EMPLOYMENT TRIBUNALS

Claimant: **Mr Z Farooqi**

Respondent: **East London Bus & Coach Company Limited**

Heard at: **East London Hearing Centre**

On: **30 June 2022**

Before: **Employment Judge Gardiner**

Members: **Mrs G Forrest**
Ms R Hewitt

Representation

Claimant: In person

Respondent: Mrs Grace Holden, counsel

JUDGMENT ON REMEDY having been sent to the parties on **8 September 2022**. and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013 by the Respondent on 20 September 2022**.**

REASONS FOR REMEDY

1. This is a Remedy Hearing to decide the remedy to which the Claimant is entitled following our decision that he was unfairly dismissed. Mr Raza has represented the Claimant and Mrs Holden, counsel has represented the Respondent.

2. The issues were identified at the start of the hearing. Essentially the Claimant was seeking reinstatement or re-engagement, which had been his consistent stance since the proceedings were first issued. He had repeated in his witness statement prepared for the liability hearing that he was looking to get his old job back. He was not able to identify any other particular jobs that he should be awarded by way of re-engagement.

3. Oral evidence was given at this hearing by the Claimant himself, and by Mrs Hannan on behalf of the Respondent. Each witness who gave evidence was cross

examined about their evidence. The Tribunal has also had regard to a bundle of documents which extended to 178 pages. This comprised the original hearing bundle, to which some pages were added before the start of this Remedy Hearing. It also included additional pages which were added by the Respondent on the morning of the Hearing and pages introduced by the Claimant at the outset of his evidence.

4. As we have said, the Claimant's primary position is that he should be reinstated to his role as a bus driver employed by the Respondent. Although he did not have the Group 2 (lorry or bus) licence at the date on which he was dismissed, since it was revoked following his stroke, this licence was reinstated on 15 February 2022. The Claimant says he is currently sufficiently fit to drive buses. As a result, from his personal point of view, his case is that he is fit and legally able to be returned to the same role he was in at the time of his dismissal.

5. The Tribunal must assess whether to reinstate the Claimant by applying the matters referred to at Section 116(1). That section is worded as follows:

> "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."

6. The Claimant has always indicated that he wished to be reinstated. It is accepted that the Claimant did not cause or contribute to the dismissal. Therefore, the only issue for the Tribunal to consider is whether it would be practicable to reinstate the Claimant.

7. We have had regard to the following guidance from the IDS Handbook on Unfair Dismissal (at paragraph 13.31):

> "The EAT has stated that, when assessing practicability, tribunals should not attempt to analyse in too much detail the application of the word 'practicable' but should look at the circumstances of each case and take a 'broad common sense view' — *Meridian Ltd v Gomersall and anor 1977 ICR 597, EAT*. Nevertheless, *practicable* in this context means more than merely possible, but rather 'capable of being carried into effect with success' — *Coleman and anor v Magnet Joinery Ltd 1975 ICR 46, CA*. It should also be borne in mind that the test is one of 'practicability' not 'expediency'."

8. The date at which the practicability of an order for re-engagement is to be considered is when such re-engagement would take effect – effectively the date of the remedies hearing. It is not normally sufficient for an employer resisting re-

instatement to argue that the employee would require additional training- *Davies v DL Insurance Services Limited* EAT 0148/19 at paragraph 24 (Choudhury J):

> "Whilst the Respondent contended that he might need some training and that he was not the best candidate for the job, that does not necessarily mean that compliance with a re-engagement order was not practicable. As has been clearly established by authority, practicability in this context means more than merely possible. The Tribunal must be satisfied that an order for re-engagement would be capable of being carried into effect with success. Capability in this context would take some account of the size and resources of the Respondent. It might be said that the Respondent was capable of carrying a re-engagement order successfully into effect, even if it did require some training to be applied to the candidate."

9. The Respondent has agreed with the relevant trade unions that it will reinstate those bus drivers who are dismissed on health grounds if they apply within six months of the date of dismissal and if they are sufficiently fit to return to work. If they apply at a later date, they will be re-engaged but on the same terms and conditions that apply to new recruits, losing the salary enhancement that applies to those employed for more than one year. There is thus a well established pathway for those drivers who are medically fit to return to their previous employment, whether on the same terms and conditions or on the conditions that apply to new starters.

10. The assessment of practicality focuses on the logistics of returning the Claimant to the Respondent's employment. There is no need to consider in these circumstances a driver's previous performance ratings or whether there is a particular vacancy to be filled. No significant problems have been raised by the Respondent to indicate that from a logistical point of view, the Claimant could not be returned to his previous role.

11. The evidence from Mrs Hannan was that the Claimant would need to undergo a driving assessment which may indicate further training was required; and that there may be a need to be re-familiarised with routes and to undergo CPD training. None of these potential features in the Claimant's case renders it impracticable to reinstate him.

12. Therefore, we find that it is practicable to return the Claimant to his previous role. This is the role of Bus Driver for the East London Bus & Coach Company Limited, based at the West Ham Garage. He should be returned to the same terms and conditions as he had when he was dismissed, with the same entitlement to seniority, namely someone who had been first employed on 3 November 2014. This means he has the benefit of over seven years continuous employment and the contractual benefits that flow from such service. His pay grade should be LJ43, not DE23 as asserted by the Claimant. LJ43 is the paygrade set out on the Claimant's payslips.

13. The Respondent's policy, agreed with the unions, is that those who reapply for their previous roles within six months of ill health dismissal and are sufficiently fit to return are put back on their previous terms and conditions with their seniority intact. Those re-applying at a later date are treated as new joiners. This policy does not

mean it is impracticable to reinstate the Claimant to his previous role on his previous terms and conditions with his accrued seniority.

14. A tribunal making a re-instatement order must specify any amount payable by the employer in respect of any benefit which the employee might reasonably have been expected to have received but for the dismissal – section 114(2)(a) ERA 1996.

15. Based on the evidence we have heard we find that the remuneration that the Claimant is entitled to receive in this role from 1 July 2022 is a basic wage of £15.86 per hour gross for working a 38-hour week. This is equivalent to £31,339.36pa gross. The Claimant is also entitled to be offered overtime, when available, in the same way as other Bus Drivers based at the West Ham Garage. As a result, it is not necessary to consider re-engagement or to make an assessment of the basic or compensatory award to which the Claimant would have been entitled.

16. We do need to consider what financial benefits the Claimant would have received had he continued to be employed. We are not currently in a position to make precise calculations. However, we indicate the following:

    a. The Claimant would have continued to receive the contractual sick pay and SSP that he was entitled to receive had he not been dismissed. This in practice means contractual sick pay would have continued until the end of August 2020; and SSP would have continued for a further 103 days. He would have received the corresponding pension entitlement over this period.

    b. Thereafter he would have been entitled to receive his holiday entitlement paid at full pay over the period from 7 August 2020 until he would have come back to work.

    c. The Claimant would have applied for a role as a bus driver on 23 February 2022 and we decide he would have been back in a role paying him the salary he would have received had he continued to be employed by 24 March 2022. He is therefore entitled to receive 14 weeks' pay to 1 July 2022.

    d. The Claimant should give credit for payment of salary in lieu of notice at the point his employment was terminated; and for accrued but untaken holiday leave.

17. The prescribed element of this award will be the 14 weeks' pay from 24 March 2022, and the prescribed period is the period from 24 March 2022 to 30 June 2022.

18. We announced our decision that the Claimant should be reinstated at the conclusion of the Remedy Hearing. We invited the parties to make further written submissions including additional pay information to enable the Tribunal to finalise the Reinstatement Order and its Judgment. The Respondent provided further information and calculations in emails to the Claimant and to the Tribunal on 7 July 2022 and 11 July 2022. The Claimant responded on 14 July 2022 with his own calculations, prompting a further email from the Respondent on 22 July 2022.

19. As the Claimant is being reinstated to his previous role, he must be placed in the same financial position as he would have been in had he not been dismissed.

20. So far as contractual sick pay is concerned, the Respondent's position is that the Claimant is entitled to a further 16 days of sick pay calculated at half rate. This was agreed by the Claimant in his email of 14 July 2022. The Respondent agrees that the Claimant's gross weekly pay was £596.06 per week. The calculation is therefore 16 x 0.5 x £596.06/5 = £952.10.

21. So far as the Claimant's entitlement to statutory sick pay, the Respondent's calculation is that the Claimant was entitled to a further 103 days. This is not challenged by the Claimant. As the rate of statutory sick pay was £95.85, the calculation is £95 x 103 = £9,872.53.

22. There is a dispute between the parties as to the Claimant's contractual hours. The Claimant argues he was required to work 40 hours per week. The Respondent says that this was reduced to 38 hours per week following a pay deal struck with Unite in 2017. Having reviewed the documentation provided by both parties, we agree with the Respondent that the Claimant's weekly contractual hours was 38 hours, rather than 40 hours.

23. We agree with the Respondent's calculations as to the amount of salary which is due in relation to the period between 24 March 2022 and 30 June 2022. This is 38 hours a week for 14 weeks at £15.86 per hour = £8,437.52.

24. We do not make any award for overtime during the period from 24 March 2022 to 30 June 2022. The Claimant has not shown, on the balance of probabilities, that he would have been offered and would have accepted work in excess of 38 hours a week during this period.

25. In its email dated 11 July 2022, the Respondent set out its calculations as to the number of days holiday to which the Claimant would have been entitled over the period from 8 August 2020 to 30 June 2022 as follows (excluding Bank Holidays):

    a. From 8 August 2020 to 1 January 2021 – 10 days leave.
    b. From 2 January 2021 to 1 January 2022 –25 days leave.
    c. From 2 January 2022 to 30 June 2022 – 13 days leave.

26. This totals 48 days leave, excluding Bank Holidays.

27. The Claimant must give credit for the notice pay he received following his dismissal (Section 114(4) ERA 1996). This was £2,975.31 gross in lieu of notice paid in his final payslip. He must also give credit for the payment he received for accrued but untaken holiday pay which was £2,618.27 gross. As these are gross sums, tax and national insurance contributions would have been deducted from these sums, such that the credit to be given will equate to the net sum received as a result of the operation of the Respondent's PAYE payroll system.

28. So far as pension contributions are concerned, if the Claimant chooses to make pension contributions in respect of past pay, the Respondent is to make the appropriate level of corresponding employer pension contributions. Employee

contributions are 5% of pensionable pay, and employer contributions are 3% of pensionable pay.

29. For the avoidance of doubt, there is to be no reduction to reflect that had compensation been awarded instead of reinstatement, it could have been reduced under the principle set down in *Polkey v AE Dayton Services Limited* [1988] ICR 142, to reflect the likelihood that the Claimant would have been fairly dismissed had a different principal reason been given for dismissal, namely lack of PCV licence – *Arriva London Limited v Eleftheriou* [2013 ICR D9.

Employment Judge Gardiner
Dated: 28 March 2023