accordance with s. 115 (2);
   (a) The identity of the Claimant's employer will be the Respondent and/or Openreach;
   (b) The Claimant will be re-engaged as a Team Member - Network Engineer 2 and will undertake work as a fibre jointer;
   (c) The Claimant's salary will be not less than £26,562;
   (d) The Respondent shall pay compensation to the Claimant in the sum of £15,328.32, being the pay and other benefits which the Claimant has lost between the date of his dismissal and the date in (f) below;
   (e) No further order;
   (f) The Claimant shall be re-engaged by 30 June 2019.

2. The Respondent is to pay the Claimant of a basis award in the agreed sum of £1,711.50.

3. No further award is made in respect of the claim of breach of contract relating to notice.

REASONS

1. The claim

1.1 By a claim form dated 24 January 2018, the Claimant brought complaints of unfair dismissal, breach of contract, discrimination on the grounds of disability and unpaid holiday pay.

1.2 At a hearing which took place on 19, 20 and 21 November 2018, the complaint of unpaid holiday pay was dismissed upon withdrawal, the discrimination claims were dismissed but the claims for unfair dismissal and breach of contract succeeded. A remedy hearing was listed for 25 and 26 February 2019 but that hearing was postponed. A Case Management Preliminary Hearing took place by telephone on 25 February 2019 instead and the remedy hearing was relisted to today and yesterday.

2. The evidence, the hearing and the issues

2.1 The Claimant gave evidence in support of his losses. From the Respondent we heard from Ms Provoost, a Senior HR Business Partner, Mr Pennells, an Area Manager, Mr Buch, the Respondent's Head of Transport and Miss Talbot, a Network Engineer.

2.2 The Claimant produced the hearing bundle, C1 and Ms Maher produced written closing submissions, R2.

2.3 The parties did not cover themselves in glory in this case. The original remedy hearing which was listed in February 2019 had to be postponed because of their failure to prepare properly for it. At the hearing which took place instead on 25 February, the parties were chastised and warned about their future conduct (see paragraphs 5 and 6 of the Case Management Summary of 25 February 2019). Despite that, the Tribunal had to deal with a number of issues at the start of the hearing;

(i) The bundle; the hearing bundle grossly exceeded the page count specified within the Order of 25 February. Mr Cooper had made no attempt to gain permission for an extension. It was also in a somewhat disorganised state; although largely paginated, it contained 3 separate bundles with their own separate paginations. There were in excess of 450 pages within it, yet only only 20 pages were referred to during the evidence. None of the witness statements cross referred to its contents;

(ii) The Respondent's witness statements; these also exceeded the word count limit specified by the Order of 25 February. Permission had been sought to extend them, but after 4.00 pm on the day before the hearing. The Claimant's representative had only seen them on Tuesday, 14 May.

2.4 Despite those problems, the parties were happy and willing to get on with the hearing to avoid the necessity for any further adjournment. The Tribunal was acutely aware of the fact that the Claimant pursued orders

for reinstatement or re-engagement. A further postponement would not have improved his chances of obtaining such an order.

2.5 The Tribunal held an extensive discussion with the parties at the start of the hearing about the issues and, in particular, the extent to which agreement could be achieved in respect of the Claimant's past losses. That discussion was fruitful and the agreed figures have been set out further below.

3. The facts

3.1 The Tribunal reached the following factual findings on the balance of probabilities and any page numbers within these Reasons are to pages within the remedy bundle, C1, unless indicated otherwise and have been cited in square brackets.

3.2 The Claimant's employment had begun with the Respondent on 4 April 2014. The details of his appointment and role were set out between paragraphs 4.2 and 4.6 of our Reasons of 27 November 2018. The Claimant had come to the Respondent as a result of the agreement or covenant which the Respondent had formed with government, referred to in paragraph 4.3 of the Reasons.

3.3 As a result of his disability, the Respondent supported him as set out within paragraph 4.15 of the Reasons. He was provided with a Health and Wellbeing Passport which recognized the nature of the Claimant's disability and set out the various adjustments and support mechanisms which were in place. The further adjustments which the Respondent had put in place were covered in paragraphs 4.15 (ii) – (vii).

3.4 From May 2015, the Claimant was part of the Respondent's Fibre Business and Corporate Delivery Team ('BCD'). He then moved into the cable laying team in 2016. Both teams worked out of the Respondent's Bristol depot. In June or July 2017, he moved to the Fibre Jointing Team which worked out of the same depot. Although he received his work from his home depot, he had a base 'garage' depot in Yeovil, which subsequently changed to Shepton Mallet, his home town.

3.5 The Claimant was dismissed on 22 November 2017 as a result of incidents of alleged misconduct which were covered in detail within our previous Reasons. At that point, he was earning £26,562 gross per year. His agreed net weekly pay was £414.46. There was no criticism about the quality of the Claimant's work.

3.6 As part of our directions on 21 November 2018, and with the Respondent's cooperation, we ordered that the Claimant's ability to resume work was to have been assessed by the Respondent's Occupational Health provider. Dr Bastock saw the Claimant in February 2019 and prepared a report on the 18th of that month [51-4]. He answered a number of specific questions in the material evidence was as follows;

"*The extent to which this condition has altered since 21 August 2017 if at all?*

There has been a substantial improvement in his condition since August to 2017. At the assessment there were no current symptoms of a mental health condition.

Whether he is fit to return to his previous role?

Mr Finn would now be medically fit to return to the role of fibre telecommunications engineer following an improvement in his condition.

If so whether any adjustments ought to be considered for that role?

There will be some adjustments required for the role. In the previous report it recommends some adjustments such as working in a small team where change is kept to a minimum and also working in a team with colleagues who are of a similar age to himself. However he stated that these adjustments would no longer be required following an improvement in his condition. However he would require a period of retraining and re-familiarisation. He may also require additional brakes if suffering with any agitation or irritability. He may also require time off for further treatment for his post-traumatic stress disorder if this was required. There would also be a requirement for a briefing from a line manager to advise any team members that sometimes he may react differently to what they would expect and to give advice regarding any triggers which may be problematic for him."

Dr Bastock further stated that the Claimant was medically fit to work as a fibre jointer, fibre cabler and/or an HGV driver.

3.7 It was clear that the Claimant's condition had improved markedly, particularly when compared with some of the previous evidence which we discussed between paragraphs 4.7 and 4.14 of our earlier Reasons. The Claimant spoke eloquently about his recovery when he gave evidence. He recognised that conversations would need to take place between him and the Respondent so that they could move forward in the event that an order for reinstatement or re-engagement was made; "*what we need to do now is both realise that we've been silly beggars and talk about the issue*".

3.8 The Claimant lives in Shepton Mallet, Somerset. He currently works there too; he has found permanent employment with Gregorys, a well-known large distribution company. He is an HGV2 driver. He nevertheless wants to be reinstated to his old job or re-engaged in any fibre jointing or driving job in the Southwest. The geographical area was more particularly refined at the Case Management Preliminary Hearing which took place on 25 February 2019; Gloucester to Lands End and as far east as Salisbury (see paragraph 8 of the Summary).

3.9 In 2000, the Respondent and the recognised union, the CWU, agreed that a reasonable travel to work time for its employees would be 1 ½ hours, a

time which is now reflected within its Effective Deployment of Displaced Individuals Policy. When asked about the possibility of being re-engaged by the Respondent more than 90 minutes from his home, the Claimant stated that he would relocate. He considered that work with the Respondent was preferable to that with Gregorys; not only were the wages better but his pension entitlement was more beneficial.

3.10 As to the possibility of the Claimant being reinstated to his old role within the Bristol depot, Ms Maher made much play of the evidence which the Claimant gave in his 'impact statement', his statement of remedy for the hearing [34-37]. It was noteworthy that the statement had been prepared in March 2019, after Dr Bastock's interview. In it, he said that he did not want to see his ex-colleagues [35] and he felt that they hated him [36]. During his evidence, he attempted to distance himself from those comments. He stated that, since he knew that Mr Ponting had left, his views had softened. Nevertheless, he considered that Mr Pennells, who would become his second line manager were he to return to the Bristol depot, had behaved '*despicably*' [37].

3.11 The Respondent's witnesses gave evidence which mirrored much of what the Claimant had said in his witness statement. Miss Talbot said that she did not want the Claimant to return to work, nor did her other team members. She recounted incidents in which she had felt intimidated by him. She said that she had spoken to about 20 people and "*everyone has said that they didn't want to work with him again".* Not only is she still within the team, but so too are Mr Webb and Mr Ware, those who were directly involved in the incidents for which the Claimant was dismissed.

3.12 In relation to fibre jointing work elsewhere, Mr Pennells indicated that there were between 260 and 290 fibre jointers in the geographical area in which the Claimant was prepared to consider alternative work. We were told that 9 vacancies had been advertised internally at the start of this week (13 May), 5 in Salisbury and 4 in Gloucester. They were to be filled from the Service Delivery department. There were also vacancies for fibre jointer apprentices in Bristol, Gloucester, Exeter and Salisbury, paid at the lower rate of £21,523 p.a.. Despite the lower wage, the Claimant was still interested in those roles. He took the view that the email which his representative had received on 15 May notifying him of those vacancies, was a specific job offer for him. We did not read the email in that way (the document was inserted at the very back of the hearing bundle, C1, without a page number).

3.13 In relation to HGV2 work, Mr Buch stated that there were a number of vacancies across the Southwest which were being filled by the agency staff who currently undertook them. There are 2 such vacancies in the Taunton depot, the only ones within the relevant area.

3.14 In general terms, Mr Buch, Mr Pennells and Ms Provoost all expressed concerns about the Claimant's past conduct and the possibility of a repeat of his violent outbursts. We were not impressed with that evidence since it

seemed to fly in the face of the up-to-date medical evidence. Ms Provoost referred to a reference of violence in Wg Cdr Neal's report of 24 February 2014 (page 61 of R1). That reference was never put the Claimant during his evidence at either hearing. There was no evidence of him having been involved in it any act of violence.

3.15 We found it difficult to accept that the Claimant presented the level of risk suggested by the Respondent's witnesses given the contents of the medical evidence and his previous history with the Respondent. We bore in mind the fact that he was known to have been disabled as a result of the mental impairment at the start of his employment for which suitable adjustments had been made. He has also held three different roles since his dismissal and there was no suggestion that his condition had impacted upon his ability to provide anything other than effective service. We considered that his evidence was infused with a good deal of insight into his condition and the potential triggers for a loss of equilibrium. He told us that he had been more open about his condition with colleagues since his dismissal, which has put him in a much stronger position.

3.16 If the Claimant was not reinstated or re-engaged, he said that he would want to continue working with Gregory's. He hoped to gain his HGV1 licence. He said that he would be able to increase his earnings with an HGV2 licence if he work nights or undertook 'tramping' (driving away from home). He was contemplating further training as a plumber and/or fire safety engineer. He also thought it possible that he might be able to obtain freelance work as a data cabler.

4. Conclusions

Reinstatement/re-engagement; relevant legal test

4.1 The Claimant in this case sought an order for reinstatement or re-engagement.

4.2 An order for reinstatement requires a respondent to treat a claimant in all respects as if he had not been dismissed (s. 114 (1)). It is an order requiring the employer to put the employee back into precisely the same job with the same colleagues as before (*British Airways-v-Valencia* [2014] IRLR 683). Upon making such an order, a tribunal must specify amounts payable by a respondent in respect of pay, privileges, benefits and pension rights which he may have lost in the interim. The order must also specify the date by which it has to be complied with. Such an order therefore effectively requires a claimant to be restored to his original job and receive back pay and benefits from the date of dismissal (s. 114 (3)).

4.3 The factors which determine whether an order for reinstatement ought to be made are those set out within s. 116;

(i) Whether the claimant wishes to be reinstated;

(ii) Whether it is practicable for the employer to comply with such an order;

(iii) Whether, in a case where a claimant had caused or contributed to his dismissal to some extent, it would be just to make such an order.

4.4 In relation to (ii), a tribunal has to consider the effect of such an order upon the respondent's business; for example, whether it might lead to industrial unrest or potential overmanning, such that as a redundancy situation might arise. A tribunal ought to ignore the fact that a respondent has engaged a permanent replacement unless it can show that it was either not practicable for the claimant's work to have been done without engaging a permanent replacement or that the replacement was engaged after a reasonable lapse of time, without the respondent having known that reinstatement or re-engagement was being sought (s. 116 (5) and (6)). Practicable here means capable of being carried into effect with success (*Coleman-v-Magnet Joinery* [1974] ICR 25).

4.5 If a tribunal decides not to order reinstatement, it must go on to consider the potential alternative of re-engagement (s. 116 (2)). The same factors apply as under s. 116 (1) (see sub-section (2)). Such an order requires a respondent, or a successor or associated employer, to re-engage a claimant in employment comparable to that from which he was dismissed or other suitable employment (s. 115 (1)).

4.6 In making such an order, a tribunal has to specify the identity of the employer, the nature of the employment, the level of remuneration, any amount payable by the Respondent in respect of any benefit and/or pay which the Claimant would have received but for the dismissal, any rights and privileges which must be restored and the date by which the order has to be complied with (s. 115 (2)). It is generally considered inadvisable for a tribunal to award re-engagement to a specific job, as distinct from the identification of a broad type of employment. Similarly, an order for re-engagement cannot be upon terms which are substantially more favourable than those of the claimant's former job.

4.7 We recognised that it will be rare for orders for reinstatement or re-engagement to be made in circumstances where the relationship of trust and confidence between the employer and the employee had been broken (*Wood-v-Crossan* [1998] IRLR 680), even in situations where there were no reasonable grounds for the Respondent's belief in misconduct (*ILEA-v-Gravett* [1988] IRLR 497).

<u>Reinstatement/re-engagement; conclusions</u>

4.8 We considered the test under s. 116 (1) to start with in relation to reinstatement.

4.9 It was clear that the Claimant wanted to be reinstated. We did not, however, consider that it was practicable for the Respondent to comply with such an order in the circumstances under s. 116 (1)(b). We reached back conclusion because of the views which both sides expressed about the Claimant returning to the Bristol depot. Miss Talbot in particular had expressed grave concerns on behalf of herself and her colleagues about the Claimant's return. He had aired significant reservations in his own

statement. Given that many of the key personalities who had been involved in the events of 2017 was still employed at the depot, we considered that there was ample scope for a return to work being unsuccessful (see, further, *Intercity-v-McGregor* EAT 473/96).

4.10 We then went on to consider the possibility of re-engagement under s. 116 (3).

4.11 Again, the Claimant wished to be re-engaged if he could not be reinstated. On the issue of practicability under s. 116 (3)(b), we were aware that there were roles being filled in Salisbury and Gloucester and that there were nearly 300 such roles in the Claimant's desired work area. We were particularly aware that the Salisbury vacancies fell well within his reasonable travel to work distance. We could therefore see no reason why, with the adjustments recommended by Dr Bastock and those which previously existed (see paragraph 4.15 of our Reasons) such a return to work could not be a success.

4.12 The Respondent asserted that the Tribunal should not re-engage the Claimant because the relationship of trust and confidence had broken down. That was an easy assertion to make and, for the reasons stated above, we considered that its concerns had been overstated. The question was to have been judged in a broad common-sense fashion and we had to consider, not only whether the employer genuinely believed that it had lost trust in Mr Finn, but whether that belief was based upon rational grounds. In *ILEA-v-Gravett,* above, the EAT criticised the Tribunal for having ordered re-engagement in a situation in which the employer had serious concerns about the future risk presented by an employee who had been guilty of indecent exposure and indecent assault on a 13-year-old girl. Despite the Respondent's unfair dismissal of the Claimant, the EAT concluded that it had been entitled to continue to hold a genuine belief of a future risk. Here, however, the Claimant's misconduct was in a wholly different league and the medical evidence, which was the cornerstone of the assessment of risk, was clear and optimistic. On any sensible or objective analysis, we considered that the Claimant ought to have been seen as presenting less of a risk now that he had in 2014.

4.13 Ms Maher also asserted that the Claimant's own views about the Respondent made an order for re-engagement in practicable. It was clear from the Claimant's statement that his experience of having been unfairly dismissed had done nothing to improve his views of the Respondent, but it was unrealistic to have expected otherwise. Nevertheless, the focus of his feelings has always been on those who had been directly involved in his demise, who had either left (Mr Moore and Mr Ponting) or would not be in contact with him if he was based elsewhere (see *Oasis Learning-v-Wolff* UKEAT/0364/12 and *Cruickshank-v-Richmond LBC* UKEAT/483/97).

4.14 As to the issue of contributory conduct under s. 116 (3)(c), Ms Maher contended that the Claimant's conduct ought to have prevented an order for reinstatement or re-engagement (see paragraph 5.23 of R2). Although there was little doubt that the Claimant's conduct had brought about his

dismissal in causative terms, we did not find it to have been culpable under s. 122 (2) or 123 (6) for the reasons set out in paragraph 5.23 of our previous Reasons. It would have been unjust and wrong to have denied the Claimant the chance of reinstatement on that basis.

Section 115 (2) terms

4.15 Next, we set out the terms under which we considered the re-engagement order ought to have been made. Those terms were discussed with the parties further and confirmed as follows;

(a) Identity; the Respondent confirmed that Openreach was now a separate corporate entity and the parties agreed that the order would be left in the alternative as set out in the Judgment above;

(b) Nature of employment; the Respondent and Claimant agreed with the description of the Claimant's job role as set out in the Judgment above

(c) Remuneration; the Respondent was only aware of the Claimant's salary at the point of dismissal. That figure was included in the Judgment as a baseline, but the parties were satisfied that the rate for the grade was readily available;

(d) Amount payable to the Claimant; we approached the calculation as it had been set out in the Counter Schedule and, unless otherwise stated, all of the figures used in the arithmetic had been agreed between the parties at the start of the hearing;

Loss of earnings

Period 1; from 23 November 2017 (dismissal) to 16 June 2018 (the day before the start of permanent employment with Gregorys)

29 weeks x £414.46 (net salary with the Respondent) =	£12,019.34
Less earnings with Dominos =	£2,143.26
Less earnings with Tesco =	£4,993.00
(although some of the Tesco earnings fell into Period 2, they were all counted in Period 1 for ease)	
Total =	£4,883.08

Period 2; from 17 June 2018 (start of permanent employment with Gregorys) to 30 June 2009 (date of re-engagement)

Loss in respect of earnings with the Respondent;	
£464.16 x 54 weeks =	£25,064.64
Less agreed receipts from Gregorys until date of hearing based upon the payslips =	£15,573.51
Plus a further 6 weeks until 30 June 2019;	
£373.33 x 6 weeks =	£2,239.98
Total =	£7,251.15

Loss of pension

Agreed loss to the date of hearing (the difference in direct contributions between the Respondent and Gregorys, where applicable);

=		£3,000.41

Further losses over the next 6 weeks;

	£45.97 (the Respondent's contributions)	
Less	£13.69 (Gregorys contributions)	
	£32.28 x 6 =	£194.68

Total =	£3,194.09
Grand total	£15,328.32

(e) Any rights and privileges which ought to be restored; none were considered applicable;

(f) Date; we considered that the Claimant ought to be re-engaged by 30 June 2019. Mr Cooper confirmed that he was capable of giving notice to Gregorys before that date.

Other issues

4.16 The Claimant was entitled to a Basic Award in the agreed sum of £1,711.50. Ms Maher considered that, in a case where a tribunal ordered re-engagement, a claimant was not entitled to such an award, but the Tribunal considered that the Act did not reflect that argument and she was not able to produce authority to support her proposition.

4.17 No separate award was made in respect of breach of contract relating to notice since that was covered within the award under s. 116 (2)(d).

Addendum

The parties will note that the sum awarded within paragraph 1 (d) of the Judgment, as expressed within paragraph 4.15 (d) above, is different from that expressed orally at the hearing. The Judge regrets that there was an error in the arithmetical calculation of the Claimant's loss of earnings within Period 2. That error has been corrected but if the parties wish to make written representations on the basis of the agreed figures and the principles adopted, they are welcome to do so.

Employment Judge Livesey

Date 17 May 2019