



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Duxbury

**Respondent:** University of Huddersfield

**HEARD:** In Leeds **ON:** 27 July 2021

**BEFORE:** Employment Judge Wade  
Mrs L Anderson-Coe  
Mr K Smith

## REPRESENTATION:

**Claimant:** Mrs S Sleeman (counsel)

**Respondent:** Mr P Smith (counsel)

Note: A summary of the written reasons provided below were provided orally in an extempore Judgment delivered on 27 July 2021, the written record of which was sent to the parties on 28 July 2021. A request for written reasons was received from the respondent at the conclusion of the hearing. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 27 July 2021 are repeated below:

## REMEDY JUDGMENT

- 1 The respondent shall treat the claimant in all respects as if he had not been dismissed: it shall reinstate the claimant to his post of senior lecturer with all associated rights and privileges (including seniority and pension rights).
- 2 The respondent shall pay to the claimant the appropriate sum in arrears of pay from 16 January 2020 until the date of reinstatement, calculated by reference to the revised Schedule of Loss Part A details (see also the note below).

- 3 Reinstatement shall take place no later than 10 August 2021.

Notes to the parties:

- 1 The Tribunal has expressed the Order in the terms at paragraph 2 above for the reasons set out in O'Laoire and because restoring the claimant's Teachers' Pension Scheme rights in accordance with Order 1 may affect the calculation of the arrears sum such that it does not accord with the calculation in Part B of the schedule. This is not a matter discussed with the parties.
- 2 As to aspects of the claimant's terms of employment, the parties are referred to the Tribunal's findings at paragraphs: 16.4, 16.5 and 19.20, sent to the parties on 30 April 2021.
- 3 Public access to employment tribunal decisions (judgments and reasons for the judgments) are published, in full, online shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

## REASONS

### Introduction

1. The claimant was found to have been unfairly dismissed from his post as senior lecturer at a hearing in April this year. In a telephone hearing in June the parties said that the likely substantive issue for today was whether the Tribunal should make a reinstatement order, taking into account its previous declaration of an unfair dismissal. Today, that issue had narrowed further to a single Section 116 question: "whether it is practicable for the employer to comply with an order for reinstatement".
2. Practicability was the key issue addressed today (the timing of such an Order was not – the claimant contended for immediate reinstatement – the respondent said it was not practicable at all for a number of reasons). There was, the representatives confirmed, substantial agreement on financial remedy, should an order not be made.
3. The findings in the Tribunal's liability judgment and reasons, sent to the parties following a hearing in April 2021, must be read into these reasons for making a reinstatement order.
4. In addition to the relevant provisions of the Employment Rights Act 1996, the Tribunal were helped by having their attention drawn to the following principles (either in Mrs Sleeman's skeleton, Mr Smith's submissions or the respondent's authorities bundle):
  - 4.1. Practicable means practical at the point of the order taking effect (not possible, or capable of being done); at this stage it is not necessary to reach a conclusion

- on practicability, the Tribunal must use their experience and common sense, looking at what has happened in the past and what can reasonably be anticipated for the future, always maintaining a balance as to what in all the circumstances is fair, just and reasonable between the parties: Rao v Civil Aviation Authority [1992] IRLR 203; Port of London Authority v Payne and others [1994] IRLR 9; King v Royal Bank of Canada Europe Ltd [2012] IRLR 280;
- 4.2. Someone who believes himself to be a victim of conspiracy by his employers is unlikely to be a satisfactory employee in any circumstances if reinstated: Nothman v London Borough of Barnett [1980] IRLR 65;
  - 4.3. Loss of trust and confidence may render reinstatement impracticable: Wood Group Heavy Industrial Turbines Ltd v Crossan [1998] IRLR 680 (a genuine belief in drug dealing and clocking offences);
  - 4.4. A decision to order reinstatement is an exercise of discretion and the Tribunal has a wide discretion. It is essentially a question of fact for them. Unless it can be said that the Tribunal failed to take into account any matter which it should have done or took into account matters which it should not have done or reached a conclusion which was wholly unreasonable, effectively perverse, an exercise of its discretion must stand: Arriva London Ltd v Mr K Eleftheriou UKEAT/0272/12;
5. Today the Tribunal had a much shorter bundle, witness statements from Mr Duxbury and Professor Johnes, and we heard their oral evidence. Professor Johnes' conclusion to her statement said this, having given detailed evidence relating to the following matters:
- "In summary, on the face of it, with two possible upcoming vacancies which will likely at least partially relate to the broad discipline area of the claimant, it may seem that reinstatement would be possible. However, given the above facts, in my opinion it would be very difficult to carry out reinstatement of the claimant effectively or successfully. The reasons relate to:*
- (a) the claimant would not fulfil the essential criteria of the vacancies;*
  - (b) the change in curriculum in the Department;*
  - (c) the need for flexible staff who can teach across disciplines;*
  - (d) the changing composition of students from undergraduate and postgraduate within the Department (and across the wider school);*
  - (e) the consequent need for suitably qualified staff to teach and supervise the postgraduate levels (both within the department and across the wider school); and*
  - (f) the budget situation of the Department which is currently predicted to be over £2 10, 000 for the upcoming year; providing a pressing need for cost savings which can be achieved by appointing at the lower lecturer grade or at the bottom of the senior lecturer grade".*
6. She said in supplementary evidence that the claimant.. *"...would appear to be the embodiment of someone who has challenged instructions... and this could be very difficult for the managers to handle... if he were to return, in comparison with other employees"*. That was her own view and that of the current head of the claimant's former department.

7. The claimant's evidence broadly rejected the workforce reasons underlying Professor Johnes opinion as to practicability, and some of the underlying reasons for her opinion – for instance the CV included for him by the respondent in our bundle was demonstrably out of date by some years and did not include his masters degree. He also asserted she was mistaken as to matters of detail relating to some teaching content.

#### Further findings and Conclusions

8. It was suggested that the Tribunal should find that in all likelihood Mr Duxbury would be back in full time employment in the sector in a very short space of time (because he had withdrawn from an imminent interview for a Leeds University post, having been shortlisted for two such other posts in the recent past). If found as a fact, it was a matter to be considered in exercising our discretion – namely the claimant would not suffer unremedied financial loss.
9. The Tribunal has applied its industrial knowledge in concluding that Mr Duxbury will not soon find himself back in a commensurate salaried post. We consider that what happens in the future is typically best informed by what has happened in the past. Mr Duxbury has applied competitively for two other positions, been shortlisted and then not being appointed at interview, for whatever reason. We consider it is most likely that that is what would have happened at Leeds, and what will happen with other posts, without wishing in any way to appear to criticise his ability at interview. Other candidates will prevail; not least, perhaps, because his confidence has been affected by these events.
10. In all likelihood, even with compensation at the cap, Mr Duxbury will suffer financial hardship well into the future as a result of his unfair dismissal. This will come at a time when he could and should have been enjoying congenial and secure employment, working with students, which was the source of much enjoyment for him, particularly those from disadvantaged backgrounds.
11. To be balanced against that hardship, and the claimant's wish to resume his post, are the practicability factors relied upon by the University and the further submissions on its behalf.
12. As to a), in the new recruitment exercise for two posts created by departing colleagues, a PhD will be advertised as an essential requirement; the ability to teach across more than one area - academic flexibility - is also required. The claimant would not satisfy the PhD requirement, but in view of our liability judgment, this does not render it impracticable to reinstate him because there is an ongoing legacy of staff who are similarly without a PhD, although this is reducing steadily. Had he not been dismissed, he could have served his retirement notice pursuant to the policy and continued on teaching in the exemptions part of the curriculum as he had before, until retirement. Furthermore, the respondent would have worked with him, no doubt, on curriculum re-design, and accommodated him within its teaching cohort whatever the changes.
13. There are also two members of academic staff in the department without a PhD, who cannot work across the full post graduate supervision or masters teaching load. There are no doubt others who cannot teach both finance and accountancy,

or economics and accountancy, and so on, however desirable this is from a timetabling perspective. The claimant has, in any event, undertaken some post graduate teaching, where appropriate, and no doubt would rise to that challenge again where appropriate.

14. As to b), d) and e) above, the accountancy and finance department (within the Business School and University as a whole) is making a turn in the road, by seeking and attracting more masters and PhD students and moving to a research active department. It is also phasing out BAs in favour of BScs (and MAs in favour of MScs) and otherwise altering the curriculum. Critically though, it is not abandoning accountancy “accreditation” through the courses it offers, by which its students secure accreditations and exemptions from professional examinations. It has (and will have) a requirement for those modules required by the professional bodies to be taught by qualified professionals like Mr Duxbury. In its own words: “*The main driver of our curriculum design at UG is the professional bodies in A&F*”. Not only that, but accounting and finance is the largest recruiter of students in the Business School, which Professor Johnes leads.
15. The professional accounting curriculum needs are exactly the expertise and arena in which Mr Duxbury has thrived (and has the relevant expertise and qualification, or regularly updates that knowledge as required to ensure mastery of subject). His suitability, for this teaching, and the practicability of his reinstatement, are entirely consistent with his ongoing good relationship with the teaching and learning leader for his subject, and others, who would welcome him back. As to the weight to be put on their comments (little weight was suggested as appropriate by the respondent), we accepted Mr Duxbury’s evidence that friendship only goes so far – if colleagues thought he would make their professional life difficult on returning (for lack of expertise, flexibility or otherwise) they would not express themselves in such terms. It is also consistent with his performance and teaching having been unchallenged at any point by the University, when he was in post, or, during these proceedings.
16. In all likelihood there will be sufficient teaching which can be allocated to him to take up his teaching capacity, albeit he will not have the flexibility across the wider curriculum, which some may have. For example, the revised curriculum has an increasing focus on finance, including banking and investment, fintech and so on, and the claimant accepted banking was not his expertise and although not impossible for him to learn, it would be rare for an accountant with his background to switch to teach this. However, he had knowledge of finance information systems (albeit such knowledge requires updating as systems update and change).
17. As to c)/e), Mr Duxbury does not have a PhD, and cannot supervise PhD students in the way that a colleague with a PhD could. However, having colleagues who cannot do all activities will always be the case in any similar environment with a flexible, dynamic workforce that is changing, with arrivals and departures being commonplace, as is the case in this department. Furthermore, Mr Duxbury will continue to be obliged to undertake RSA (research and scholarly activity) albeit short of achieving a PhD. A lack of flexibility across a redesigned curriculum, and across post graduate teaching is only part of the balance in deciding practicability. The ultimate aim is to provide students with excellent teaching from qualified academics in their subjects – and there has been no challenge to Mr Duxbury’s

ability to do that at undergraduate level and in some other specific areas. Mr Duxbury will also be able to contribute, as he did in achieving his masters and otherwise, in research to achieve the respondent's research goals.

18. These are the headline workforce matters which do not, in our judgment, suggest impracticability, save for finance, which I will come to in due course.
19. In Professor Jones' evidence the further matter of difficulty in managing someone who is perceived to have challenged instructions arose; and Mr Smith suggested that while the claimant had no difficulty trusting the new head of department or other colleagues supportive of him, he would have to show trust in the respondent's leadership at the highest level, who had dismissed him. While he fully trusted the immediate colleagues with whom he would work, he expressed his expectation of resuming trust in the respondent as a whole, as a hope, on the basis that the decision of the Tribunal would be respected. This wish and expectation, in our judgment, renders reinstatement doable, and not outside the realms of possibility as suggested by the respondent, because it is an eminently reasonable and sound expectation for a publicly funded institution.
20. We consider that Mrs Sleeman has identified the management issue entirely correctly: at its highest there would be a sense of embarrassment should the Tribunal decide to order the reinstatement of Mr Duxbury. He cannot reasonably be seen to embody challenging instructions in the sense of being generally insubordinate. He has considered one instruction (to enrol for a PhD) to be an unreasonable basis for the respondent to dismiss him, and he has been successful in establishing that. Embarrassment or even perception of someone as challenging can reasonably be overcome – it is practicable to do so. That is all the more the case given the undisputed qualifications, good record and good standing as an academic of Mr Duxbury, clearly set out in our Judgment on liability. The parties relationships have not been irreparably damaged the way in which the disciplinary proceedings were conducted.
21. It will be apparent that save for the matter of finance we are inclined to order reinstatement of Mr Duxbury, because that is both practicable and the just course in all the circumstances of this case.
22. Turning to finance, a very large proportion (50% or so) of student fees earned by the claimant's former department goes to the University centrally. The department must deliver 3% savings on last year's budget. On current modelling the department has a deficit of £210,000 for the 2021/2022 academic year.
23. The university is as a whole reported a surplus in July of this year. These are uncertain times for higher education going into the impending take up round for undergraduates that will unfold over the next few weeks, and for post graduates generally. The situation may change very quickly. There are two vacancies for lecturers or senior lecturers in the coming months as a result of resignations (one has secured the Leeds post for which the claimant was shortlisted). Without the

reinstatement of Mr Duxbury, the department will recruit in due course but will appoint at the lecturer level or at the bottom of the senior lecturer pay scale, saving some £20,000 per annum or thereabouts on Mr Duxbury's cost. That will contribute to addressing the anticipated budget deficit.

24. It seems to us that the respondent being in surplus (given the contribution of fees to central costs) albeit with a department in deficit, is not a matter which renders it not practicable on this preliminary assessment, for the university to reinstate. The overall contribution to the deficit reduction is relatively small, from recruiting at lower levels. Furthermore, it is wholly unattractive for a respondent in surplus to assert that it should be able to achieve cost savings by unfairly dismissing a member of staff in the circumstances we have found.
25. It also seems to us that in exercising our discretion, and addressing which matters are properly to be taken into account, Mr Duxbury's unremedied financial loss if reinstatement is not ordered, is unlikely to be addressed even if he does secure employment. It is likely that other universities will apply exactly the same analysis as the respondent, that is, that on new appointments, staff often start at the bottom of the pay scale, unless there are compelling circumstances not to do so. It follows that even if we are wrong in our conclusion about the likelihood of securing another similar permanent post, it remains the case that the claimant's salary on new appointment is likely to be at the bottom of the relevant pay scale, and less than that enjoyed with the respondent after many years of service.
26. All these matters inform the exercise of our discretion and as a result the balance is in favour of making a reinstatement order. We have considered the appropriate date and it seems to us that 14 days or within 14 days from today, allowing for the time of year and impending busy period in which student numbers will become clear. It seems to us that there is little required by way of financial order other than to identify that the parties had reached agreement as to the calculation of the back pay until today's hearing, but that it will need to be recalculated and paid in accordance with the actual date of reinstatement, which might arise before 14 days from today.
27. As to the date of reinstatement, it has informed our discussions that such a date holds the prospect of Mr Duxbury taking part in the recruitment activity during clearing and augmentation this year, which takes place during August when students might revise their positions and/or numbers may be greater than expected. His evidence on a previous occasion was that he has played a role in that admissions exercise in the past and could no doubt sensibly be used on this occasion. Early reinstatement would also enable him to engage in student support, which again has formed part of his work.
28. That is the limit of the order that needs to be made. As far as Mrs Sleeman's request that we identify the reinstatement terms to the position that the claimant held before he was dismissed and on the contractual terms that he enjoyed before he was dismissed, that will be self-evident in the order, but we have no difficulty in confirming a reference to our liability Judgment in the circumstances of this case. Those circumstances include that we agree with Mrs Sleeman that in some

respects Professor Johnes' evidence did not give confidence that it had been fully assimilated by the respondent.

Employment Judge JM Wade

18 August 2021

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