Case No: 3300402/2023
3302080/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J. Richardson	v	West Midlands Trains Ltd

Heard at: Watford (by CVP) **On:** 19 October 2023

Before: Employment Judge Hunt

Appearances
For the Claimant: Mr A. MacMillan (counsel)
For the Respondent: Mr A. Ohringer (counsel)

JUDGMENT ON REMEDY

1. The Tribunal orders the Respondent to reinstate the Claimant on or before 19 January 2024.

2. The amount payable by the Respondent to the Claimant in accordance with s.114(2) of the Employment Rights Act 1996 will be determined on a later occasion and will form the subject of a separate decision document.

REASONS

1. This decision on remedy follows on from the Tribunal's judgment of 27 September 2023 that the Claimant was unfairly dismissed by the Respondent. S.116 of the Employment Rights Act 1996 (the "Act") provides the framework for the Tribunal's decision on remedy. Reinstatement is the remedy that the Tribunal is required to consider first. The Tribunal must take into account the following issues: (a) whether the Claimant wishes to be reinstated, (b) whether it is practicable for the Respondent to reinstate him, and (c) whether it would be just to order reinstatement in circumstances where the Claimant caused or contributed to his dismissal. I will address each issue in turn.

2. I have been assisted by a bundle of documents extending to 127 pages, together with two supplementary documents provided by the parties (an email from Driver A and a "shunt link" work rota), statements and oral evidence from the Claimant and a Senior Human Resources Business Partner of the Respondent – Mr Gill – and submissions from each party's counsel.

3. The first issue is whether the Claimant wishes to be reinstated. He clearly does. He does not seek re-engagement in comparable employment.

4. The second issue is whether it would be practicable for the employer to reinstate the Claimant. I find that it would be. The four main considerations I have taken into account are as follows.

5. Firstly, I considered the matter from a workforce perspective (by which I mean number of workers). The Respondent submits that there are no vacancies at Bletchley which the Claimant could fill. The Respondent's internal analysis and business planning indicates that the appropriate full-time equivalent driver allocation for Bletchley is 227. There are currently 235 drivers, representing a full-time equivalent of 231.16 drivers due to some part-time working. A further 10 drivers that are currently completing their training are expected to join the qualified workforce in 2024. The Claimant referred me to s.116(5) and (6) of the Act, which require me to disregard any permanent replacements that have been engaged, save in certain circumstances – in essence, that it was not possible to arrange temporary cover. Mr Gill's written statement suggested that the Claimant had been replaced by one of an intake of six newly-qualified drivers in May 2023, who had just completed their training. He submitted that it would have been impracticable not to replace him as the lack of a full complement of drivers at Bletchley could lead to unacceptable service disruption. He clarified the statement in questioning at the hearing to confirm that the Claimant's position was never directly advertised or filled; any vacancy that the dismissal may have created was simply filled by a newly-qualified driver a few months after the dismissal in November 2022. Those drivers were already in training with the Respondent at the time of the Claimant's dismissal. All of those trainees would have been offered a full-time position in May 2023 at the end of their training regardless of the Claimant's dismissal. Mr Gill explained that a workforce future needs analysis is particularly complex in the rail industry in light of the lengthy training process for new train drivers lasting approximately 12-24 months. I was told there is relatively little movement in driver postings, including because even qualified drivers need specific local training if they are to change region (typically lasting a number of weeks). There is no established "bank" of temporary drivers on the railway. Accordingly, the Respondent operates a rolling trainee program in order to always be in a position to meet unanticipated fluctuations in the workforce even if that might result in a "surplus" of drivers at any given point in time. At present, it is the first time Mr Gill is aware of that Bletchley has operated with a surplus of drivers. That surplus is due to increase further in 2024 when the current trainee drivers qualify unless there are several departures in the interim. This does not mean that drivers are kept idle: there is and would be sufficient work for them all whether due to timetable changes, covering for annual leave or sickness absence, retirements, dismissals, reducing rest-day working or overtime, etc. If there was a significant surplus, Mr Gill confirmed that the Respondent could consider reducing trainee intake but has no plans to do so. No redundancy process is being considered.

6. This evidence raises an interesting point with respect to s.116(5) of the Act. Should a new employee recruited in line with a process established prior to a dismissal be considered "*a permanent replacement for a dismissed employee*"? On the one hand, the recruitment is designed to provide a supply of qualified drivers to replace drivers who unexpectedly leave the Respondent, such as the Claimant. One of the new intake has in fact replaced the Claimant. On the other hand, none of these drivers appears to have been recruited with

the Claimant's specific position in mind and they would have joined the Respondent regardless of whether he had been dismissed. It was largely a coincidence that further drivers were recruited by the Respondent since the Claimant's dismissal.

7. I don't believe that I actually need to decide this point for two reasons. Firstly, if I were to find that any one of the new driver intake was a permanent replacement for the Claimant, I accept that it would have been impracticable for the Respondent not to recruit them (in accordance with s.116(6)(a)). To require the Respondent to interrupt an entire established trainee program and essentially recruit none of the new intake who were not direct replacements of any other departing or ill driver on the basis that they may be considered replacements of the Claimant is not a sensible outcome in the circumstances. Secondly, and of greater practical relevance, is that the recruitment process as described leads me to the conclusion that having a "surplus" workforce above the notional 227 driver allocation at Bletchley is not a significant problem for the Respondent regardless of s.116(5) and (6) of the Act. On the evidence, it is clearly "practicable" in my view, from a workforce perspective, for the Respondent to reinstate the Claimant. Accordingly, I believe it is best to leave the issue of the correct interpretation of s.116(5) to another case where it is relevant.

8. At the remedy hearing, the parties and Tribunal explored in some detail the status of the Respondent's workforce at Bletchley, how driver needs have been arrived at and how the operation at Bletchley works. Although 227 full-time equivalent train drivers are required at Bletchley, currently it has over 231, and that is programmed to rise to 241 in 2024, neither number apparently posing any significant operational problems for the Respondent. This demonstrates that there is scope for flexibility in driver numbers. Indeed, throughout his evidence, Mr Gill has been very clear that analysis of driver need is a complex and predictive process, encompassing much uncertainty. It is hard to predict exactly how many train drivers are required at any particular time. There has been no difficulty integrating newly-qualified drivers above Bletchley's 227 driver allocation and Mr Gill stated that, to an extent, driver surplus brings some benefits to the organisation. The Respondent has confirmed that there was no question that current drivers are redundant; they may benefit from (or be required to accept) reduced rest-day working and there may be an impact on the amount of overtime the drivers take. Accordingly, there is plainly sufficient flexibility and capacity generally within the Bletchley operation to accommodate the Claimant. Another way of looking at this is to consider what would have happened had the Claimant not been dismissed. All of the newly-qualified drivers would in any event have joined the workforce without necessitating departures, including that of the Claimant. Driver numbers would simply have been at 232.16 full-time equivalent drivers rather than 231.16, due to potentially rise to 242.16 in 2024. The Claimant's reinstatement would not elevate workforce numbers to a level considered unacceptable by the Respondent. So, as far as the workforce perspective is concerned, in relation to quantity of workers, I find it clearly practicable for the Respondent to reinstate the Claimant.

9. The second main consideration I took into account was the Claimant's relationship with Driver A. It was confirmed at the hearing that there is only one individual who may have any serious concerns about the Claimant's reinstatement and that is Driver A who was the victim of the Claimant's ill-judged pranks. She was upset by the pranks, and appears to remain so. Whether or not that may have been tempered by knowledge of the Claimant's apology is a matter of speculation, but it certainly could not have increased her upset. Mr Gill confirmed in his statement and at the hearing that he had had a meeting with Driver A to alert her to the Tribunal's judgment on liability and the potential for the Claimant's reinstatement. He stated that she was concerned about that prospect and would consider her position at the company were it to come to pass. I have seen a report from Mr Gill of that meeting in his witness statement, together with an email exchange undertaken with Driver A to confirm its accuracy. Driver A reiterates her upset and states concerns at the Claimant's future conduct, including both the possibility of further pranks and potential repercussions from having raised the complaint that led to the Claimant's dismissal. The Claimant refuted that account, referring to a recent conversation he had had with somebody he referred to as a trusted colleague, not a particular friend, who had checked how Driver A would feel about the Claimant's reinstatement. The colleague had indicated that Mr Gill's statement was somewhat exaggerated and that Driver A would have no difficulty with the Claimant's reinstatement.

10. Whatever was actually said, taking a step back and considering the position overall, I have found that it was not fair to have dismissed the Claimant for his pranks. If he had remained in post at Bletchley, Driver A and he would have needed to find a way to return to cordial relations for the rather limited occasions when they would be likely to cross paths. Even if they had not, it doesn't seem to me to be a requirement of their roles that they have any sort of relationship whatsoever. As train drivers, they operate to a very large extent entirely independently of each other. The only professional circumstances in which they might be expected to work together for any extent of time would be during supervised training sessions. In the contemporaneous evidence there has been no suggestion that Driver A wished for the Claimant to be dismissed or for any particular sanction to be imposed, or that she herself would have to consider her own position at the company if the Claimant was not dismissed. The account of Driver A's recent meeting with Mr Gill appears to be the first time the latter point has been raised. This account was not the product of Driver A's own words. Driver A's initial complaint simply requested the pranks to cease. In her recent email to Mr Gill, the only words she used herself to describe her concerns were "*I don't need to be thinking about what was left in my pigeon hole and why whilst driving a train*". It seems to me that this statement reflects her principal desire, which, as I found in my liability judgment, is for the pranks to stop. She is clearly apprehensive about them being repeated, and that is also understandable. However, not once has she recorded in her own words that she wishes the Claimant to be, or remain, dismissed, that she would not be able to work with him again, or that she would have to consider her position with the Respondent were the Claimant reinstated. The meeting between Mr Gill and Driver A, very caring and sensible as it may have been, appears to have been held in circumstances where Driver

A had still had no knowledge of the Claimant's apology or remorse, a situation likely to have been exacerbated by the significant lapse in time since the events themselves. There was also a significant element of surprise in the way the meeting was arranged, at short notice, during Driver A's annual leave, without prior notice of the issue to be discussed, or indeed any knowledge that the Claimant had even instituted Tribunal proceedings. It was held with several attendees, including at least one senior manager with whom Driver A would not have been familiar. I intend no criticism of the Respondent in how it decided to deal with this issue, but I find it difficult to establish what Driver A's true feelings might be from Mr Gill's record of the meeting and subsequent email exchange. The Claimant's rather anecdotal evidence is of very limited assistance and I place little weight on it. Even if accurate, it might suffer from similar considerations to those raised in relation to the meeting with Mr Gill: it may have been an unanticipated approach to Driver A, in circumstances where Driver A has been surprised by the developments, and she may be wary of not displaying her true feelings to a colleague who she knows might still be in contact with the Claimant. What I find most likely is that Driver A has some genuine concerns about the Claimant's reinstatement, that this prospect evokes bad memories that are understandable and far from trivial, and that her primary concern is not to suffer any further pranks or any form of retribution from the Claimant. However, those concerns are not so great that it would significantly impact on the Respondent's operations. In any event, the Claimant understands Driver A's concerns and stated on oath that he held no anomosity whatsoever towards her, fully intended to apologise to her again once the proceedings were concluded, whatever the outcome, and in future would never conduct any more pranks at work as he would not wish to jeopardise his career. Were the Claimant's conduct at any point to again fall below the expected standards, that would be able to be dealt with through the Respondent's disciplinary process. Driver A is clearly aware that the Respondent will not hesitate to act if the Claimant repeats his actions or engages in any further misconduct. Be that as it may, what I must determine is whether the relationship between Driver A and the Claimant is such as to make his reinstatement impracticable.

11. Highly relevant to this issue is the amount of time the two individuals are likely to spend together in the workplace, as touched on above. The evidence from the Claimant is that weeks or months may go by without him having any contact with Driver A. Sometimes, encounters will be more frequent, maybe several times in a week, but for the majority of the time those encounters will consist of passing each other in a corridor or in other common areas. They do not work together in any real sense, as they spend the majority of their days driving separate trains. There was a debate at the hearing about whether it would be possible to arrange the Claimant's work schedule in a manner to further avoid any potential contact with Driver A. Although certain steps may be possible to limit that contact, I accept that it is unlikely that encounters could be reliably excluded. In my judgment, it would not be necessary to do so in any event to render the Claimant's reinstatement practicable. If the Respondent considered it desirable to seek a period of separation between the drivers at

any point, for instance to reassure Driver A, an option would be to place the Claimant on the "shunt link", typically reserved for drivers on light duties, in need of performance improvement or under disciplinary investigation. But the evidence does not suggest this to be necessary.

12. Pulling these threads together, I find that the working relationship between Driver A and the Claimant is not irreparable, at least to a level where they would be able to behave cordially and appropriately in each other's presence in the workplace on the few occasions of limited duration they are likely to encounter each other. The context of their particular employment requires nothing more; they do not work closely together or even have any regular contact. In summary, I find the Claimant's reinstatement is practicable from the perspective of colleague relations.

13. The third main consideration to which I had regard is whether there has been an irreparable breakdown in trust and confidence between the Respondent and the Claimant, held genuinely on reasonable grounds. The Respondent submitted that was the case. The thrust of the Respondent's concern is that it has no faith that the Claimant would desist from similar misconduct in the future. I don't consider there are reasonable grounds for this belief. As to the Respondent's lack of trust in the Claimant, this was the first occasion the Claimant had committed a prank in the workplace. He actively admitted the prank to Driver A and admitted responsibility as soon as he was asked by the Respondent's management. He was not aware at the time of the hurt and upset he had caused. The Claimant has stated on oath that he would not conduct any further pranks, and he has been consistent in saying so since the outset of the proceedings and sequence of events that led to this remedy hearing. He believes he may well have lost the only career he states that he has ever wished to have. It is highly unlikely he would jeopardise it again. In any event, if he did, any misconduct would be capable of being addressed appropriately by the Respondent in line with its disciplinary policy. The policy clearly provides that the Respondent's main objective is to "*improve employees' conduct and behaviour*". This demonstrates that the Respondent will allow employees opportunities to improve their conduct, save when engaging in gross misconduct warranting summary dismissal. I have found that the Claimant's conduct could not reasonably be considered gross misconduct or warrant summary dismissal. Accordingly, it is misconduct of the sort the Respondent's policy is aimed at improving and for which it envisages a "second chance". The same considerations apply to the harassment and bullying policy. In all likelihood, both policies have succeeded in their aims and the Claimant has learnt his lesson. If he has not, he can have no complaints if he is subsequently fairly dismissed. In all these circumstances, there are no reasonable grounds for believing there has been a complete breakdown of trust and confidence between the Respondent and the Claimant, and that the latter is incapable of improving his conduct. To hold otherwise is to take a position that is unsupported by the evidence and is directly contrary to the Respondent's own disciplinary policy.

14. Mr Gill dwelt to some extent on the Claimant's past dishonesty, resulting in a written warning that had not expired by the time of the Claimant's dismissal. I appreciate that, but the misconduct alleged here is not misconduct relating to dishonesty, it is misconduct relating to bullying. From the outset of the sequence of events that led to where we are now, the Claimant has been frank and admitted what he did. This seems to me to demonstrate precisely the ability to learn and improve that the Respondent's policies seek to achieve. Rather than trying to escape responsibility, the Claimant has been honest about what happened on this occasion. The Respondent has sought to rely on alleged differences in how the Claimant described his intentions when explaining his pranks to support its view of continued dishonesty. But this is not a reasonable conclusion from the facts. As highlighted in my liability judgment (notably at paragraphs 85-86), all parties appreciated what a prank was. They are difficult to rationalise. The Claimant was seeking to do so in the context of disciplinary hearings on which his career was potentially at stake. By describing his intentions as being to "shock" Driver A in one context, and that he intended to "show her" the tarantula exoskeleton in another, or that he expected it to elicit interest, are just explanations of different elements of the same prank. The initial reaction is shock, followed by relief. As someone himself interested in exotic creatures, he clearly imagined that once the shock had passed, it might spark a similar interest. It isn't unreasonable for the Claimant to have believed that someone might consider such items unusual and want a closer look. His union representative at the disciplinary meeting understood the context as being the Claimant wishing to "*show off how cool*" the objects were (p.123). Once the nature of the prank was understood, this was an obvious conclusion. Describing the first part of the prank on one occasion, and the second part at a different occasion does not mean the Claimant's account was inconsistent or dishonest, and there are no reasonable grounds for finding that, which is the only issue I am addressing at this point.

15. Accordingly, viewed in all of its respects, it would be practicable to order reinstatement despite the Respondent's assertion that there has been a breakdown in trust and confidence with the Claimant. The assertion is not founded on reasonable grounds. This finding is supported by a finding I made previously in my liability judgment relating to the dismissing and appeal officer's views taken during the disciplinary process. Both believed that an informal response may have been capable of resolving Driver A's complaint and leading to no further action. I find that in light of this, in addition to having no reasonable grounds for believing there has been a breakdown in trust and confidence with the Claimant, the Respondent in fact does not genuinely believe that either.

16. The fourth main issue I considered was the Claimant's training requirements. The Respondent submitted it would take around 16-18 weeks to prepare the Claimant for a return to driving duties. The Claimant disagreed, accepting that certain safety certificates would need renewal, and update training required, but not in all respects. His existing experience and knowledge of the local railway network would assist in limiting the time the re-training and re-certification process would take. Whatever the true training requirement and

duration, the Respondent accepted that it had capacity to conduct the requisite training and there were no clear obstacles to doing so. In light of this, my findings above about the size of the Bletchley workforce, and that it is a natural consequence of the Claimant's unfair dismissal that he would be required to undertake additional training before returning to active duty, the Claimant's reinstatement would be practicable despite the required training.

17. Having found that it is practicable in all respects for the Respondent to reinstate the Claimant, I must now consider a final issue – whether it would be just to reinstate the Claimant due to his conduct and its contribution to his dismissal. In my judgment, it would be just. I have found that dismissal was not within the range of reasonable responses to the Claimant's misconduct. The Claimant accepts his conduct contributed to his dismissal, but it was not so serious as to provide a reasonable basis for it. In short, he should not have been dismissed, and it would accordingly be perfectly fair and just to order reinstatement. In any event, the various other failures I highlighted in the dismissal process clearly indicate that justice would be best served by ordering reinstatement, not least the very basic failure to transmit the Claimant's apology to Driver A.

18. Having first considered reinstatement as required by s.116(1) of the Act, I find that it is the appropriate remedy for the Claimant's unfair dismissal. Accordingly, I order reinstatement. In light of the Claimant having a 2-month notice period with his current employer, and the Respondent indicating uncertainty as to whether it would comply with the Tribunal's order for reinstatement, I order reinstatement within three months, by 19 January 2024. This is to allow the parties sufficient time to consider their respective positions calmly and without undue time pressure, without jeopardising the Claimant's current employment.

19. The parties agree that a financial award in accordance with s.114(2) of the Act is appropriate and anticipated that agreement of the sum due, or formula to calculate such a sum, would be possible. This will form the subject of a separate decision document once determined, whether by agreement or Tribunal determination.

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Employment Judge Hunt

Date: 8 December 2023

Judgment sent to the parties on
8 December 2023

For the Tribunal office