EMPLOYMENT TRIBUNALS

Claimant: Mr H Umradia

Respondent: Department of Transport

Heard at: Watford Employment Tribunal (in person)

On: 3 and 4 October 2022

Before: Employment Judge Quill; Mr M Bhatti MBE; Mr T Maclean

Appearances
For the Claimant: Mr P Tomison, counsel
For the respondent: Mr S Crawford, counsel

REMEDY JUDGMENT having been sent to the parties on 13 October 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REMEDY REASONS

1. The remedy hearing involved us hearing the evidence from two witnesses in person. These were the claimant and Mr Williams, both of whom gave evidence at the liability hearing.

2. The documents that we have had available are all of the documents from the liability hearing together with a remedy bundle prepared specifically for this hearing. We have our liability decision and reasons and some additional documents including adverts for jobs, a revised schedule of loss and written statements from each of the two live witnesses.

3. We have taken into account the law as follows.

4. Remedies for a claimant whose complaint of unfair dismissal has been upheld are dealt with in sections 112 to 126 of the Employment Rights Act 1996.

5. At this particular stage of our decision making in this matter, we are considering first of all the orders that might be made under s.114 or s.115.

> 114.— Order for reinstatement.
>
> (1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) On making an order for reinstatement the tribunal shall specify—

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,

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

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

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) 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 reinstatement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

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

115.— Order for re-engagement.

(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—

(a) the identity of the employer,

(b) the nature of the employment,

(c) the remuneration for the employment,

(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to 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—

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

6. As per s.116(2) we will only consider an order for re-engagement if we first decided that we will not make an order for re-instatement.

7. When considering whether to make an order for either re-instatement or re-engagement (which I refer to collectively as re-employment) we have a duty under s.116 to consider three things in particular;

3.1 whether the employee wants an order to be made,

3.2 whether it is practicable for the employer to comply, and

3.3 whether it would be just to make either type of order where the employee's conduct caused or contributed to some extent to the dismissal.

4 We must always take all of those factors into account but we also have a broad discretion to take account of such other factors as we decide are relevant and appropriate in a particular case. As with any other judicial decision we must take into account everything that is relevant and ignore anything that is not relevant.

5 The requirements of s.117 are not relevant to the decision that we are making at this stage.

6 Furthermore, we discussed with the parties on the first day of this remedy hearing, that we would first make a decision about whether to order re-employment. Having done so, we would hear further submissions about the amount payable as part of any order, or else (as the case may be) about compensation.

7 If the employee is re-instated or re-engaged by the employer following an order made by us then his continuity of employment will be preserved. If we do order re-instatement under s.114 then the order is for the employer to treat the complainant in all respects as if he had not been dismissed.

8 If making an order for re-instatement the tribunal is not ordering any changes in the contract so no changes about the contractual requirements for the work location or for anything else. If we did think that it was not practicable for the employee to resume on the same terms as before (either work location or anything else), then that would potentially be a reason not to order re-instatement. That is, instead we might order re-engagement or else make neither order.

9 When an employee does want to be re-instated or re-engaged then the practicability or otherwise of the respondent being able to comply is a question of fact for us to determine. We must look at all the circumstances of the case and take a common-sense view based on the evidence. There

is no presumption that it will be practicable and we must take into account relevant considerations based on the available evidence and submissions. The fact that it might be inconvenient for an employer to have to reemploy does not necessarily lead to a finding that it would not be practicable for the employer to have to comply with an order. That being said, a mere finding that it would not be impossible for the respondent to comply is not enough for us to decide to make such an order.

10 Since there is no presumption that re-instatement or re-engagement will be, or will not be, practicable, it follows that the respondent is not obliged to provide evidence that it is not practicable. The tribunal will make its decision based on such evidence that has been presented and that can take into account the evidence from the liability hearing as well as any specific evidence at the remedy stage.

11 Practicable means more than merely possible; it means capable of being carried into effect with success: Coleman and Stephenson v Magnet Joinery Ltd [1975] I.C.R. If an employee is not capable of starting and performing the work and that it might mean that it is not practicable.

12 If the effect of an order would be that the employer would become overstaffed then that might mean it is not practicable. The effect of the employer having hired a direct replacement for the employee is specifically addressed by sections 116(5) and 116(6).

13 The relationship between the claimant and his colleagues is usually a relevant factor. The fact that the employee might be on bad terms with one or more colleagues is not necessarily a complete barrier to an order.

13.1 One factor will be whether there has been an irretrievable breakdown or whether the relationship is likely to improve.

13.2 Another factor is whether the bad relationship in question would have an effect on the respondent's business. That is likely to include analysis and consideration of (for example): whether the claimant was on bad terms with somebody who would be responsible for managing him; whether he was on bad terms with somebody with whom the claimant would be expected to work closely and harmoniously with on a regular basis.

13.3 The more important the relationship between the claimant and the colleague, then the less likely it is that re-employment would be appropriate where the relationship has soured.

13.4 In some cases a decision that a relationship is so bad that re-instatement is not practicable would not necessarily prevent an order for re-engagement being made.

14 Working relationships do not necessarily have to be perfect in order for there to be an order for re-employment provided the tribunal is satisfied that both parties, and especially the claimant, would be willing to work professionally with each other.

15 If there has been a breakdown of trust and confidence between employer and employee then an order for re-employment might not be appropriate. The

employer does not have to provide that there has been a breakdown which meets the threshold that is necessary to demonstrate a breach of the implied term requiring trust and confidence.

16 In Kelly v PGA Tour Neutral Citation Number: [2021] EWCA Civ 559, the Court of Appeal ruled that the correct approach to practicability was that set out in United Lincolnshire Hospitals NHS Foundation Trust v Farren. In paragraph 43 of Kelly, the Court of Appeal quoted from paragraphs 40 to 42 of the EAT decision in Farren and added at paragraph 44 that the Court of Appeal considered that that approach, was the one which employment tribunals should adopt.

> 43. The way in which employment tribunals should approach the issue of practicability in this context was considered by the EAT in *Farren*. There, the employer, an NHS Trust, believed that a nurse had administered medication to patients without prior prescription, contrary to the trust's policy. The employment tribunal had accepted that the employee had administered drugs in breach of the trust's policy but considered that the employee had long service, had undertaken training and understood the importance of the policy on administration of medication and, in the view of the tribunal, the employee could be trusted to act properly in an environment other than an accident and emergency unit, given her experience, record and professional commitment. On appeal against that conclusion, the EAT held:
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> > *"40. That, however, was not the correct question for the tribunal. As the case makes clear (see Wood Group Heavy Industrial Turbines Ltd v Crossan [1998] IRLR 680, para 10, cited at para 24 above), it had to ask whether this employer genuinely believed that the claimant had been dishonest, and—per the Employment Appeal Tribunal in, 27 April 2000 , para 14 (see para 25 above)—whether that belief had a rational basis. It was, after all, this employer—not some other and certainly not the employment tribunal—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 trust 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 rehearing, but the tribunal 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 trust's view of trust and confidence— appropriately tested by the employment tribunal as to whether it was genuine and founded on a rational basis—that mattered, not the tribunal's.*
> >
> > *"41. We make clear that we are not saying that we find that a reengagement order was not a permissible remedy in this case. The answer did not have to be in the negative simply because the tribunal had found that a fundamental part of the substantive charge against the claimant had been made good or because it had concluded that her compensation should be reduced by a third, given her contributory conduct, or because it had refused to order reinstatement. These were all relevant considerations but were not necessarily determinative and we would not have allowed the appeal simply on those bases. In particular, we observe that stating the bare facts of a case can seem to suggest a particular answer, but the assessment of practicability for the purpose of a re-engagement order requires a far more nuanced consideration of the position; something that an employment tribunal is very much best placed to undertake. In this case*

> *the assessment undoubtedly included the claimant's long experience, her past good record and professional commitment; all matters that permissibly weighed with the tribunal. We equally do not say that the tribunal was wrong to have regard to evidence of references from other employees: we can see why an employment tribunal might not consider such evidence to be relevant, and we do not consider these were given great weight in the present case, but it is all a matter of assessment for the tribunal.*
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> *"42. What we consider the tribunal did have to do was to consider, as at that point in time, whether the trust had made good that which it said made it impracticable or unjust to order re-engagement; that it could no longer have trust and confidence in the claimant. Given the tribunal had found that the claimant had committed the act of misconduct in question, that might not seem to have been an obviously irrational position, but, as Mr Bourne accepted in oral argument, it was not the only question. The tribunal also needed to consider whether the trust had made good its case that trust and confidence could not be repaired, whether its belief in her dishonesty was such that a reengagement order was unlikely to be carried into effect with success. The tribunal was thus entitled to scrutinise whether the trust's stated belief was genuinely and rationally held, tested against the other factors the tribunal considered relevant. It was, however, still a question to be tested from the perspective of the trust, not that of another employer, still less that of the tribunal: was it practicable to order this employer to re-engage this claimant? And, unfortunately, we do not feel able to conclude this was the approach adopted by the tribunal. We consider that paras 48–49, in particular, set out the conclusions reached by the tribunal itself, standing in the shoes of the employer, testing the question of practicability from the tribunal's perspective rather than asking what was practicable as between these parties, the parties to the re-engagement order it was considering making. That being so, we consider we are bound to allow this appeal and set aside the order."*
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> 44. I consider that that approach is the one that employment tribunals should adopt in considering whether it is practicable to order re-engagement in cases where an employer asserts that the conduct of an employee was such as to have led to a breakdown in trust and confidence between the employer and employee. The question is whether the employer had a genuine, and rational, belief that the employee had engaged in conduct which had broken the relationship of trust and confidence between the employer and the employee.

17 So, as highlighted by the last sentence, the question is whether the employer had a genuine and rational belief that the employee had engaged in conduct which had broken the relationship of trust and confidence between the employer and the employee.

18 The court continued in paragraph 45:

> … similar principles apply to the consideration of whether it is practicable to order re-engagement in cases where an employer has a genuine and rational belief that the employee lacks the ability to perform the required role if re-engaged. The employer will need to establish that it genuinely believes that, if re-engaged, the employee would not be able to perform the role to the requisite standards and that that belief is based on rational grounds. Mere assertion by an employer that it does not believe that the employee would, if re-engaged, be able to meet the demands of the role will be insufficient. But if the employer is able to establish that it genuinely and rationally had such a belief, that will be relevant to, and

> probably determinative of, the question of whether it is practicable for an employer to comply with an order for re-engagement

19 And then, in 46:

> Similarly, an employee may have engaged in conduct which did not, of itself, cause or contribute to dismissal, but which an employer may genuinely and rationally believe means that it can no longer rely upon the integrity of the employee and is unable to have trust or confidence in the employee in future if he were to be re-engaged. … (if the conduct had caused or contributed to the dismissal, section 116(3)(c) of the Act requires the employment tribunal to consider whether it would be just to order re-engagement). Again, the tribunal will have to test whether the employer genuinely believes that the employee cannot be trusted to work for the employer in future and whether there is a rational foundation for that belief. It would not be appropriate to seek to restrict the type of conduct capable of leading to such a conclusion to a category defined, or described, as extreme cases. Rather, the nature of the conduct may well be a factor that is relevant to the assessment of whether the belief is genuinely held, or whether there is a rational basis for the belief. If, for example, the conduct was insignificant or involved minor misconduct, or occurred a long time ago, that may be a factor pointing to a conclusion that the belief that the employer cannot trust the employee to work for him is either not a genuine reason for objecting to re-engagement or is a belief that has no rational basis.

20 Thus the tribunal does not simply take the employer at its word (or at the word of a senior member of staff) when there is an assertion that the employee's conduct (whether or not it was conduct which led to the dismissal) is such that it can no longer rely on the integrity of the employee. The genuineness and rationality of the belief must be analysed.

21 The Court of Appeal went on in the subsequent paragraphs to comment on how the employment tribunal had been wrong in that case and the Employment Appeal Tribunal had been correct in the approach it had taken. In particular, it was made clear by the Court of Appeal that the employment tribunal must not substitute its own view for whether the employee could be trusted not do the job (to the required standard). Instead it must decide whether the employer does have a genuine and rational belief about the employee's lack of honesty and/or lack of capability. It is that belief that should be considered when deciding whether re-instatement or re-engagement is not practicable.

22 The fact that the tribunal has decided that the dismissal was unfair does not prevent the respondent from asserting that it still has a genuine and rational belief that the employee did in fact commit the misconduct in question and that that belief means that it is not practicable for him to resume employment See Wood Group Heavy Industrial Turbines Limited v Crossan [1998] I.R.L.R. 689.

23 The employee's conduct during the litigation including the types of things said in written witness statements or oral evidence might potentially be taken into account as meaning that it is not practicable for the claimant to resume employment. However, given the fact that the unfair dismissal complaint has succeeded, the mere fact alone that the employee has expressed disagreement with the decision to dismiss him, or said that he has been treated unfairly, or that his treatment was inconsistent with the treatment for

other employees, does not mean that it is not practicable for him to be re-employed. The power to award this remedy would be meaningless if it could never be awarded if the employee has criticised the employer for the dismissal.

24 Any risks to the public from re-instatement are obviously important factors as well as any risks generally to the respondent's business.

25 In terms of contributory conduct that is an issue which must always be considered. As just mentioned, the employer's belief about the employee's actions might be relevant to the question of practicability. In any event, apart from considering the employee's conduct (or perceived conduct) at the practicability stage, as per sections 116(1)(c) and 116(3)(c) ERA, the tribunal must consider whether it would be just to order reemployment in light of the decisions the tribunal has made about the Claimant's contributory conduct. The fact that contributory conduct has to be taken into account does not prevent a tribunal from making a re-employment order, if the circumstances warrant it, even if there has been a large amount of contributory conduct.

Facts and Analysis

26 We think that the following 9 issues are particularly relevant when weighing up the decision which we must make.

26.1 The respondent is currently advertising for driving examiners. It is advertising for employees to be issued with two year fixed-term contacts but with a possibility of permanence.

26.2 The respondent argues that it might need to make budget savings and/or reduce head count in the future.

26.3 We take account of the length of time since the end of employment in November 2018. That is slightly under four years. We also take account and the longer period of time since the claimant last performed his duties prior to being suspended. He was suspended in April 2018 which was close to four and a half years ago.

26.4 We note the requirement that driving examiners who have not been performing their duties for 12 months for any reason have to undertake a five-week training course.

26.5 We take into account the evidence which has been presented about the claimant's health.

26.6 The respondent argues that it doubts the claimant's honest and integrity.

26.7 The respondent argues that it doubts the claimant's capability and/or willingness to comply with relevant policies and procedures.

26.8 The respondent argues that it doubts the claimant's capability and/or willingness to understand the requirements of data protection in particular including knowing what amounts to personal data.

26.9 The respondent argues that the claimant was disruptive prior to leaving

and/or that he did not have harmonious relationships with colleagues the same level as him (in other words, other driving examiners) and also with his line manager at the time, Jan, and his line manager's line manager, Chas Perkins.

27 In considering our decision we have taken into account all of the findings set out in out liability decision and reasons. It is not necessary for us to quote extensively from what we have already said there.

27.1 We do note that, in paragraph 199 of those reasons, we said that it was our decision that there should be no Polkey deduction because we did not think a fair procedure could have resulted in a fair dismissal of the claimant given that the decision was outside the band of reasonable responses.

27.2 At paragraphs 200 and 201 we listed the contributory conduct and said that there would be a 33% reduction.

27.3 The conduct was broken down into three subparagraphs 200.1, 200.2 and 200.3, that included: the facts that the claimant took the photo; he printed it at home; he did not explore other alternatives to making the copy that were more secure; the claimant did not promptly send the item to Mr Perkins but waited until he met Ms Collyer; in the disciplinary meeting with Mr Williams the claimant was slightly obstructive in suggesting he would only read a prepared statement rather than answer questions on the supplementary report.

27.4 For the last of these, as we went on to say in paragraph 200.3, we did not hold him fully responsible for that and furthermore, we acknowledged that he, in effect, answered almost every question that was put (some by speaking himself and some by his union representative's remarks).

28 In our liability reasons we discussed the respondent's specific reasons for the dismissal at some length and there is no need for us to repeat everything we said there. We do note, in particular, that, at paragraph 147, we analysed the assertion of dishonesty.

29 We note the respondent is seeking driving examiners and we note that there is such a shortage that it is offering a £1,500 premium for people who are appointed and remain in the job for six months. (It is offering that, not everywhere, but at some particular locations including Barnet).

30 Even though it is possible that - in the fullness of time - not everybody who is offered a two-year fixed-term contract will be taken on permanently, there are clearly vacancies at present and a large number of them.

31 The evidence from Mr Williams was that there are approximately 1,600 driving examiners in the UK in total and that in the South East area there are about 450. For the Barnet centre, he is not sure of the exact number, but his estimate was that there are about 6.

32 The adverts at the moment are seeking about 41 new examiners. So the vacancy rate is around 2.5%, and Barnet seems to be one location for which they are particularly keen to recruit (or else they would not offer the £1500 premium there).

33 Although it is possible that there will be a head count reduction in the future that does not mean that it is not practicable to take the claimant on now. The respondent will not become overstaffed as a result of taking on the claimant (regardless of whether or not it changes the number of new recruits that it is seeking at present from 41 to 40, for example).

34 It sems likely that it would be at least two years before the respondent is going to consider potential redundancies, given that it is issuing two year fixed-term contracts at present. If, in two years' time, it does decide that it is not going to renew the fixed-term contracts and potentially make staffing reductions then those decisions will be made in the light of whatever the facts are at the time. There will potentially have been some natural reduction between now and then as a result of retirements and people departing for other reasons. If there has not been sufficient reduction, then it might have to make compulsory redundancies. However, this is speculative. Firstly, it might not need to make compulsory redundancies in two years' time, and secondly, if it does have to do so in two years' time, that mere fact alone does not make it not practicable to take on the Claimant now.

35 In terms of the length of time that the claimant has been out of the business we do accept that four years is a long time. The respondent retrains people in any event if away for 12 months for any reason. That counts both ways. The fact that they give that training in any event means that it is a fairly regular event and therefore not impracticable to train the claimant. The need to retrain the claimant does not seem likely to be more burdensome than training anybody who has been away, for example, for sickness absence. The respondent is hiring people at the moment as we have just said and it is not going to be more burdensome for the respondent to retrain the claimant than it will be to train these various new employees from scratch. In fact, it is likely to be the opposite. Very fairly, Mr Williams accepted that it is not likely that the claimant will fail to be approved at the end of the training, even taking into account changes which have happened since he left. It is the trainers who will make the decision of whether further training is necessary, or not, at the end of the five weeks. This is an individual decision based on an assessment of each examiner and how they have performed during the training.

36 The claimant's health does not mean that it is not practicable for him to be re-instated or re-engaged; he is fit to work at present. His eye operations were more than two years ago and his other health problems have diminished.

37 The respondent suggests that it would not be practicable to re-instate the claimant taking into account that, as far as Mr Williams is concerned at least, the claimant showed no insight into his wrongdoing and did not acknowledge it, apologise for it or admit it.

38 In fact, as we said in the liability reasons, during the hearing before Mr Williams, the claimant's representative did say on the claimant' behalf that the claimant acknowledged that some disciplinary sanction might be appropriate. When it was put to the claimant in the disciplinary hearing that what he had done had been a breach of data protection requirements, the response the Claimant gave (or one of the responses he gave) was that what Jan did was also a breach of data protection. In other words, tacitly at least

the claimant was accepting that what he had done was a breach of data protection requirements. In context, the comparison to Jan's actions was not an outright denial of wrongdoing. So, by that answer and as well by accepting that some punishment was appropriate, there was acceptance that there had been wrongdoing on his part. It was not unreasonable for him, at the hearing before Mr Williams, to put forward reasons why he did not think that his conduct was such that he should be dismissed.

39 We do not think it is rational for the respondent to say that there had been no acceptance of any wrongdoing by the claimant. It is noted by the respondent that the claimant argued against the proposition that the photograph he had taken and/or the written information in that photograph amounted to personal data. Clearly the claimant was wrong about that and he is aware of that by now. The fact that he argued against that proposition four years ago does not mean that there is a rational basis for thinking that he fails to understand, in 2022, that just because the data consisted of information about himself and information about colleagues who had given him consent to process the data, that the data in question is personal data.

40 It is also suggested that the claimant was dishonest in relation to the date on which the photo was taken. We accept that Mr Williams genuinely believes that that is the case. To put it another way, Mr Williams still genuinely believes that the decision he made in November 2018 was the correct one.

41 We commented in our liability reasons on various things in connection with this including the enquiries that were not made.

41.1 Mr Williams relies on for one thing the issue that the photos showed Sat Nav boxes on the desk and he reached the conclusion that that proved that the photograph must have been November or December.

41.2 He based that on the fact that it was his own experience of other test centres that they did not have Sat Nav boxes on the desk.

41.3 That part of his reasoning is not a rational conclusion. Just because the test centres he had visited had tidied their boxes away (or, at least, had done so on the times Mr Williams visited, as far as he was able to observe and recall) does not mean that every centre had done so. Furthermore, the issue was about Jan's desk specifically.

41.4 It is fair to say that Jan had suggested during her own investigation that she believed that the Sat Nav boxes would not have been on the desk in February. However, there was no further attempt at the time, or since our liability decision, to investigate that further.

41.5 We do accept as we have already said in our liability reasons that there is a limit to how much other people might have been expected to remember the presence or absence of boxes on Jan's desk, and to put a date to their recollections. That was true at the time of Mr Williams' decision making, is even more true if people four years later. Nonetheless, Mr Williams has reached his firm view that the claimant is lying about the issue based on no further enquiries.

41.6 Some of the other factors that Mr Williams took into account for doubting

the claimant's honesty are not rational or relevant. In particular, any alleged discrepancy between what the claimant said about who discovered the book and what Mr Miller said about who discovered the book were not things, as we said in the liability reasons, about which there was an allegation. It was not alleged that Mr Miller and Mr Umradia had staged the scene (eg removed the book from Jan's drawer and placed it on her desk). There is no rational reason to think that the confusion or discrepancy about what Miller said and what the Claimant said about who discovered the book on the day that it was photographed had any relevance to the issue of whether the Claimant was telling the truth – as he recalled it – about the date of the photograph.

42 In terms of the date on which the photograph was taken, as a matter of logic there seems to be three possibilities.

42.1 One possibility is that the claimant is correct when he says that he took the photo on the same day (or immediately before the day) Ms Lal telephoned HR. The date of that call has been independently established.

42.2 Another possibility is that the claimant honestly believes that that is when he took the photo but he has made a mistake about that, and actually he had taken the photographs some significant amount of time earlier.

42.3 The third possibility is that the claimant is deliberately lying and that - consistently what Mr Williams believes - the claimant knows that the photograph was taken in around November or December 2017 but is falsely claiming to think that it was taken in February.

43 An honest mistake seems to be the least likely of the three because the claimant does seem emphatic that he clearly remembers Ms Lal telephoning HR shortly after the photographs. So that seems to leave just the first and third possibilities.

44 As we discussed in the liability reasons, there was evidence about what was written on the left hand side of the notebook. As we said the liability reasons it is a normal fact of everyday life that pages can be torn out in this type of ring binder notebook. That is not unusual or far-fetched. It does not require some conspiracy theory to think that some pages might have been torn out of the notebook in between the date of the photograph (which the Claimant claimed to have been February) and the date that the notebook was examined, first of all by Ms Collyer in April and later by Mr Williams in November 2018. Both of them examined the notebook some significant amount of time after Jan had already been made aware that there had been a suggestion that her notebook somehow breached data protection requirements.

45 In summary, we do not think that either is a rational basis for doubting the claimant's honesty.

46 It is also argued that the respondent has very high standards in relation to honesty but that must be assessed against what is said, for example, about Dave. It is said that the respondent has very high standards in relation to data protection but that must be judged against what actions were taken by the respondent in relation to the manager, Jan.

47 In terms of the data, the precise data which the claimant was alleged to have misused which was data (as more fully discussed in the liability reasons) which was held by the manager, Jan, in a hard copy handwritten notebook. She frequently took that item home with her. She was given a warning. That warning was because she left the item open on her desk unattended. The respondent's decision was that she had done so, even though she denied that when challenged by Ms Collyer.

48 Jan was not dismissed. The fact that it was not Mr Williams who made the decision is of limited significance when set against the facts that Jan was the claimant's line manager and the people who were tasked with the decision in relation to Jan did not think that it was not practicable to continue to employer her. Is is not for this panel to take any views of whether Jan should have been dismissed or not or treated more severely. However, it is appropriate for us to consider the seriousness of her conduct in comparison to that of the claimant's given that the claimant's conduct is alleged to be one of the reasons it is not practicable for him to be re-employed. We do not think that what the claimant did is any worse than what Jan did. He had a particular excerpt of the data from the book, and printed that at home on an unsecured printer. Jan took the whole of the book home which included that page as well as others.

49 We do take account of the fact that the claimant took the phone on holiday with him and it became damaged so it could no longer be used. We also take into account the fact that the information in the photo was his own data and data of other people who had consented to the photo being taken (subject to the clarifications on that point we make in the liability reasons, in relation to the possibility of Jan's data being included).

50 The claimant did genuinely believe that he had been told by Mr Perkins (via Ms Lal) to make a copy. There was a lot of discussion at the liability hearing about whether the claimant did need to make the copy, whether he should have checked with Mr Perkins directly, whether he should have made other enquiries in how to make a copy and so on. However, regardless of all of that he genuinely did believe that he was doing what Mr Perkins had suggested by making a copy.

51 In terms of the suggestion that he claimant only revealed to Sharon Collyer that he had made a printout when she questioned him about that, we do not accept that that is what happened. As per our findings in the liability decision, the claimant had wanted to attend the meeting with Ms Lal. She had arranged to see Mr Perkins and the Claimant wanted to go with her and his intention was to tell Mr Perkins that he had the photograph on the phone. It was Mr Perkins decision that the claimant would not taken part in that meeting and that the matter was to be investigated by Ms Collyer. The claimant went into the meeting with Ms Collyer knowing that his phone was no longer available to show her and knowing that he did have a hard copy available to show her. This is not something that he was intending to hide from her, and not something he only revealed under questioning. It was the whole purpose of his wanting to meet her.

52 Significantly however, in deciding whether it is practicable for the respondents to re-employ the claimant, it is relevant to consider the case of Dave. Dave

is now a Driving Examiner. As discussed in the liability reasons, prior to being investigated and having a decision of misconduct made by Mr Williams, Dave had been in a more senior role managing staff; he reverted to the role of Driving Examiner as a result of decisions made by Mr Williams. Dave volunteered to revert to that role, but it was Mr Williams who decided that he could do so, and that he would not be dismissed.

53 Dave's dishonesty, which was admitted, was putting signatures, which were not his own signature, onto documents and holding out those documents as having been signed by those other people. It seems clear to us that that is a far more significant example of dishonesty and far more relevant to the trust and confidence that is required by a driving examiner than the dispute over the date of the photograph (ie the fact that Mr Williams says that the Claimant is lying when he says the photo was February).

54 The panel is not in any way criticising Mr Williams in relation to what he did in relation to Dave. Mr Williams took a decision that was obviously open to him. He decided that Dave's actions had been satisfactorily explained by the medical evidence and that Dave could be entrusted in the future to perform the role of driving examiner.

55 However, our decision is that if Dave could be trusted - despite his past dishonesty - to continue in the role of driving examiner, it is not rational to say that the Claimant cannot be trusted in the role of driving examiner (even if Mr Williams is correct and the claimant has lied about the date of the photo). Of particular significance is the fact that Mr Williams downgraded the allegations against Dave prior to the disciplinary hearing against Dave; he reduced the allegations from being gross misconduct to serious misconduct and he lifted the suspension.

56 In terms of relationships with employees, Mr Williams specifies in his witness statement the names of three employees from the claimant's time are still at Barnet. Tony Assano is one. He was referred to in the supplementary investigation report as making some critical comments about the claimant. Tony Assano was also a driving examiner. Driving examiners spend significant amounts of their time each day actually carrying out the driving tests for member of the public. There is a limited amount of time each day when they are required to mingle with colleagues and they have a team meeting perhaps once a week which may last an hour or so.

57 Of the other two employees neither of them is reported as having had problems with the claimant. In fact, one of them, Richard Miller, is the third employee along with the claimant and Ms Lal who were present at the time of the photographs.

58 Jan has left and no doubt been replaced as a line manager. We do not think that the fact that the claimant had some particular issues with her necessarily demonstrates that he would have issues with any line manager whatsoever. On the claimant's case at the liability hearing, the main issue between him and Jan was that there was a particular test route which the Claimant thought should not be used anymore because the legal requirements on the route had changed. He argued that the route was no longer one that could lawfully be used. Whether that is true or not true it does not seem to show that the claimant will have any problems with his line manger whoever that might be.

59 In terms of Mr Perkins, we do not have any evidence from Mr Perkins. There was reliance placed on an exchange of emails between Mr Perkins and the claimant. The claimant had written to Mr Perkins setting out his version of events over a particular conversation and copying in other people. Mr Perkins replied setting out Mr Perkins' own version of those events. The fact that the claimant did not reply again does not necessarily mean that the claimant accepted Mr Perkins' version was correct. In any event, the Claimant denied that in his oral witness evidence. If the claimant is re-instated and Mr Perkins is still there then Mr Perkins will be the claimant's line manager's line manager. It will obviously be important for the claimant to have a respectful and harmonious relationship with Mr Perkins. However, the evidence presented to us does not lead us to doubt that that will be possible. The relationship with Mr Perkins is not such that it would not be practicable for the claimant to be re-employed.

60 As we have said there is no presumption either way that re-instatement is appropriate or not appropriate for a given employee but, in all the circumstances of this case we do think that re-employment would be a just and fair outcome.

61 The claimant was dismissed in circumstances set out in the liability decision more fully. In particular, our finding was that he did take the photograph to report it to the managers or to report it to the employer and we do not think that there was a rational basis for thinking that he took that photograph for ay other reason. Having reported the manager's wrongdoing to the employer, the employer imposed a particular sanction on the manager which did not lead to her dismissal. The claimant was actually dismissed and this sequence of events does not cause us to doubt that the claimant would be able to resume the duties of a driving examiner. There was no suggestion that the claimant had ever misused the data of customers and there is no reason to believe he will do so in the future.

62 It is our decision therefore in all the circumstances that re-instatement is appropriate. We do not need to order him to go to a different driving centre because we do not think there is any particular issue with his being returned to the same Centre that he was in before. It will obviously be a matter for the parties to resolve whether or not the claimant's contract is such that the employer is free to deploy him anywhere. However, to the extent that his contract requires him to return to Barnet, then presumably, they will return him to Barnet. It is not a matter for us because the order that we have made, as we have already said, is that he is to be treated as if he had not been dismissed.

Financial Issues

63 As we said earlier, our decision under s.114(2) of the Employment Rights Act is that he claimant will be re-instated. The date by which that order must be complied with is 7 November 2022.

64 The tribunal is satisfied that the claimant would have had absence for his cataract operations and he would not have come back to work between the two operations so his absence would have started in December 2019. He would not have been able to work from December 2019, and in the absence of any clearer or specific dates we are going to say around the middle of

December, so around about the 18 December, he would have had six months on full pay after that and he would have returned to work on 12 September so, from 18 June 2022 to around 12 September 2020 he would have been on half pay.

65 We make no reductions for any time off sick that the claimant might hypothetically have had for other reasons such as depression. We are not satisfied that the claimant would have had lengthy periods of absence for depression. Even if he had a day or two here and there if he was so affected by depression we do not think it would have affected his entitlement to sick pay. We are not persuaded that it would have come within the same period in which he was affected by the cataracts but in any event, we are not persuaded that the claimant would have had time off sick for depression but for the dismissal.

66 So, the overall gross amount that we order that the respondent must pay is £113,585.84. We wish to make clear that we are making that on the basis that our order is for reinstatement, and so he will be deemed to have been continuously employed. On that basis, it is our expectation that the parties and HMRC will decide that the overall gross amount will be subject to PAYE and other deductions. If HMRC or if the parties come to a different view and that it becomes apparent that the award will be taxed differently, then there can be an application for reconsideration on the basis that the panel has misunderstood what the actual tax situation was going to be.

67 The calculations we have done are:

67.1 From the dismissal date until 1 August 2019 the weekly gross rate was £552.08 x 38 weeks, so that period is £20,979.07.

67.2 From 1 August 2019 to 18 June 2020 would have been a full pay period, 21 August 2019 to 18 June 2020, 46 weeks at the gross rate of 557.560 per week, so for that period it is £25,649.60.

67.3 He would have been on half pay for the next 12 weeks.

67.3.1 The first 6 weeks of that period 19 June to 31 July, that is half of £557.60, so for those 6 weeks the total would be £1,672.80.

67.3.2 The next 6 weeks, still on half pay but now at half of £565.97. Those 6 weeks in total would be £1,697.91.

67.4 The next period is for 13 September 2020 to 31 July 2022, back on full pay. Full pay at £565.97 per week x 98 weeks and so gross £55,465.06 for those weeks

67.5 From 1 August 2022 to the day before the re-instatement date, so up to 6 November, is 14 weeks at the rate per week of £580.10, and that totals £8,121.40.

67.6 We calculate that to aggregate to £113,585.84.

68 In relation to pension, it is our understanding that the parties are in agreement that the claimant will be re-instated back into the same pension scheme and

so any amounts that the respondent needs to deduct from the gross sum that we have just described in relation to the Claimant's obligations to make employee contributions can be deducted from the gross sum in the normal way by the respondent's pension provider.

69 In relation to the non-consolidated sums or non-com sums that we heard about (£252 and £132), we were not satisfied on the evidence that those are sums that the claimant would have been entitled to but for his dismissal. There is not sufficient evidence one way or the other on that point, it is perfectly possible that these are some sort of bonus entitlement that not every employee received and we have not been persuaded that the claimant should be awarded the benefit of those losses.

Employment Judge Quill

Date: 14 December 2022

Reasons sent to the parties on

15 December 2022

For the Tribunal office