EMPLOYMENT TRIBUNALS

Claimant: **Tasneem Kiani**

Respondent: **Department for Work and Pensions**

Heard at: **East London Hearing Centre**

On: **10-12 January 2024**

Before: **Employment Judge S Knight**

Representation

Claimant: Mrs Louise Mankau (Doughty Street Chambers)

Respondent: Mr Antoine Tinnion (Trinity Chambers)

JUDGMENT

1. Pursuant to section 114(1) and 114(2) of the Employment Rights Act 1996 ("**ERA**") the Respondent shall reinstate the Claimant.

2. The Respondent is ordered to treat the Claimant as if she had benefitted from any improvement to his terms and conditions of employment that he would have obtained had she not been dismissed.

3. Pursuant to section 114(2)(a) of the ERA, as at the date for compliance with paragraphs 1 and 2 of this Order, the amount payable by the Respondent shall be £68,440.02, subject to all such deductions including for tax and national insurance as the Respondent is required by law to make.

4. Paragraphs 1 and 2 of this Order must be complied with by 12 February 2024.

REASONS

Introduction

The parties

1. The Claimant was employed by the Respondent as an Executive Officer. The Respondent is a government department which is responsible among other things for Jobcentres and administration of Universal Credit. The Claimant was employed by the Respondent between 22 June 1997 and 10 August 2020.

The Liability Judgment and the remedy sought

2. In a Liability Judgment given orally on 12 January 2024 the Tribunal concluded that the Claimant had been unfairly dismissed. Written reasons for the Liability Judgement were requested and will be handed down separately. The Claimant sought reinstatement, or re-engagement, or compensation.

Procedure and evidence heard

3. At the hearing on remedy I heard evidence under oath from the Claimant. The Respondent offered to tender Jo-Ann Reilly for cross-examination but the Claimant's representative chose not to cross-examine her.

4. Both parties made helpful oral closing submissions.

Findings of fact

5. Findings of fact were made in the reasons for the Liability Judgment which apply equally to this Remedy Judgment.

The Claimant's remuneration in employment

6. The Respondent has always been aware of the amount that the Claimant earned, and the contributions it made to her pension, because the information was always in its possession. In the early stages of the claim the Claimant served a Schedule of Loss which included figures for her weekly pay which were higher than the correct amount. On the last day of the hearing she served very late an Amended Schedule of Loss and a payslip for July 2020. The Amended Schedule of Loss set out the corrected, lower figures for the Claimant's pay, based on the information on the payslip. The parties are not prejudiced by the use of the lower figures and I proceed on the basis of the lower figures.

7. The Claimant's Schedule of Loss claimed for pension loss, in an amount to be assessed. The Amended Schedule of Loss quantified this amount. The Respondent's witnesses, through counsel, confirmed the accuracy of the Claimant's payslip, from which the correct figure for pension loss was drawn. However, the Respondent's counsel challenged the Claimant's reliance on a quantified figure for pension loss, on the basis that this was done very late. It is often the experience of the Tribunal that parties are unable to quantify pension

loss themselves, or are only able to do so at a late stage. The Respondent does not challenge the accuracy of the figures provided by the Claimant and does not provide alternative figures. The late service of information that was already known to the Respondent is inevitably frustrating to counsel, who would want to prepare the case with all the information available, but it does not prejudice the Respondent who is already aware of the information, given that they could provide the correct information to their counsel at any time. In the circumstances there is no reason for the Tribunal not to calculate the Claimant's pension loss based on the unchallenged evidence of her payslip and it is in the interests of dealing with the case fairly and justly to do so.

8. The Claimant's gross weekly pay was £367.81.

9. The Claimant's net weekly pay was £317.56.

10. The Claimant's employer's pension contributions were 27.1% (i.e. approximately £99.68 per week).

The misconduct

11. On 5 occasions the Claimant accessed the Respondent's computer systems to check her son's Universal Credit account. This was a breach of the Respondent's Acceptable Use Policy. According to the Respondent's policies, a single unauthorised access would only have been misconduct, not gross misconduct. Equally, according to the Respondent's policies, the Claimant's actions were defined as gross misconduct because they involved multiple accesses to the same account, albeit over a short period of time and with a benign intent. However, this did not mean that they in fact were gross misconduct from a legal perspective. Each of the actions was an instance of misconduct. Taken together they were misconduct. But applying an objective approach, rather than simply using the restrictive approach of the Respondent's written policy, none of the accesses alone or collectively were gross misconduct.

The Respondent's position

12. The Respondent has led no evidence about the unavailability of work for the Claimant if she was re-employed. The Respondent is a large employer. There is nothing to suggest that no work would be available at the Claimant's grade and workplace. In the absence of such evidence I find that the same work would be available for the Claimant.

13. The evidence of the dismissing officer, Mrs Reilly, was that trust had broken down between the Claimant and the Respondent. However, this conclusion by Mrs Reilly was drawn from a misunderstanding of the Respondent's own policy. It also did not mean that the Respondent viewed the actions as having amounted to a breach of the implied term of trust and confidence in a legal sense. "Trust and confidence" is a term of art. It would be inappropriate for the Tribunal to seek to read a term of art into a legally unqualified witness's evidence, simply because the witness used the same or a similar expression.

14. The Claimant remained employed with the Respondent for 7 months after the disciplinary investigation began. She was not suspended (whether paid or unpaid), as will often happen to protect an employer's interests where they fear that a person has committed some extremely serious form of misconduct which breaks the implied term of trust and confidence between employer and employee. The Respondent has always known that they could suspend the Claimant if needed but chose not to do so. Instead, the Respondent allowed the Claimant to work from home unsupervised during the COVID-19 pandemic and provided her with a Departmental computer to use. Every day at work she continued to log on to the Respondent's computer systems and diligently carry out her role.

15. The Respondent as an institution did not take the view that trust and confidence between it and the Claimant had broken down. Further, there was no evidence from Sarah Tanner, the Claimant's line manager, that she viewed trust and confidence as having broken down. If she had this view then it would have been included in her evidence because the Respondent has always known that matters relevant to re-employment were live issues. Indeed, such a view would be inconsistent with Ms Tanner's own actions: Ms Tanner did not report the Claimant's misconduct when she originally learnt of it.

The actions the Claimant took after being dismissed

16. After being dismissed the Claimant was initially in shock. For the first time in 23 years she was not employed by the Respondent. She took steps to search for work by contacting friends and family, handing out her CV, and registering for job alerts through agencies including Indeed. She also applied for jobs through LinkedIn.

17. The Claimant has found it hard to find new work. She has not had any paid employment since she was dismissed by the Respondent.

18. The Claimant's husband was ill for a lengthy period of time. However, he recovered and returned to work. This illness made it harder for the Claimant to find work initially, but it would not have stopped her being able to work if she had found work.

19. Towards the end of her employment by the Respondent, the Claimant had thought that she was beginning to experience dementia. However, she no longer experiences symptoms of dementia. It appears that her symptoms were a result of the acute stress and depression she was experiencing, rather than being indicative of a cognitive decline. She remains sufficiently well to be in employment.

20. In order to maintain her skills and to keep her used to being in the workplace the Claimant has been working on a voluntary basis in an estate agent's office. The character of voluntary work is necessarily not identical to the character of paid employment. However, the Claimant has been able to ensure that her skills used in the workplace remain sharp.

21. The Respondent says that the Claimant should have documentary evidence of looking for work, and that the fact that she does not have such evidence

undermines her contention that she did look for work. However, the Respondent has not set out jobs that the Claimant should have applied for (for instance because she was appropriately qualified for them, they were the right pay range, and they were in her area). The Claimant says that she has been operating in a very difficult job market, as a result of the COVID-19 pandemic and subsequent economic difficulties, and so there have not been many appropriate jobs to apply for. It is pointed out on her behalf that many of the methods that she has used to find work are traditional methods which do not generate evidence, which she used because of her age and time in employment. This is an entirely credible account. The Claimant's work for the estate agent on a voluntary basis shows that she is not workshy: she has wanted to keep her skills sharp and to keep herself in a working frame of mind because she wants to return to work.

22. The evidence does not support the Respondent's case that the Claimant voluntarily absented herself from the job market due to her age and ill-health. Rather, the evidence supports the Claimant's case that she is a woman in her 60s who has been returned to a difficult job market, because of a finding of gross misconduct, and who therefore finds it difficult to find a new job, despite her efforts.

Relevant law

23. The three remedies for unfair dismissal are reinstatement, re-engagement (collectively, "**reemployment**"), and compensation. Only if reemployment is not awarded will the Tribunal consider an award of compensation.

The most relevant parts of the Employment Rights Act 1996

24. Insofar as is relevant the Employment Rights Act 1996 provides as follows in particular:

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

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.

(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.

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) […] it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement. […]

(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement."

The extent to which a decision at this stage is "provisional"

25. According to Lord Hodge, giving the judgment of the Supreme Court in the case of *McBride v Scottish Police Authority* [2016] UKSC 27; [2016] IRLR 633 (15 June 2016) at ¶ 37, the Tribunal's judgment on the practicability of the employer's compliance with an order is a prospective assessment and not a conclusive determination. It is therefore sufficient if the Tribunal reasonably thinks that it is likely to be practicable for the employer to comply with reinstatement. In relation to the question of practicability, at this stage, the Tribunal is required to make a forward-looking "provisional determination" as to practicality. *McBride* was a case relating to reinstatement but which in this regard is equally applicable to re-engagement.

26. The Court of Appeal in *Kelly v PGA European Tour* [2021] EWCA Civ 559; [2021] ICR 1124 (19 April 2021) considered the case of *McBride*. Lord Justice Lewis, with whom the rest of the Court agreed, noted as follows in particular regarding the question of the determination of the practicability of re-engagement being "provisional":

"56. Furthermore, the fact that the case law refers to the assessment of practicability at the stage of making the order as being provisional ought not to be mis-interpreted. The role of the employment tribunal is to determine whether to exercise its discretion to order re-engagement under section 116(2) of the Act. In doing so, it must take account of whether it is practicable for the employer to comply with an order for re-engagement. That assessment will not necessarily be a final, conclusive determination of practicability as an employment tribunal considering the award of compensation under section 117(3)(a) of the Act, if the order was not complied with, may also consider whether it was practicable to order re-engagement. In that sense, the initial assessment of practicability at the time

> of making an order for re-engagement may be described as "provisional" as the assessment may be subsequently revisited."

The meaning and assessment of "practicability"

27. According to Lord Justice Stephenson in the Court of Appeal in the case of *Coleman and anor v Magnet Joinery Ltd* [1974] IRLR 345 (8 October 1974), practicability means more than merely re-employment being possible: it means being "*capable of being carried into effect with success*". According to Mr Justice Choudhury in the EAT in the case of *Davies v DL Insurance Services Ltd* [2020] IRLR 490 (28 January 2020) at ¶ 24(b), whether it is so capable includes taking account of the size and resources of the particular employer.

28. Further, according to the EAT in *Davies* at ¶ 24(c), the "*employer's desires or commercial preferences are of little relevance*" albeit their commercial *judgment* remains important to the question of what is practicable.

29. In the case of *Rembiszewski v Atkins Ltd* EAT 0402/11/ZT (10 October 2012) the EAT held at ¶ 39 that as a matter of principle practicability must be assessed as at the date the order will (or may) take effect.

The specificity required of an order for re-employment

30. The limits of the Tribunal's powers in this regard were discussed in the case of *Lincolnshire County Council v Lupton* [2016] IRLR 576 (19 February 2016) by Mrs Justice Simler at ¶ 22:

> "Although tribunals have a wide discretion as to the terms of an order for re-engagement those terms must be specified with a degree of detail and precision. […] To require simply that the employment must be comparable is not adequate to identify specifically and with precision into what role the council is ordered to re-engage the claimant."

Arrears of wages

31. According to the EAT in the case of *Electronic Data Processing Ltd v Wright* [1986] IRLR 8 (27 February 1985), any calculation of arrears of wages is to be based on the employee's earnings in the job from which they were dismissed, and not any job to which they might be re-employed.

32. According to the EAT in the case of *City and Hackney Health Authority v Crisp* [1990] IRLR 47 (27 October 1989), there is no jurisdiction to reduce an award for arrears of pay due to a failure to mitigate losses.

Conclusions

Reinstatement

The Claimant's wishes

33. The Claimant wants to be reinstated to her old role.

Practicability for the Respondent to comply

34. I therefore turn to consider the overall practicability of reinstatement. I look at this question holistically. I consider whether and how the Respondent can make this work, carrying it into effect with success.

35. There is no evidence that work is no longer available for the Claimant in her old role. As a result this is not an obstacle to her reinstatement.

36. The Claimant still has the skills required to undertake the work that she was undertaking previously. Her time outside the labour market is not a problem in the way it could have been because she has kept her skills sharp in voluntary work. The Respondent can further update any of the Claimant's skills as necessary once the order for reinstatement is complied with.

37. The Respondent challenged whether the Claimant could work if reinstated because she had assistance with navigating the Tribunal bundle and accessing the technology for the hybrid hearing. In reality, this was not evidence that the Claimant could not work. Many highly qualified litigants would benefit from the same sort of assistance, and there is no evidence that the Claimant could not have participated in the hearing without assistance. Rather, the assistance simply made her participation in a hybrid hearing smoother.

38. The Respondent as an institution has not lost trust and confidence in the Claimant. The Claimant's direct line manager would have no difficulty in welcoming the Claimant back to the workplace.

39. The Claimant's reinstatement into this role would not be without any difficulties at all. However, the start of many employments, and the return to employment after protracted periods of leave, carries with it some difficulties. A degree of difficulty does not mean it is not practicable. In this case, reinstatement would be practicable.

Justice of ordering reinstatement

40. The Claimant committed misconduct. Her actions were culpable and blameworthy conduct, and this fact is not changed by the Claimant's mitigation. It is accurate to say that the misconduct was a factually causative factor in her dismissal inasmuch as, if she had not committed misconduct, then the disciplinary proceedings would not have commenced. However, as I found in the Liability Judgment, no reasonable employer fully aware of the circumstances and applying the Respondent's disciplinary policies correctly would have dismissed the Claimant. The actual cause of the dismissal was the Respondent's managers' misinterpretation of the Respondent's policies. Nonetheless, the misconduct cannot be ignored. The Claimant contributed by her misconduct to her dismissal. This is a matter to which I give very significant weight in determining whether reinstatement should be awarded. If I was ordering compensation, then I would make a reduction of 20% to take account of this.

41. If reinstatement was not awarded then the Claimant would never work in the civil service again, given the terms on which she was dismissed. The Claimant has

already faced very significant difficulties in obtaining employment outside of the civil service because of the job market, her age, her health, and the circumstances of her dismissal. As a result, reinstatement is the only way that the unfair dismissal in this case can be fully "made right".

42. Considering the case in the round and bearing in mind the contribution to the dismissal by way of conduct, it would nonetheless be just to order reinstatement because this is the only way of undoing the wrong that the Respondent did to the Claimant and the Claimant's misconduct was not so serious that reinstatement would not be just.

Conclusion on reinstatement

43. I then weigh up these matters in considering whether to make the reinstatement order. Reinstatement is the primary award made in unfair dismissal claims. It is the starting point from which the Tribunal can then move on to consider re-engagement or compensation if it is not awarded. Considering the matters identified by the parties in favour of and against the making of an award of reinstatement, I find that it is practicable, just, and appropriate to order reinstatement. That is the Order I make. I do not need to move on to consider re-engagement or compensation.

Date for compliance

44. The Respondent will need time to physically comply with the order by arranging for its terms to be communicated to its HR department and the manager of the Claimant. It will also take a short amount of time for the Tribunal administratively to promulgate this Judgment and Reasons. As a result, the Order for re-engagement could not be complied with as at the date of its drafting.

45. As such, the Order for re-engagement must be complied with by 12 February 2024.

Arrears of pay

46. The award the Claimant receives cannot be limited due to a failure to mitigate loss.

47. The award the Claimant receives can be reduced due to contributory conduct. It would be just to reduce the award by 20% to take account of the Claimant's contributory conduct. As a result, she is only entitled to 80% of her arrears of pay.

48. The Claimant is entitled to arrears of pay. The order must be complied with within 183 weeks of the effective date of termination. As a result she is entitled to £68,440.02 composed of:

    (1) In order to compensate her for arrears of wages she is entitled to:
    183 weeks x £367.81 x 80% = £53,847.38.

    (2) In order to compensate her for pension loss she is entitled to:
    183 weeks x £367.81 x 27.1% x 80% = £14,592.64.

49. In calculating the arrears the Claimant would be entitled to benefit from any improvement in the terms and conditions of employment she would have had if she had not been dismissed. The Tribunal is aware that various civil service pay increases have been made between the effective date of termination and today's date, disproportionately benefitting grades including the Claimant's. However, the Claimant did not put forward any evidence of what these improvements in terms and conditions of employment would have been. As a result, the Tribunal has no information about increases in the wages the Claimant would have earned and therefore is not in a position to adjust its award for arrears of pay accordingly.

50. Upon reinstatement the Claimant is entitled to any improvement in the terms and conditions of employment she would otherwise have received.

51. On the basis that the Order of this Tribunal will be complied with, there is no basis for any further award of compensation to the Claimant for unfair dismissal.

Wrongful dismissal

52. No separate award needs to be made for wrongful dismissal as this would result in the Claimant recovering more than she is entitled to.

Employment Judge S Knight

16 January 2024