



EMPLOYMENT TRIBUNALS

Claimant: Mr BRIAN WEBSTER

Respondent: DIAMOND BUS (NORTH WEST) LIMITED

Heard at: Manchester

On: 14 July 2023

Before: Tribunal Judge Holt
Ms Sheard
Ms Pennie

REPRESENTATION:

Claimant: In person

Respondent: Ms Rebecca Jones (Counsel)

WRITTEN REASONS

Introduction

1. These are the written reasons of the judgement regarding the Claimant's claim for reinstatement with the Respondent. Our decision was given orally at the conclusion of the hearing on 14 July 2023. The oral decision included the reasons for our decision. The oral decision was followed by a written judgement prepared by me on 19 July 2023. The (written) short judgement was sent by the Tribunal staff to the parties shortly thereafter. The judgment of the Tribunal was that the claim for reinstatement was refused.
2. For completeness, I will give some more contextual information about the progress of this claim. The background is that the Claimant had originally brought multiple claims, including: for protected disclosures (pursuant to Part IV A of the Employment Rights Act 1996 ("ERA 1996")); for whistleblowing detriment pursuant to section 47B ERA 1996; and for automatic unfair dismissal pursuant to section 104 of the ERA 1996. In addition, the Claimant brought other claims, which have not yet been determined, for unlawful deduction from pay pursuant to Part II ERA 1996 for unpaid wages and holiday pay.
3. We heard the various claims between 12 and 16 June 2023. However, our decision was reserved because of the lack time allocated to the case (which

had been brought forwards due to a re-organisation affecting the Respondent), but we were able to produce our reserved/written Judgment on 3 July 2023 and which was promulgated by the tribunal admin staff very quickly thereafter. In our Judgment dated 3 July 2023 we found that the protected disclosure and whistleblowing claims to be unfounded. However, we also found that the Claimant had been unfairly dismissed pursuant to section 104 ERA 1996.

4. A first remedy hearing was listed as soon as 14 July 2023 to deal with the discrete issue of interim relief. This was because there was a significant degree of urgency due to the fact that the Respondent is currently in the throes of a complex process of working out redeployment and TUPE transfers for their workforce, connected to a massive re-organisation and franchising operation applying to the provision of bus services in the Greater Manchester area.

The parties to the litigation procedural background

5. On 14 July 2023, the Claimant appeared as a litigant in person (as he had done at the June hearing), and the Respondent was represented by Ms Jones (Counsel).
6. In terms of timing, unfortunately, the 14 July 2023 hearing fell at a time when the Claimant was dealing with a very difficult personal matter for him and his family. Linked to his personal difficulties, he asked to be excused from the end of the hearing when I delivered our decision on reinstatement. Before reaching our decision on reinstatement we deliberated and I produced a document although, unfortunately, Mr Webster had opted to leave by the time that the decision was delivered by my reading the document containing our decision.
7. Immediately after delivering our decision, I emailed my informal draft of our decision to Ms Jones' clerk. As anticipated, Ms Jones shared the document with her solicitor. At the same time, and because the Claimant had not been present at the end of the hearing, I emailed my informal draft of the decision to the tribunal admin staff and asked them to forward it to the Claimant because (i) he had not been present to receive our decision due to his personal difficulties, and (ii) I had given directions on the next steps in order to progress the case to a further remedies hearing. Unfortunately, the tribunal staff did not act immediately and so the slightly unfortunate consequence was that the Respondent's legal team knew of our oral decision and had also received the written draft very quickly, whereas the Claimant did not receive anything for a number of days. In the interim, entirely understandably, the Claimant contacted the Respondent's solicitor to find out the result of the 14 July 2023 hearing and I understand that, quite properly, a copy of the informal draft document was shared with him.
8. When I checked with the Tribunal admin staff at the end of July, the formal Judgment on Reinstatement document had not been sent out to the parties, although I understand that it was finally sent around 27 July 2023. However, having received a copy of the informal draft and before receiving the formal Judgment on Reinstatement, the Claimant indicated that he required written

reasons of the interim relief decisions. It should be noted that this has fallen within the summer holiday season which has added in some further delay.

9. At the beginning of the hearing on 14 July 2023, it was agreed that the only issue that we would be able to complete was the issue of whether the Claimant should be re-instated to his role with the Respondent, given that the parties had genuinely not had enough time to prepare for a remedies hearing which involved, potentially, a number of complex calculations which were dependant upon both parties (as we understand) disclosing further material to each other, including the Claimant's payslips, P60s and the like. I have already indicated that this was urgent due to the redeployment and TUPE transfer project; a project relating to Transport For Greater Manchester (TFGM) articulated by the Greater Manchester Mayor Mr Burnham and which has been widely discussed in the media.

The issue of the Claimant's witness evidence.

10. The Claimant had provided a witness statement at the previous 5-day hearing in June, plus a then up-to-date schedule of loss [443 onwards June hearing bundle]. However, his witness statement did not deal with an explanation as to why he wanted to be reinstated to the Respondent's employment. He did not provide a witness statement in advance of the 14 July 2023 hearing dealing with his wish to be reinstated.
11. At the hearing on 14 July 2023, the Respondent provided a witness statement from Mr Leonard (their Operations Director) dated 12 July 2023, exhibits and a skeleton argument. Mr Leonard's witness statement set out the detailed reasons why the Respondent did not want to reinstate the Claimant and why the Respondent considers that reinstatement would be impracticable and unworkable.
12. At the beginning of the 14 July 2023 hearing we told the parties that we did not know why the Claimant wanted to be re-instated and indicated that it would be helpful to know, as this was central to our decision. Understandably, the Respondent objected to the Claimant being able to give any evidence on this topic. The Respondent objected to the Claimant giving evidence "blind" and also objected to my suggestion that he write out a short witness statement giving his reasons, and upon which he could be cross-examined, after counsel had taken instructions.
13. In the end, we decided that we could not decide the issue of reinstatement without the Claimant giving his reasons and we were alive to the fact that he would probably tell us anyway in submissions. We were also alert to the danger of the panel speculating and reaching the wrong decision. It is always extremely difficult balancing the parties needs when there is a litigant in person without access to legal advice and assistance with procedure. Nonetheless, applying the overriding objective, we decided that, given the narrowness of the issue and the importance of justice being done, and also being seen to be done, that the

Claimant should write out his reasons so that the Respondent, at least, was not taken by surprised, could take instructions and formulate a response.

Reinstatement: the Claimant's case

14. Following a short adjournment on 14 July 2023, the Claimant provided a short witness statement, the Respondent considered the witness statement and he was cross-examined on it. In essence, he gave two reasons only why he wanted to be reinstated:

- i. He enjoys being a bus driver; and
- ii. He asserted that he was dismissed because the Respondent was avoiding having to comply with working time regulations [para 10 of his witness statement] where he asks rhetorically "*if I am not reinstated, what is there to prevent the respondent taking some action against the next person who does not want to work against the law*"? In this way, he seemed to articulate that he wanted to be reinstated to somehow "police" the Respondent's treatment of their workforce insofar as it relates to the recording of working time.

15. The Claimant gave no other reasons for wanting to be reinstated.

Reinstatement: the Respondent's case

16. In stark contrast to the Claimant's position, the Respondent was adamant that this was a case when it was wholly impractical and inappropriate (this is my summary description and not the legal test) for the Claimant to be reinstated. Fundamentally, this was because the relationship of trust and confidence between them broke down long ago and continues to be broken.

Relevant legal principles

17. Sections 112 and 113 of the Employment Rights Act 1996 allow, in principle for an employee to be re-instated when considering remedies for unfair dismissal. We note that ordering of this remedy is "extremely rare". As per section 116(3) of the ERA the Tribunal has to consider whether it is practicable for the Respondent-employer to comply with an order of reinstatement. I set out these provisions here:

Section 112 The remedies: orders and compensation

- (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 be paid by the employer to the employee.

Section 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.

Section 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.
- (4) ...

18. Although in most unfair dismissal cases claimants seek compensation only, it is clearly possible for a claimant to seek reinstatement (or re-engagement under section 115 ERA 1996). Reinstatement involves the Respondent re-employing the dismissed employee, either in the role from which they were dismissed, or in a comparable role. Reinstatement should be considered before compensation is considered.

19. The principal factor that the Tribunal must take into account when considering whether to make a reinstatement order when one is sought, is whether it would be “practicable” for the employer to comply with such an order. In considering section 116 ERA 1996 the tribunal may give weight to the employers’ commercial judgment in deciding what is practicable. Factors that potentially

have an impact on the practicability of reinstating an employee include the employee's relationship with his ex-colleagues and whether trust and confidence remains between the employer and the employee. Relationships with ex-colleagues must logically include colleagues in positions of management within the hierarchy of the organisation. Ms Jones helpfully drew our attention to the authority of Coleman v Magnet Joinery Limited [1975] ICR 46 where it was observed that "*practicable*" means not merely "*possible*" but "*capable of being carried into effect with success*".

Decision on re-instatement

20. We find that, in the particular facts and circumstances of this case, that it would **not** be practicable for the Respondent to comply with an order for re-instatement relying on the authority of Coleman v Magnet Joinery Limited [1975] ICR 46. The reasons for our decision are set out below.
21. We find that, as of July 2023, the Claimant was 36 years of age, he has a PSV licence, he has worked since he was dismissed by the Respondent in July 2020 as a bus driver and at no point did he say that he would not be able to find another role as a bus driver. In fact, we found that because of the massive re-organisation of bus services in the Greater Manchester area going on at the moment, then there are a lot of employment possibilities for someone with the Claimant's PSV licence and experience.
22. Consequently, to address the Claimant's first reason for reinstatement, we find that there should be every reason why he will be able to find another bus driving job that he would enjoy.
23. Further, we agree with the Respondent's submissions and find that the relationship of trust and confidence between the parties has broken down irretrievably.
24. Dealing with the Claimant first, whilst he did not concede that the relationship had broken down, his second reason for wanting to be re-instated articulated that he does not trust the Respondent. He does not trust that they will not treat another staff member in the way that he perceives he was treated by the Respondent, which was, to a partial extent vindicated by our findings of automatic unfair dismissal.
25. So far the Respondent is concerned, we are satisfied that the relationship of trust and confidence between them and the Claimant broke down long ago and continues to be broken. There is no evidence of these matters being treated as "water under the bridge" or a situation whereby the parties could "move on" leaving events of 2020 behind.
26. We are satisfied that the relationship of trust and confidence between the parties broke down because:

- i. The Claimant, even at the hearing on 14 July 2023, persisted in expressing the view that the passenger complaint of May 2020 (dealt with in huge detail at the June hearing) was a forgery; that was the Claimant's stance even after our detailed analysis and findings in the judgement.
- ii. The Claimant, even at the 14 July 2023 hearing, persisted in expressing the view that there was CCTV footage available from relevant buses that would vindicate his assertion that the passenger complaint was an elaborate con designed to get rid of him. It was emphasised by the Respondent that he had made multiple applications following on from detailed correspondence in which he did not accept that, whilst the relevant busses were fitted with cameras, they were not operational at the relevant time of the complaint.
- iii. The Claimant has gone to the press to air his dissatisfaction regarding the way he has been treated by the Respondent; a matter that potentially impacts on their reputation.
- iv. The Claimant has also reported the Respondent to the DVSA and the Office of the Transport Commissioner, although I note that there is no evidence that these bodies have done anything about his complaints.
- v. The Claimant was very open about the fact that he had reported the Respondent to the Greater Manchester Good Employment Charter organisation. The Respondent found this to be particularly sensitive and potentially undermining because it has come at a time which coincided with the TFGM reorganisation and re-franchising.

27. In making our decision we note that we considered the genuine belief of the Respondent and we are satisfied that they sincerely believe that the relationship has broken down. So far as the Claimant is concerned, whilst he states that the relationship has not broken down and he could go back to work for the Respondent, at the same time he clings to his views that the Respondent are unreasonable and "out" not to treat the workforce fairly in recording their working time. The Respondent's belief is, we find, entirely rational. In contrast the Claimant's belief is confused and appears to be irrational.

28. In reaching our decision we also noted the helpful comment in Kelly v PGA European Tour [2021] ICT 1124 where Underhill LJ said "...an employment relationship has got to work on human terms". We also entirely agree with the sentiment expressed by Ormrod LJ in Nothman v London Borough of Barnet (no 2) when he said: "anyone who believes that they are a victim of a conspiracy; and particularly by their employers, is not likely to be a satisfactory employee in any circumstances if reinstated or re-engaged".

29. As was the case at the June hearing, we were grateful for the thorough preparation on the part of Ms Jones and her sensitive handling of the Claimant at a time which is very challenging for him. We are also grateful that the Claimant attended the hearing, warned us of his personal difficulties and yet was able to participate fully.

30. Separately I will make further directions for another remedies hearing which has already been listed for Monday 13 November (ELH 1 day). However, we would urge the parties to work together to try and reach a final, amicable resolution to this case in the hope that a further hearing and the stress, cost and expense of that, can be avoided.

Decision

31. The judgment of the Tribunal is that the claim for reinstatement is refused.

Tribunal Judge Abigail Holt
14 August 2023

DECISION AND REASONS
SENT TO THE PARTIES ON
17 August 2023

FOR THE TRIBUNAL OFFICE

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