THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
Mrs J Forecast
Mr M Walton

BETWEEN:

Ms K Rogers **Claimant**

AND

Picturehouse Cinemas Limited **Respondent**

ON: **3 June 2019 and 24 July 2019 in Chambers**

Appearances:

For the Claimant: Mr R O'Keeffe (Union Representative)

For the Respondent: Mr T Croxford QC (Counsel)

RESERVED REMEDY JUDGMENT

The unanimous decision of the Tribunal is that:

1. It is not practicable for the Claimant to be reinstated or re-engaged by the Respondent.

2. The Claimant is entitled to a compensatory award of £8804.27 calculated as set out in paragraph 29 of the reasons below.

REASONS

1. By a claim form presented on 28 November 2017 the Claimant, Ms Rogers , presented to the Tribunal claims of:

    a. Detriment in breach of s 146(1)(a) and/or (b) Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”);
    b. Unfair dismissal under s 152 TULRCA; and
    c. Ordinary unfair dismissal under Part X Employment Rights Act 1996 (“ERA”);

    arising from her dismissal for gross misconduct. She had sought reinstatement and compensation for injury to feelings.

2. By a judgment sent to the parties on 1 March 2019 the Tribunal found unanimously that the Claimant was automatically unfairly dismissed pursuant to s152(1)(b) Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”)

3. A remedy hearing was listed to hear the Claimant’s applications for reinstatement, or in the alternative re-engagement or in the alternative compensation.

4. The Claimant gave evidence on her own behalf at the hearing having prepared two statements. The Respondent’s evidence was given by James Vandyke, the General Manager at Brixton Ritzy and investigating officer who had also prepared a written statement. We read the statements before the start of the oral evidence and were also referred from time to time to passages from the statements for the liability hearing and to the liability judgment. There was a bundle of documents containing 242 pages. References to page numbers in this judgment are references to page numbers in that bundle.

The issues and the relevant law

5. The law on the remedies available to a claimant who has been found to be have been unfairly dismissed Is set out in Chapter II of the ERA. Sections 113, 116 and 118 provide as follows:

    113 The orders.

    An order under this section may be—

    (a) an order for reinstatement (in accordance with section 114), or

    (b) an order for re-engagement (in accordance with section 115),

    as the tribunal may decide.

    116 Choice of order and its terms.

    (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.

(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.

118 General.

(1) F1. . .Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—

(a) a basic award (calculated in accordance with sections 119 to 122 and 126), and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126.

6. We were also referred to a number of authorities which we refer to in our conclusions.

7. The Tribunal had not been provided with a list of issues but we determined at the start of our deliberations in chambers that the issues we needed to determine were as follows:

    a. What remedy did the Claimant seek?
    b. What were the terms on which the Claimant was employed at the time of her dismissal?
    c. Would it be practicable for the Respondent to comply with an order to reinstate her into her old role on those terms?
    d. Was there any conduct on the part of the Claimant that meant that it would not be just to order the Respondent to reinstate her?
    e. If it would not be practicable or just for the Respondent to reinstate the Claimant would it be practicable or just for the Tribunal make an order for the Respondent to re-engage the Claimant in a different role, on different terms or at a different location?

f. If an order of either reinstatement or reengagement is made what financial remedy should be awarded?
g. If neither reinstatement nor reengagement is the appropriate remedy should the Respondent make an award of compensation to the Claimant and if so in what amount?
h. Should any award to the Claimant be reduced to take into account any contributory conduct on the Claimant's part or the effect of the decision in Polkey v AE Dayton Services?

Findings and conclusions on the issues

8. The Claimant sought an order for reinstatement as her primary remedy. She was also willing to consider re-engagement at one of the Respondent's cinemas elsewhere in London, other than the cinema at West Norwood.

9. The role in which the Claimant was employed was Customer Service Assistant. The terms of the Claimant's employment at the time of her dismissal were set out in a contract of employment dated 1 September 2015 which provided that the Claimant had no guaranteed hours of work. However in practice the Claimant had a regular shift pattern. There was a dispute as to the precise number of working hours in a week. It was the Claimant's case that she worked 44 hours per week, but the Respondent considered that her working hours did not exceed 39 on average.. The Claimant was however seeking reinstatement on the basis of a 39 hour pattern. The Respondent said that since the Claimant's dismissal it had moved away from engaging staff on zero hours contracts and that all new recruits are engaged for a minimum of 24 hours per week.

10. The Respondent accepted that Customer Service Assistant roles would arise from time to time within its network of cinemas but submitted that there was at the time of the remedy hearing no vacancy in an identical position at the Ritzy permitting reinstatement. Mr Vandyke also maintained that at the time of the hearing there were to his knowledge no Customer Service Assistant roles available in cinemas near to the Ritzy.

11. The question of vacancies is clearly relevant to the question of practicability. The Respondent's principal submission however was that reinstatement and re-engagement were inappropriate because it no longer had trust in the Claimant. The Respondent's submissions referred to what it described as the Claimant's "repeated lies during the disciplinary process and during the tribunal hearing". The lies relied on were set out in Mr Vandyke's witness statement. Mr Vandyke relied upon the Claimant's admissions in cross examination that she had told lies on a number of occasions. The specific instances included:

    a. the position the Claimant took about the nature of the meeting on 15 April 2017;
    b. the position the Claimant took about the presence of Nia Hughes at that meeting;
    c. the position the Claimant took about the role of Edd Bauer in cyberpicketing;
    d. the Claimant's failure to disclose the identity of union members involved in

the meeting and in associated activities;

e. the fact that the Claimant had agreed that a solicitor from Thompsons, who was acting for the Claimant at the time, could tell the employment tribunal, untruthfully, that the Claimant was unable to attend a tribunal hearing on a specific date (the "tribunal issue"). This untrue statement was made in the interests of ensuring that the Claimant's case was heard separately from those of a number of her colleagues who had been dismissed at around the same time as the Claimant.

12. Mr Vandyke also relied on a matter (the "strike fund issue") that had emerged during disclosure for the liability hearing. This was documented at page 48 of the remedy hearing bundle and concerned a conversation between the Claimant and a number of other union members about fund raising for their strike. The conversation included a message from one of the participants which stated, "*A friend said she can embezzle 300 quid from her SU [Students' Union]. Told her not to risk it yet, should I give her the go ahead?"* The Claimant did not reply, but nor did she raise any objection when other participants suggested going ahead.

13. On the question of the relationship between honesty and practicability in considering both reinstatement and re-engagement the Tribunal was referred to the EAT Judgment in *United Lincolnshire Hospitals NHS Foundation Trust v Farren [2017 ICR 513*, in which the EAT states at paragraph 40:

> **"That, however, was not the correct question for the ET. As the case law makes clear (see Crossan at paragraph 10, cited above), it had to ask whether this employer genuinely believed that the Claimant had been dishonest, and - per the EAT at paragraph 14 of United Distillers v Brown, see above - whether that belief had a rational basis. It was, after all, this employer - not some other and certainly not the ET - that was to re-engage the Claimant. The issue of trust and confidence had to be tested as between the parties in order to determine, even on a provisional basis, whether an order for re-engagement was practicable, whether it was capable of being carried into effect with success, whether it could work. The Respondent might have reached a conclusion as to the Claimant's honesty by an impermissible route in its dismissal decision and might also have drawn the wrong inference at the re-hearing, but the ET still needed to ask, as at the date it was considering whether to order re-engagement, whether it was practicable or just to order this employer to re-engage the Claimant. It thus was the Respondent's view of trust and confidence - appropriately tested by the ET as to whether it was genuine and founded on a rational basis - that mattered, not the ET's."**

14. It is clear from this guidance that when considering whether or not a reinstatement or reengagement order is appropriate the Tribunal must reach a conclusion (a) as to the Respondent's view of the Claimant's honesty and (b) whether this view was genuinely held and founded on a rational basis. It is the perspective of the Respondent that matters and not that of the Tribunal itself. The question is also stated slightly differently in this extract from the passage in paragraph 13:

> "**The issue of trust and confidence had to be tested as between the parties in order to determine, even on a provisional basis, whether an order for re-engagement was practicable, whether it was capable of being carried into effect with success, whether it could work."**

15. An employment relationship being one based on trust, if trust has been eroded then reinstatement or reengagement is likely to be impracticable. It will be tantamount to an order for specific performance where one party to the contract has on genuine grounds lost the confidence required to participate in the employment relationship. In essence the relationship will not work where trust has gone. But the Respondent's loss of trust must have a rational basis, otherwise an order for reinstatement or reengagement would be easy to evade.

16. In support of its case that this is a paradigm case in which trust has been lost, the Respondent also provided the Tribunal with the relevant extract from Harvey on Industrial Relations and Employment Law, which contains a reference to the case of *Central and North West London NHS Foundation Trust v Abimbola [2009] All ER (D) 188*. That case confirms that a Claimant's dishonesty in giving evidence to a tribunal is a factor that is not only relevant to the question of whether or not to make a reinstatement or re-reengagement order, but positively ought to be taken into account. The relevant passage is this:

> **"At paragraph 7 of the remedy reasons the Employment Tribunal found that the Claimant's evidence at that hearing was, at times evasive and on one occasion perhaps even dishonest in that initially he said that he had not done a day's work since dismissal by the Respondent, but later in cross-examination accepted that he had done on average three days a week at a carwash for a period of ten weeks earning about £900.**
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> **It was submitted on behalf of the Respondent that such conduct in these proceedings caused a lack of trust on the part of the Respondent. The Employment Tribunal held that such evasiveness and dishonesty was not a relevant factor. The legislation, in their opinion, does not envisage such a matter being taken into account on the reinstatement question. Mr Morton submits that, first the Tribunal was not restricted to simply considering the three mandatory factors in s116(1) ERA, relying on the judgment of Neill LJ in Payne particularly at paragraphs 36 and 48, but that in any event loss of trust and confidence goes to the question of practicability under s116(1)(b) on the authorities.**
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> **Mr Dutton argues to the contrary by reference to an obiter remark by Lord Simon of Glaisdale in Devis v Atkins [1977] ICR 662, 684 C-D where his Lordship said**
>
> > **"Although there is, on the face of it, a discretion in the tribunal whether or not to order reinstatement or re-engagement, the fact that an employee was guilty of successfully concealed misconduct does not appear to be one of the matters which the tribunal can take into consideration."**
>
> **and then refers to s71(6) and (7) of the Employment Protection Act 1975 precisely re-enacted in s116 ERA. We are not persuaded that Lord Simon's fears were well-founded. It is now settled law, see Wood Group and Nothman, that a breakdown in mutual trust and confidence is material to the practicability of a re-employment order. In our judgment, this dishonesty in giving evidence at the remedy hearing was material to the Employment Tribunal's consideration of whether or not to make a reinstatement order and ought to have been taken into account in the exercise of their discretion."**

17. We did not at any time find that the Claimant was dishonest or evasive in giving her evidence in these proceedings. Nor was it the Respondent's case that she was. It relied primarily on her lack of truthfulness in its own disciplinary proceedings but it did also rely on the tribunal issue. Although *Abimbola* concerned a case in which the Claimant had given untruthful evidence during

the remedy hearing itself we considered that the Claimant's decision to allow the employment tribunal to be misled about her availability to attend a hearing also fell within the ambit of *Abimbola.* The issue concerned the Claimant's honesty in the context of employment tribunal proceedings and *Ambibola* makes it clear that this is a matter to which a Tribunal ought to have regard when assessing whether or not it is practicable or just to make a reinstatement or reengagement order. The case thus assists the Respondent in its assertion that it had lost confidence in the Claimant because of her conduct in misleading the tribunal. We return to this point below.

18. Our principal concern about the Respondent's position was that it involved reliance on matters that were inextricably linked to the Claimant's trade union activities. As we found in the liability judgment and in particular in paragraphs 48(f) to (i) and 49, the Respondent improperly pressed the Claimant to disclose the names of colleagues and other trade union participants at both the disciplinary and appeal hearings. The matters relied on by Mr Vandyke in asserting that he had lost trust in the Claimant that are set out in paragraphs 11 (a) to (d) above were intrinsically bound up with the Claimant's engagement in trade union activities and confidential meetings and with the identity of trade union members and the nature of some of their activities The Respondent now seeks to rely on the Claimant's evasive answers to that line of questioning as evidence of dishonesty and a reason not to either reinstate or reengage her.

19. If that were the entirely of the Respondent's position we would have had had real concerns about allowing the Respondent to rely on it as a basis for the refusal of a reinstatement or reengagement order. We are not aware of any authorities on this specific point. But it seems to us potentially incompatible with the regime of protection in s152(1)(b) TULRCA to enable a Respondent who has in our judgment clearly overstepped the mark in questioning an employee in respect of trade union activities in the manner described in the liability judgment, to be able to rely on the Claimant's responses to those questions as an argument for resisting reinstatement or reengagement. We also consider that Article 11 ECHR would be engaged in such a case although we heard no argument from either party on that specific point.

20. The trade union related matters were not however the entirety of the Respondent's position. It also relied on two matters not related to the Claimant's trade union activities – the tribunal issue and the strike fund issue. The Claimant submitted that the fact that she (1) knew a student union officer may have arranged an unauthorised donation to her union's strike fund and/or that (2) she authorised her solicitor to tell Mishcon de Reya that she could not attend a hearing date when that was untrue were not a rational basis for Mr Vandyke or the Respondent to lose trust in her. In respect of the strike fund issue she submitted that Mr Van Dyke must have appreciated that she had done nothing personally to effect an embezzlement and that the term was being used very loosely. In respect of the tribunal issue she submitted that she had been in a very difficult position having been expressly advised that it would undermine her colleagues' case for hers to be heard with theirs.

21. Turning first to the tribunal issue, the Tribunal was satisfied that whilst trade

union activities formed the background and context, the Claimant's decision to agree to the tribunal being misled was not connected to and did not arise during the course of the Claimant's trade union activities. The Tribunal's concerns about undermining the regime of statutory protection for trade union activities do not therefore arise in relation to it. The Claimant's contemporaneous view of her situation was set out in the WhatsApp exchange at page 49 in which she was asked if she intended to go to any of the forthcoming tribunal hearings involving colleagues and she replied "I don't think I'm allowed to. I've had to tell the Tribunal there's absolutely no way I could make this hearing, so that they didn't hear my case with the others. It's a shame, I'm interested to see what happens!"

22. The Tribunal had been unable to test in evidence the nature of the advice given to the Claimant at this time. We accept that if a person is being given legal advice they will be inclined to rely on it. But the Claimant was a well-educated person who must have realised that it is a very serious matter to deliberately mislead a court or tribunal, even on advice. On the Claimant's own evidence she was asked by the solicitor then acting for her whether it would be "alright with her" if the Tribunal was given this (untruthful) information. Whether that was a proper question for a solicitor to put to a client is not a matter for this tribunal. For his part, Mr Vandyke accepted that Claimant had been put in a difficult position but considered that the Claimant had to take personal responsibility for her decision. The Tribunal sees the force of that perception in the context of what we are required to decide, namely whether Mr Vandyke and the Respondent had a rational basis for having lost trust in the Claimant. The Claimant agreed to the Tribunal being told something that was untrue – and that would have consequences for others, including the Respondent itself and the Tribunal system. In our view it was rational for Mr Vandyke to conclude on the basis of the tribunal issue that he could not fully trust the Claimant to tell the truth about important matters or to exercise good judgment in a challenging situation in the workplace.

23. We were cautious about this conclusion as there was no evidence of any improper conduct at any time during the Claimant's employment. In another context, not involving potential jeopardy to colleagues' chances in a tribunal hearing, the Claimant might have made a different decision. But even if the Claimant was not acting self-interestedly, but in the interests of her former colleagues it was put to her that she was prepared to lie to help other people. She responded that she had been acting on advice and had been encouraged to say that she could not attend the hearing. In our judgment whilst that may mitigate any culpability attaching to the Claimant, it is insufficient to undermine the basis of Mr Vandyke's assessment of her. Our focus is not on whether and to what extent the Claimant acted culpably, but whether and to what extent the Respondent was rational in forming the view that its trust in her was undermined.

24. Turning next to the strike fund issue, as noted above, the Claimant submitted that she did nothing at all to effect an "embezzlement" and that the term was being used very loosely. Her evidence at the remedy hearing was that the Strike Fund group member who had seemingly suggested that £300 could be "embezzled" was inclined to express himself in what she referred to as a

"particular way" involving bravado and loose expression. The "friend" referred to was a friend of the Claimant's who was a Student Union officer and whose Union Council had passed a motion to support the strike. The Claimant knew that there had been a democratically passed motion in support of the strike fund. She did not think that an elected Student Union official would be stealing from her union and saw no reason to comment on the remark about embezzlement.

25. The question is whether at the date of the remedy hearing it was rational for Mr Vandyke to rely on this exchange as a reason for having lost trust in the Claimant, given the explanation that the Claimant gave to the Tribunal in her evidence. In our judgment it cannot be said that his reliance was irrational. His evidence was that everyone understands the meaning of the word "embezzle" and he considered it surprising that no one in the exchange had questioned it. He was not sure how it could be misinterpreted. He noted that the Claimant had not flagged it during the WhatsApp exchange and thought that if you were spearheading a strike fund you would want to know that everything about it was above board. Asked about the Claimant's explanation during his evidence at the remedy hearing he said that he could only go by what was on the page (page 48) and would expect someone honest to have written something in reply to a suggestion that Student Union funds were going to be embezzled.

26. We considered the context in which Mr Vandyke formed his view. We were particularly conscious of the fact that some of the Respondent's reasons for doubting the Claimant's honesty were bound up with her trade union activities. It was very clear from the way the Respondent put it case that it relied on a holistic assessment of the Claimant's trustworthiness and it did not put its case on the basis that any one of its concerns would have been enough by itself to cast doubt on the Claimant's honesty. The picture was therefore complex. We also considered the possibility that the Respondent had in effect manufactured its concerns about the strike fund issue and the tribunal issue in order to bolster its position and provide a basis for doubting the Claimant's honesty that was unrelated to trade union activity. We came to the conclusion however that Mr Vandyke's views about both theses issues were genuinely held and that even if the matters related to trade union activity were left out of account, he would have formed a rationally held view that he no longer had trust in the Claimant based on the tribunal issue and the strike fund issue alone. We considered that the Respondent went too far however in suggesting that the Respondent would not be able to have confidence that the Claimant could be trusted in a customer facing role involving the handling of money. Mr Vandyke's assessment was in effect an assessment of the Claimant's ethics as distinct from her trustworthiness in handling customer cash. There would have been no rational basis for the Respondent's position if that had been its concern, but we find that it was a broader ethical position that was the source of Mr Vandyke's concerns.

27. That being the case we conclude that it would not be practicable for the Respondent to reinstate the Claimant under Mr Vandyke's line management. In order for a working relationship to be possible there must be trust and confidence between employer and employee and in particular between employee and line manager. It would not be practicable to order the Respondent to reinstate the Claimant at Brixton Ritzy (leaving aside any issues about the

availability of suitable roles) on the basis that the working relationship between the Claimant and Mr Vandyke could not be restored for the reasons set out above.

28. Should the Claimant therefore be reengaged by the Respondent in a different venue? In our judgment the issues relied on go further than the individual relationship between the Claimant and Mr Vandyke. Mr O'Connor, the Respondent's Regional Manager for London gave evidence to the liability hearing about the impact on his trust for the Claimant of the tribunal issue and the strike fund issue. It seemed to the Tribunal that despite the lack of evidence that there had been any concerns about the Claimant's propriety during the course of her employment, it would not be practicable to expect the Respondent to re-engage an individual in whom it had lost trust and confidence for two substantial and rationally based reasons which came to light subsequent to her employment. We noted the Claimant's submission that not all dishonesty goes to practicability, but we consider that the Claimant's conduct in the tribunal issue and the strike fund issue was such that reengagement also ceased to be practicable in this case. It is the Respondent's view that must prevail, not that of the Tribunal itself, provided there is a rational basis for that view. We conclude that given the impact on the relationship between the Claimant and Respondent of the strike fund issue and the tribunal issue it would not be practicable for the Respondent to reengage the Claimant.

Compensation

29. We conclude that the Claimant should receive compensation under s 123 ERA. We award her:

    a. £500 for loss of statutory rights;

    b. A basic award of £5970 on the basis of her automatic unfair dismissal for participation in trade union activities;

    c. Loss of earnings from the date of dismissal (6 July 2017) to 1 October 2017 at £9.10 per hour for 39 hours per week giving £306.35 net weekly pay but giving credit as per the Claimant's Schedule of Loss for a total of £1628.23 in charitable donations and sick pay received in this period. The total net loss of earnings is £2201.15. The Tribunal was satisfied that it was not reasonable to expect the Claimant to have mitigated her losses in the immediate aftermath of her dismissal given that the events had an impact on her state of mind and health, albeit temporarily.

    d. Pension contributions of £10.65 per week for the 12.5 weeks from 6 July 2017 to 1 October 2017 amounting to £133.12.

    e. The total compensatory award is therefore £8804.27

30. The Tribunal concluded that the Claimant ought to have been able to mitigate her losses after 1 October 2017 by finding part time work at equivalent pay during her university course and full time work thereafter. There would have

been ample work available to her at similar rates of pay to those she had earned in the Respondent's employment and it would not be just and equitable to make any further award of compensation.

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Employment Judge Morton
Date: 30 August 2019