EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		RESPONDENT
MR M Z HASSAN	V	ROYAL MAIL GROUP LIMITED

HELD AT: CARDIFF CROWN COURT ON: 18 JUNE 2019

IN CHAMBERS ON: 25 FEBRUARY 2020

EMPLOYMENT JUDGE W BEARD: MEMBERS MS GEORGE

MR BRADNEY

REPRESENTATION:

FOR THE CLAIMANT - Mr Khan (Friend)

FOR THE RESPONDENT - Mr Bownes (Solicitor)

JUDGMENT

1. The respondent is ordered to re-engage the claimant in a role which complies with the terms as set out below.
2. The respondent is ordered to pay to the claimant compensation for unfair dismissal in the sum of £13,367.30 as calculated below.

REASONS

Preliminaries

3. This remedy judgment should be read in conjunction with the liability judgment promulgated on 18 January 2019. The claimant succeeded on a claim of unfair dismissal and seeks re-instatement or in the alternative re-engagement, the claimant also seeks compensation for losses. The respondent resists both re-instatement and re-engagement as potential remedies. Further the respondent seeks to limit the compensation to the claimant on the grounds of a failure to mitigate loss. The tribunal had already made findings that the claimant contributed to his dismissal to the extent of 20% and that there should be a 10% reduction in any compensation payable to the claimant as there was a chance that, had a fair procedure been followed, the claimant might have been dismissed in any event

4. The claimant gave oral evidence and the respondent called evidence from Mr Andrew Colclough, production control manager at the Cardiff Mail Centre. In addition, the tribunal were provided with a bundle of documents.

5. Because there had been difficulties in arranging a chambers meeting with the employment judge and members in this case, the employment judge caused the administration to write to the parties as to whether they would wish there to be a further hearing. The respondent wrote indicating that it did not wish there to be a further hearing and there was no response from the claimant. On that basis, although the decision related to the arguments over re-instatement/re-engagement the tribunal reached its decision based on the evidence heard in June 2019.

The Facts

6. The claimant, who was born on 10 February 1982, commenced his employment with the respondent at the age of 16 on 28 September 1998. Until his dismissal on 10 May 2017; the claimant had worked nowhere else. The claimant's role at the time of his dismissal was as a reserve driver, this mean that he drove the respondent's vehicles (up to a particular class of vehicle) and was required to undertake other duties on occasion.

7. The claimant clearly has issues with some of the management that conducted his disciplinary process. He was of the view that a number of those colleagues had conspired in his dismissal. He was, however, clear in his evidence that his attitude reflected the conduct of five people and not the organisation. When he was asked about the work he could do with the respondent he told us that he had covered many roles in his eighteen and a half years with the respondent, including driving, sorting packets in the warehouse, sorting letters and operating machinery.

8. Mr Colclough told us that there had been changes in the organisation in Cardiff. Particularly in the use of reserve drivers. It was clear from his evidence that the role the claimant used to undertake no longer existed in the new structure. This was, in part because the claimant did not have the requisite class of driving licence for the larger vehicles the respondent was now operating. Mr Colclough also told us that there were discussions with the CWU about potential redundancies, but at that stage there was no figure or certainty about the situation, however 10% of the staffing group the claimant had belonged to was suggested. Mr Colclough told us that the workforce in Cardiff was divided and the area that redundancies were being considered in had 120 staff out of a 400 total staffing. He accepted that volunteers would be sought at first, and whilst reluctant to be firm on figures, said it was likely that the number of volunteers was likely to be oversubscribed for the number of redundancies.

9. In the liability judgment orally handed down the tribunal indicated that it considered there was a 10% chance that the claimant would have been dismissed in any event had a fair procedure been followed. This was, in

error, not set out in the judgment and reasons. Our reasons for so deciding was as follows. The claimant had admitted approaching his colleague in the car, so a view could have been taken on his level of involvement based on that admission by a decision maker who had not viewed the CCTV. A decision maker could have drawn the conclusion that the claimant's response on the platform was out of proportion with the comments of his colleague. We had no medical report which showed causation arising from the claimant's conduct. Had a report been obtained by the respondent it might have ruled out such causation. However, balanced against that was evidence which, in the past, linked erratic conduct on the part of the claimant to his disability, there was evidence before the decision maker about the conduct of the claimant's colleague on the platform and that was not sufficient to dismiss that employee. We came to the view that on balance if the platform incident and car park incident had been considered together and a medical report obtained there was still a chance, albeit small, that the claimant would have been dismissed with a fair procedure.

10. The parties were agreed on the base figures to be used the claimant's gross weekly pay with the respondent at £471.20 gross and £371.90 net. The claimant gave evidence that in the first two months or thereabouts he was not actively seeking work as he was working on an appeal and had advice from the CWU to that effect. The claimant looked for other driving roles and in the year after his dismissal worked for nine weeks where he brought home £380.00 per week (driving for an agency) and then four weeks with a double-glazing firm where he brought home £250.00 per week.

The Law

11. In terms of the approach to remedy for unfair dismissal the tribunal having considered that the claimant's conduct caused or contributed to his dismissal must apply sections 122 and 123 of the Employment Rights Act 1996 which provide:

> ***Section 122***
>
> ---
>
> *(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*
>
> ***Section 123***
>
> *(1) Subject to the provisions of this section and sections 124[, 124A and 126], the amount of the*

compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

----

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

12. The tribunal have also considered ***SCOPE v. THORNETT [2007] IRLR 155***. This deals with the need for tribunals on occasion to engage in a certain amount of speculation as to the loss incurred in the words of Pill LJ at paragraph 34:

> *"The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve a consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account."*

And at paragraph 36

"The EAT appear to regard the presence of a need to speculate as disqualifying an employment tribunal from carrying out its statutory duty to assess what is just and equitable by way of compensatory award. Any assessment of a future loss, including one that the employment will continue indefinitely, is by way of prediction and inevitably involves a speculative element. Judges and tribunals are very familiar with making predictions based on the evidence they have heard. The tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty because their task is a difficult one and may involve speculation."

13. The tribunal must consider whether the claimant has mitigated his loss. It is for the claimant to prove loss but for the respondent to prove that the claimant has failed to mitigate loss.
14. The tribunal is required to take account of Section 112 of the Employment Rights Act 1996 which provides:

"(1) This section applies where, on a complaint under section 111, an [employment tribunal] finds that the grounds of the complaint are well-founded.

(2) The tribunal shall -

(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made; and

(b) ask him whether he wishes the tribunal to make such an order.

(3) If the complainant expresses such a wish, the tribunal may make an order under section 113.

(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118-[126] to be paid by the employer to the employee.

Sections 113 et seq. set out the orders that a tribunal can make. In this case we were asked to consider (amongst other things) an order under Section 115 which provides:

"(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a

successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including -

the identity of the employer,

the nature of the employment,

the remuneration for the employment,

any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected so have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement.

(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee; and

(f) the date by which the order must be complied with.

(3) In calculating for the purposes of subsection (2)(d) 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 re-engagement by way of -

----

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

15. Section 116 sets out in what circumstances an order under Section 115 can be made, and in particular Section (3) and (4) provides:

"(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, it is order re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement."

16. The tribunal then has discretion to make award of compensation if it does not make another type of award.

17. The respondent asked us to consider the decision in ***Nothman v London Borough of Barnet (No 2) [1980] IRLR 65, CA*** where the employee thought she had been the victim of a conspiracy by her employers. The respondent argued that the case demonstrated that because the claimant has shown that he lacks confidence in her employer he would not be a satisfactory employee if reinstated. However, we also considered ***Oasis Community Learning v Wolff UKEAT/0364/12*** where it was held that the fact that an employee has made serious allegations against colleagues or managers at one workplace will not as such impact on the relationship which he will have with colleagues and managers at a different workplace.

Analysis

18. In our judgment the claimant cannot seek re-instatement as it would not be practicable for him to return in his old role because of the structural changes that the respondent has made. In addition, we consider that the claimant would not work well within the specific management structure that he does not trust. We consider the principles in ***Nothman*** apply.

19. However, we do not consider that the same problems exist with respect to re-engagement. The respondent's evidence about potential redundancies was vague and it was clear that an incomplete process was being drawn to our attention. Further it was clear that the number of volunteers could well exceed the number of redundancies. The respondent is a very large organisation and in in Cardiff is divided into several sections. We considered the claimant's evidence that his concern was limited to individuals and his previous experience with the respondent in a number of roles and that this had been his employer since he left school. We considered the claimant's contribution to his dismissal, but concluded that it was related to the very specific circumstances and given the low level of contribution we considered that this should not prevent his working with

the respondent's large organisation. We concluded that it would be practicable for re-engagement to take place. On that basis we order the respondent to re-engage the claimant.

20. The terms of re-engagement are: the employer shall be the respondent; the claimant shall be employed at an OPG grade with a shift pattern that achieves the same rate of remuneration for the claimant as if he had remained employed with the respondent since 2017 in his previous role (i.e. taking account of workforce pay-rises), that the claimant shall be employed in an establishment within the boundaries of the City and County of Cardiff, that the claimant shall be readmitted to the pension scheme of which he was a member at the time of his dismissal (or if there has been a successor scheme because the original scheme has closed admitted to the successor scheme). The respondent should re-engage the claimant within four weeks of the date of this judgment. The claimant should be treated as if there had been no break in his employment and given seniority as if he had remained an employee throughout.

21. In terms of the amounts the respondent should pay to the claimant, pursuant to section 115 ERA 1996 the tribunal conclude the following. Because of the passage of time it would not be reasonable to expect the respondent to pay all arrears of pay for the period between the date of termination of employment and the date of re-engagement. We consider that the respondent could be reasonably expected to pay the amounts the respondent would have had to pay had an award of compensation been made and we have calculated such an award taking account of mitigation.

22. In our judgment the claimant would have been entitled to a basic award of £471.20 x 18 a sum of £8,481.60. We consider that the claimant was reasonable in following the advice of his union in not seeking employment in the first two months. However, we consider the claimant was overly restrictive in his approach thereafter. In our judgment the claimant could have obtained employment with a similar wage to that with the respondent within nine months of dismissal. We calculate that to be a period of 39 weeks at £371.90 per week a total of £14,504.10. That gives a sub-total of £22,985.70, we must reduce that figure by the sums the claimant earned in those nine months, those are 9 weeks at £380.00 and 4 weeks at £250.00 a total of £4,420.00. That sum deducted from £22,985.70 gives a figure of £18,565.75. That figure is subject to a reduction of 20% for contribution equalling £3,713.14 which leaves a figure of £14,852.56. From that figure a further 10% reduction must be made on the chance of the claimant being dismissed in any event a figure of £1,485.26. That leaves a figure of £13,367.30 which we order the respondent to pay to the claimant.

_____
Employment Judge
Mr Beard

Date - 2 March 2020

Order sent to Parties on 2 March 2020

_____

` FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS