EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Steven Hickling	**v**	ASDA Stores Limited

Heard: in Nottingham

On: 16 June 2023

Before: Employment Judge Ayre
Ms H Andrews
Mr R Jones

Representatives:

Claimant: Mr A Korn, counsel
Respondent: Mr P Sangha, counsel

FIRST REMEDY JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The respondent is ordered to pay to the claimant a basic award of £7,180.80.

2. The claimant's applications for reinstatement and/or re-engagement fail and are dismissed.

3. The amount of the compensatory award will be determined at a subsequent remedy hearing.

REASONS

Background

1. In a judgment sent to the parties on 13 April 2023 the Tribunal found that the claimant was unfairly dismissed but contributed to his dismissal by 45% so that the basic and compensatory awards should be reduced by 45%. The claimant's claims for disability related harassment were dismissed.

2. The case was listed for a Remedy Hearing today and Case Management Orders were made to prepare the case for today's hearing.

The Proceedings

3. There was an agreed remedy bundle running to 211 pages. The parties also wished to refer to documents in the original bundle used at the liability hearing. The claimant gave evidence and had prepared a witness statement. Mr Korn prepared a written skeleton argument for which we are grateful.

4. At the start of today's hearing, we discussed the issues that would fall to be determined. It became evident that there were a large number of areas of dispute between the parties, and very little agreement. We gave the parties, both of whom had the benefit of representation by experienced counsel, time to try and agree the issues, but they were unable to do so.

5. The only issues that were agreed were:

    a. The calculation of the basic award which, after a 45% reduction for contributory conduct, came out at £7,180.80;
    b. The amount to be awarded for loss of statutory rights; and
    c. The amounts claimed by the claimant for loss of shopping discount and gym membership.

6. The Tribunal was concerned that there may not be sufficient time to deal with all of the issues in the 3 hours allocated for the hearing. It appeared that, notwithstanding the Case Management Orders that had been made, the parties had left preparation for today's hearing until the last minute. The respondent indicated that it had only received the claimant's remedy witness statement two days before the hearing and had received four different Schedules of Loss.

7. There were discrepancies between the amounts claimed in the latest Schedule of Loss and in the claimant's witness statement. The respondent's position on some issues had also changed. For example, in the Counter Schedule of Loss the respondent appeared to agree with the claimant's figure for loss of sharesave benefit, but during the hearing Mr Sangha indicated that it was not agreed.

8. In light of the state of preparation and the number of issues that fell to be determined, it was the unanimous decision of the Tribunal that we would deal today with the claimant's application for reinstatement or re-engagement and make an order for the payment of the basic award, but that all other remedy issues would have to be determined at another hearing.

9. A one day remedy hearing was fixed by agreement with the parties and Case Management Orders have been made separately to prepare the case for that hearing and avoid the difficulties that have been experienced today.

Findings of Fact

10. We make the following findings of fact on a unanimous basis.

11. The claimant gave evidence today that he did not believe that trust and confidence between him and the respondent had broken down irretrievably. His remedy witness statement also said however that his mental health had been severely impacted by what happened to him at work, to the extent that he had no alternative but to seek medical advice and was prescribed anti-depressants and counselling.

12. The claimant's evidence, which we accept, is that he found it extremely difficult to carry on after the way in which the respondent's management accepted Adrian Stretton's account without attempting to investigate the mitigation that he put forward. He has suffered from poor mental health and continues to receive treatment for that.

13. Even now, the claimant finds it very difficult to even drive past his former place of work.

14. It is clear from his evidence to the Tribunal at today's remedy hearing that the claimant is still very upset by what happened to him at work, and resentful. He told the Tribunal that if the respondent had done its job properly he would not have been dismissed, and maintained that Adrian Stretton had been lying.

15. In his evidence to the liability hearing (paragraph 19 of his witness statement for that hearing) the claimant said that from December 2019 to March 2021 ASDA had been complicit in allowing him to suffer continuous abuse and harassment in the workplace on a daily basis whilst clearly being aware that it was taking place. His statement also said that there had been a 'clear pattern of targeted victimisation' and that the respondent had treated him with indifference and insouciance.

16. The claimant gave evidence to the liability hearing that what happened to him at work led to him having a lack of confidence and trust in the management that should have protected him whilst he was employed.

17. During today's hearing the claimant said that the reference to a lack of confidence and trust was in relation to the local management at the depot where he worked, and Paul Statham the dismissing manager in particular. He said that his issues were not with the company, and that the general manager and shift manager had been replaced since he left. He also referred however to Adrian Stretton having lied, and to Liam Hough having failed to carry out any investigation. Both Mr Stretton and Mr Hough are still employed by the respondent.

The Law

Remedies for unfair dismissal

18. Section 112 of the Employment Rights Act 1996 ("**the ERA**") sets out the remedies that can be awarded for unfair dismissal:

"*(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 to 126) to be paid by the employer to the employee."

19. The following are the relevant provisions of the ERA relating to reinstatement and re-engagement:

"***113 The orders***

An order under this section may be –
(a) an order for reinstatement (in accordance with section 114), or
(b) an order for re-engagement (in accordance with section 115)
as the tribunal may decide.

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….

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…

116 Choice of order and its terms

(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account –

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and
(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the tribunal shall take into account –

(a) any wish expressed by the complainant as to the nature of the order to be made,
(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and
(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms…."

20. When considering whether to order reinstatement or re-engagement, the most important factor for the Tribunal to consider is whether it would be practicable to make such an order. That question is one of fact. It has been held that Tribunals should take a 'common sense' approach to the question of practicability (***Meridian v Gomersall and anor [1977] ICR 597 EAT***) and that in order to be practicable, an order must be capable of being carried into effect with success (***Coleman and anor v Magnet joinery Ltd [1975] ICR 46 CA***).

21. In ***First Glasgow Ltd v Robertson EATS 0052/11*** the EAT held that the Tribunal was wrong, when deciding to make an order for reinstatement, to take account of the fact that the employer did not lead evidence or even make submissions on the question of practicability. The EAT found that there is no statutory presumption of practicability and no burden on the respondent at the stage when the Tribunal is considering whether to make an order, to prove that reinstatement would not be practicable.

22. Although contributory conduct must be taken into account by the Tribunal when deciding whether to make an order for reinstatement or re-engagement, a finding of contributory conduct, even substantial, is not a bar to either reinstatement or re-engagement.

23. The personal relationship between the claimant and his former colleagues is a relevant factor when deciding whether it would be practicable to order reinstatement or re-engagement. In addition, a breakdown of trust and confidence between employer and employee may render reinstatement or re-engagement impracticable (***Wood Group Heavy Industrial Turbins Ltd v Crossan [1998] IRLR 680*** and ***Northman v London Borough of Barnet (No.2) [1980] IRLR 65***).

24. In ***Kelly v PGA European Tour 2021 EWCA Civ 559*** Lord Justice Underhill suggested that the words 'trust and confidence' in the context

of reinstatement or re-engagement should be given a common sense interpretation, so that it may not be practicable for an employee who has been dismissed to return to work for an employer that does not have confidence in him because of previous conduct or poor performance.

25. In cases involving dismissal for misconduct, a relevant consideration for the Tribunal when deciding whether to order reinstatement or re-engagement is whether the respondent genuinely and rationally believed that the claimant was guilty of misconduct (***Wood Group Heavy Industrial Turbins Ltd v Crossan [1998] IRLR 680*** and ***United Lincolnshire Hospitals NHS Foundation Trust v Farren [2017] ICR 513*** and approved in ***Kelly***).

Basic Award : Unfair dismissal

26. Section 118 of ERA the provides that:

"*(1) Where a tribunal makes an award of compensation for unfair dismissal…the award shall consist of –*

(a) A basic award (calculated in accordance with sections 119 to 122 and 126), and
(b) A compensatory award (calculated in accordance with sections 123, 124, 124A and 126."

27. Section 119 (1) of the ERA contains the provisions for calculating a basic award, which shall be done by:

"*(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,*
(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
(c) allowing the appropriate amount for each of those years of employment…"

28. The 'appropriate amount' is set out in section 119 (2) of the ERA as follows:

"(a) *one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,*
(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
(c) half a week's pay for a year of employment not within paragraph (a) or (b)."

Submissions

Claimant

29. Mr Korn submitted that there was no witness evidence from the respondent objecting to reinstatement or re-engagement or arguing that

it was impracticable. The respondent's case on the issue is therefore based entirely on counsel's submissions which are speculative and mere assertions.

30. Mr Korn accepted that a fundamental loss of trust and confidence may be a reason for the Tribunal to conclude that reinstatement or re-engagement is not practicable, but that cannot be merely asserted by counsel, the Tribunal needs to hear evidence on that issue.

31. One option, Mr Korn suggests, is for the Tribunal to make an exploratory order. The dismissal in this case was not merely procedurally, but also substantively unfair and, had the matter been properly investigated, a different conclusion may have been reached. Responsibility for that failing lies with the management at the time.

32. Mr Korn pointed out that the Tribunal found in its liability judgment that the claimant's actions on 12 March (for which he was dismissed) were not premediated. Trust and confidence has not broken down. The claimant has a long and previously unblemished record with the respondent and had initially got on well with Adrian Stretton.

33. In light of the Tribunal's conclusions in the liability judgment there are, Mr Korn submits, no good reasons not to order reinstatement or re-engagement, and no reason to believe that there would be a repeat of the issues which led to the claimant's dismissal were he to be reemployed by the respondent.

Respondent

34. Mr Sangha submitted that it would not be practicable to order either reinstatement or re-engagement. The question is whether the respondent's belief that there is a barrier to practicability is genuinely held and based on rationale grounds. He referred us to the case of ***Kelly v PGA European Tour 2021 EWCA Civ 559***. This is, Mr Sangha says, a question of fact for the Tribunal based on a common sense assessment.

35. In Mr Sangha's submissions, the evidence shows that reinstatement and re-engagement would not be practicable because:

    a. The parties need to be able to trust each other and the evidence shows that they no longer do.

    b. Of the nature of the conduct for which the claimant was dismissed – namely driving a Low Level Order Picker ("**LLOP**") dangerously in a workplace in which health and safety are paramount; and

    c. The working relationship is likely to be very difficult, or even poisonous should the claimant return to work. The claimant made very serious harassment allegations about someone who is still employed, and it is hard to see how that is 'water under the bridge'.

Conclusions

36. The following conclusions are reached on a unanimous basis after considering carefully the evidence before the Tribunal, the legal principles summarised above, and the oral and written submissions of both parties.

37. The Tribunal considered very carefully the claimant's application for reinstatement or re-engagement. In reaching our decision we have reminded ourselves that reinstatement or re-engagement are the primary remedies for unfair dismissal and that contributory conduct, even substantial, is not a bar to making either order.

38. We were concerned by the lack of evidence from the respondent on the question of practicability of reinstatement or re-engagement, but in light of the guidance of the EAT in In ***First Glasgow Ltd v Robertson EATS 0052/11*** it does not follow that the failure to adduce such evidence should result in an order being made.

39. The primary consideration for the Tribunal remains whether reinstatement or re-engagement would be practicable, and we find on balance that neither would be practicable.

40. In our liability judgment we found that the claimant had deliberately driven his LLOP into the back of Adrian Stretton's LLP, thereby causing damage to property belonging to the respondent. We also found that the claimant had driven into the aisle where Mr Stretton was working intending to confront Mr Stretton and swearing at him.

41. The claimant has continued to maintain throughout that what happened was an accident rather than deliberate.

42. The Tribunal found Mr Statham, who took the decision to dismiss the claimant, to be an honest and credible witness. He concluded (as referred to in our liability judgment) that the claimant had driven into Mr Stretton's LLOP deliberately, and this is behaviour was inflammatory and a serious breach of health and safety. We found (paragraph 204) that Mr Statham considered the claimant's actions to amount to gross misconduct and that that was a conclusion it was open for him to reach on the evidence before him. We also found that Mr Statham had reasonable grounds for believing that the claimant had committed gross misconduct (paragraph 207).

43. It is in our view clear from the findings in the liability judgment that the respondent's trust and confidence in the claimant has broken down. The respondent genuinely and rationally believed that the claimant had committed gross misconduct.

44. We have then gone on to consider whether trust and confidence is also broken from the claimant's perspective. We find that, based upon the claimant's evidence to the Tribunal today, and the way in which he speaks about the respondent, that he is still very resentful towards Asda. Whilst that resentment may very well be justified, at least in part, it does affect the practicability of reinstatement and re-

engagement. We find on balance that the claimant does not have trust and confidence in the respondent and, from the way in which he speaks about Liam Hough and Adrian Stretton, do not accept that his lack of trust and confidence is limited to former members of management.

45. We are concerned about the practicability of putting the claimant back into a workplace where relationships broke down so badly, including with some members of staff who are still present in that workplace. We are particularly concerned about the potential working relationship between the claimant and Adrian Stretton and Liam Hough. We cannot ignore the fact that the claimant contributed substantially to his dismissal and, whilst that is not a bar to a reinstatement order, section 116(3)(c) requires the Tribunal to take it into account.

46. In light of the above, and of the contributory conduct by the claimant, it would not in our view be just to order that the claimant be re-engaged by the respondent, even on an exploratory basis as suggested by Mr Korn.

47. We have also considered carefully whether to order re-engagement to another place of work and whether some of the concerns above could be circumvented by such an order.

48. The claimant has not suggested any particular roles or other workplaces where he could work, nor submitted any evidence in support of a re-engagement order. We are also concerned about the lack of flexibility that was shown by the claimant previously when he was asked to work temporarily in another workplace and refused to do so. There is, quite simply, insufficient evidence before us to make a re-engagement order. We are also of the view that the breakdown of trust and confidence between the parties makes such an order impracticable.

49. In the liability judgment the Tribunal also found that the claimant had refused a reasonable request by Mr Wright that he work on a temporary basis in another location and that the claimant was "*being difficult and coming up with excuses because he did not want to work in the IDC*" (paragraph 188).

50. We therefore find that neither a reinstatement nor a re-engagement order would be practicable. We have considered Mr Korn's suggestion of an exploratory order but no evidence or submissions have been provided as to how such an order would make and, in light of this and of our findings above, we are not minded to make such an order.

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Employment Judge Ayre

Case No: 2601439/2021

19 June 2023

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE