Case No: 3314511/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr S Ali

Respondent: West Midlands Trains Ltd

Heard at: Cambridge (by video) **On:** 9 January 2024
11 January 2024 -Discussion

Before: Employment Judge Dobbie, sitting with Mr Sutton and Mrs Bray

Representation
Claimant: In person
Respondent: Mr A Watson (Counsel)

RESERVED JUDGMENT

1. For the reasons set out below, the tribunal unanimously finds that the Claimant shall be reinstated to his role as Senior Conductor at the Respondent's Bletchley Depot.

REASONS

Introduction and process

1. The hearing was convened to determine the remedy for the Claimant's successful unfair dismissal claim. The Claimant sought reinstatement as his primary remedy or re-engagement as a secondary position.

2. We were provided with a 224-page bundle, a separate four-page document from the Claimant and witness statements from:
   (a) The Claimant
   (b) Mr Stephen Craddock (of the RMT union)
   (c) Mr Curtis (for the Respondent)
   (d) Mr Kirk (for the Respondent)

3. Each witness was called to give live evidence and cross-examined in that order.

4. The Respondent's counsel confirmed at the outset that the Respondent was not taking a point on mitigation, *Polkey* or contribution.

5. Due to the number of witnesses (which was not expected to be as great when the matter was listed for a one-day remedy hearing) and the volume of papers, the evidence ran until past 16:30 and it was necessary to reserve judgment.

6. Based on the evidence provided, the Tribunal unanimously makes the following findings of fact and decisions:

Findings of fact

7. Whilst the Claimant was at work, he was a good employee with no performance concerns. This was advanced by the Respondent's witness, Mr Curtis in his statement at the liability hearing and he confirmed he still held the same view at the remedy hearing.

8. Where a Senior Conductor (SC) has been out of their post for some time, they require retraining to be certified. The Respondent's witnesses stated that where the employee has continued to be employed, their digital training record is retained and this shows the modules or tests that are out of date such that re-training can be done on that basis (bespoke to the individual) rather than a complete re-training. This would be the case for a SC even if they have been out of the role for months or even a few years (perhaps on union duties or off sick for example). However, where someone has left the business, the digital training record is deleted and only the original paper record of the initial training is retained. In such a case, the employee would need to undertake full retraining which would take approximately 6-12 weeks. The Claimant says that where people have remained in employment and returned to the role after time away from active duties, the bespoke re-training plan can take as little as 4-7 weeks and this was not challenged. He stated he should only be required to undergo such training (not complete re-training).

9. The Respondent decides what is called the EST for each depot, being the number of staff they think they need as a minimum to ensure efficient running of all services from that depot. This EST number takes into account suspected rates of attrition (through retirement etc) and expected levels of sickness absence and other sorts of leave.

10. There is a relatively high turnover of SCs because of various factors, such as moving to different railway franchises, taking up roles as drivers, retirement and leaving the railway.

11. Mr Curtis stated, and we accepted, that "workforce planning is not an exact science. We are not able to predict exactly how many will leave and how far above the EST we need to be to operate the service. We have regular meetings with the resources department to look at leavers to try and predict how many may be leaving. EST figures are not based just on our diagram numbers (i.e. the exact hours per day that need to be covered to cover all lines) it takes into account other factors such as sickness and

number of cover days for each conductor when they have failed to attend and we base this on predictions and information about proposed retirements and make a prediction about how far to go over EST to be comfortable but have to justify it to the DFT to be cost effective." The DFT is the Department for Transport.

12. Mr Curtis explained (and we accepted) that each depot is unique and they have to consider individual factors relevant to each depot including if that depot is exclusively responsible for a unique line (such as Birmingham New Street, Bletchley and Watford) or historically has a higher level of sickness absence (such as Watford).

13. Mr Curtis also stated (and we accepted) that the Respondent aims to staff depots above the EST, but how far above the EST depends on the individual circumstances of the depot, including the absence levels, lines covered etc. He also stated that Bletchley is historically one or two heads over the EST. So that would be 75 or 76 SCs based on the current EST of 74.

14. In order to ensure that the EST can continue to be met for each depot, the Respondent places interested applicants for the role of SC in what is called the "Talent Pool" which is a holding place for when there is a role they can be trained into. Once in the talent pool, the applicant is not in any way engaged by the Respondent, they are simply waiting to be offered a role and training for the role once one becomes available. There were no applicants in the SC talent pool for the Bletchley or Northampton depots at the time of the hearing because there was no need for them.

15. The number of SCs and trainee SCs at each depot was shown to us at page 117 to be up to date at the date of disclosure. It also indicates the EST for each depot and the percentage staffing against the EST. From this it is clear that the Respondent has a practice of overstaffing above the EST by up to 12.96%. The average staffing levels across the depots is 104.9% at present. There are 14 trainee SCs due to progress to work as SCs. This would take the total SCs to 625 against an EST of 587, meaning the staffing levels are on average 106.47% against EST if there is no attrition before each trainee commences the role.

16. The Respondent's witnesses acknowledged this and stated it was necessary to have that buffer or resilience because if there were too few SCs, this could lead to cancellation of services. At present, the Bletchley depot was an EST of 74 SCs, but has 76 operative SCs and one in training. So the percentage above the EST is currently 102.7% and will be 104% once the trainee is working (assuming there is no other attrition).

17. Mr Craddock gave evidence (which was not challenged and which we accepted) that of the 76 SCs at Bletchley, two were in fact acting up from other roles. Without these acting up staff, they would have 74 SCs and one trainee, making a total of 74 operative SCs on permanent SC contracts. This would mean the staffing level as against the EST was 100% and once the trainee is operative, it would be 101% at Bletchley.

18. At the date of the hearing, we were provided with a list of vacancies up to date as of 5 January 2024. On that list, there were no vacancies for SCs

across the business, nor were there vacancies to enter the talent pool for SCs. There were three non-driver vacancies, none of which were for roles the Claimant had any interest in.

19. Mr Kirk explained (and we accepted) that the Respondent is now funded by the Department for Transport (DFT), because train operators would not have survived during the pandemic and the DFT takes all the revenue and pays all outgoings and the operator is then paid a fixed fee for running the services, such that it is public money being spent on staff costs and the Respondent has to justify such costs. In the event that a cost is deemed to be unjustified by the DFT, there is a risk that the DFT will refuse to cover that cost and deem it to be a "disallowable expense". Mr Kirk stated that he was not aware of the DFT having ever refused to pay an expense to date. He specifically confirmed that Birmingham New Street, Worcester and others that were overstaffed above the EST by more than 10% each were not subject to disallowable expenses.

20. Between the date of the Claimant's dismissal and the hearing, there had been approximately 20 SCs engaged across the Bletchley and Northampton depots and Mr Curtis for the Respondent stated this was indicative of the average sort of attrition / recruitment for those depots for such a period. This accounts for a period of approximately 16 months (from 7 September 2022 to 9 January 2024). Accordingly, we find that the attrition rate of SCs is approximately 1.25 SCs per calendar month for those two depots.

21. A permanent replacement has been recruited to the Claimant's old role and this was done shortly after his dismissal, but neither Respondent witness could provide an exact date for this.

22. Since the Claimant's EDT, there is of course no longer a legal obligation to self isolate in the event of contracting covid-19 or being in contact with someone who has. As stated in the liability judgment, this was the main reason for the majority of the Claimant's absences before his dismissal.

23. The Claimant's Tesco payslips in his new employment show that he has had very modest sickness absence. The Respondent sought to argue that the references to "unpaid leave" on the payslips indicated further sickness absence, but the Claimant explained that this was referable to times he had finished his duties early in the shift (i.e. he had done all the deliveries allocated to him) and was permitted to and did clock off from work earlier than the allotted shift time. In such a case, his pay was reduced by the time he had not worked. The Respondent did not challenge this and we accept it.

24. Since the EDT, the Claimant has applied exclusively for jobs "on the railway" aside from his delivery job with Tesco. He has applied to a number of railway franchises including roles with the Respondent.

25. The Claimant indicated he would be willing to be reinstated as a SC at Bletchley, Watford or Northampton, but that the other depots would be too far for him to travel to.

26. He stated that he loved his job and has no ill feelings towards Mr Curtis or anyone else. He described that Mr Curtis had made a "simple mistake" in respect of the dismissal.

27. Since the Claimant's dismissal, there has been a pay deal agreed of a 5% increase on pay backdated to April 2022. Respondent counsel accepted that this would apply to basic pay and overtime. If the Claimant had remained employed, he would have had this uprating of back pay.

Relevant legal principles

28. Orders for reinstatement and re-engagement are dealt with under sections 112-117 ERA 1996. Section 114 provides: "(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." This involves re-employing the employee on the same terms of employment with no loss of pay, pension rights or continuity of employment, and with the benefit of any pay rises or other improvements that they would have enjoyed if they had not been dismissed (section 113(3), ERA 1996).

29. The power to make a reinstatement or re-engagement order only applies if the claimant expresses a wish for such an order (section 112(3), ERA 1996). The tribunal must first consider reinstatement and only go on to consider re-engagement if it decides reinstatement is not appropriate (section 116(2), ERA 1996).

30. Section 116 provides as follows in relation to the Tribunal's choice of order and the terms of the order:

(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) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) 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.

(6) Subsection (5) does not apply where the employer shows—

(a) that it was not practicable for him to arrange for the dismissed employee's
work to be done without engaging a permanent replacement, or

(b) that—

(i) he engaged the replacement after the lapse of a reasonable period,
without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and

(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.

31. The requirements of s.116 are mandatory in that tribunals *must* take the factors listed therein into account when considering whether to grant a re-employment order (Kelvin International Services v Stephenson EAT 1057/95). However, tribunals are not limited to these considerations and they have a general discretion to consider a wide range of other factors, including the consequences for industrial relations if the order is complied with (Port of London Authority v Payne and ors 1994 ICR 555, CA).

32. As stated by the Respondent's Counsel, the statutory framework provides for the question of "practicability" to be determined at two different stages: First, when deciding whether to make the order for reinstatement or re-engagement; second, if the employer subsequently fails to comply with the order for reinstatement/re-engagement, and the Tribunal is required to consider whether to make an award for additional compensation under s.117(3)(b) ERA. In Kelly v PGA European Tour [2021] ICR 1124, the Court of Appeal confirmed that the determination of practicability at the first stage is a provisional determination or assessment on the evidence before it as to whether it is practicable for the employer to reinstate or re-engage the employee. It is only at the second stage, where the employer has not complied with the order and seeks to show that it was not practicable to do so, that a tribunal must make a final determination on practicability.

33. In First Glasgow Ltd v Robertson EATS 0052/11 the EAT stressed that a respondent does not bear the onus of establishing that reinstatement is not practicable. As the EAT put it, 'there is no statutory presumption of practicability' — the issue of practicability is one which the tribunal is required to determine in the light of the circumstances of the case as a whole.

34. We broadly accepted Respondent Counsel's submissions on the law (with a few adjustments) as follows:

(a) The Tribunal must look at the evidence as a whole and decide whether it reasonably thinks, based on the evidence, that at the time at which the order would take effect it is likely to be practicable for the employer to comply with the order: McBride v Scottish Police Authority [2016] IRLR 633 (SC) at [37]-[38].

(b) In assessing practicability, the Tribunal should look at the circumstances of each case and adopt a broad, common sense view of what is practicable: Meridian Ltd v Gomersall [1977] ICR 597;

(c) "Practicability" means more than merely possible. It must be held that the order is "capable of being carried into effect with success": Coleman & Anor v Magnet Joinery Ltd [1974] IRLR 344 (CA) at [16]-[18].

(d) Whether the arrangement is so "capable" includes taking account of the size and resources of the particular employer: Davies v DL Insurance Services Ltd [2020] IRLR 490 (EAT). Davies is also authority for the fact that where there is someone is seeking re-engagement, the fact that they may not be the best candidate for the role, and might need some training, does not render it impracticable to re-engage them.

(e) While the Tribunal should carefully scrutinise the reasons advanced by an employer in support of its case that an order for reinstatement/re-engagement would not be practicable, the Tribunal must give due weight to the commercial judgement of the employer and not substitute its own view for that of the employer: Port of London Authority v Payne [1994] ICR 555 (CA).

(f) Where an order for reinstatement or re-engagement would lead to compelled redundancies or significant overstaffing, that is an important consideration when determining whether it is practicable. In Cold Drawn Tubes Ltd v Middleton [1992] IRLR 160 the EAT held that, "it would be contrary to the spirit of the legislation to compel redundancies and it would be contrary to common sense and to justice to enforce overmanning." This decision was cited with approval by the Court of Appeal in Port of London Authority v Payne (above).

(g) The personal relationship between the employee and their colleagues is clearly a relevant factor that will affect the question of practicability and/or the tribunal's exercise of its discretion. Re-employment is unlikely if relations at work have become irretrievably soured. However, not all incidences of workplace strife will present a bar to re-employment.

(h) The fact that the respondent has no trust and confidence in the claimant either because of his conduct, or because of the respondent's view of his capability and performance is also relevant. The relevant question here is, "whether the employer had a genuine, and rational belief that the employee had engaged in conduct which had broken the relationship of trust and confidence between the

employer and the employee: Kelly v PGA European Tour. As Underhill LJ put it at [69], the use of the language of "trust and confidence" in this context "simply connotes the common sense observation that it may not be practicable for a dismissed employee to return to work for an employer which does not have confidence in him or her, whether because of their previous conduct or because of the view that it has formed about their ability to do the job to the required standard. Of course any such lack of confidence must have a reasonable basis."

(i) Where the claimant has, in addition to a successful complaint of unfair dismissal, brought unsuccessful claims of discrimination and victimisation against senior employees with whom they would have to work and report to were they to be re-employed, that is also a relevant factor (Phoenix House Ltd v Stockman [2019] IRLR 960).

Parties' Submissions

35. The Respondent's submissions against reinstatement were (in brief) that:
    (a) There are no SC vacancies anywhere across the network at the date of the remedy hearing;
    (b) The Bletchley depot currently has two more SCs than its EST;
    (c) There are currently no vacancies for recruitment into the talent pool for SCs;
    (d) Ordering reinstatement would therefore cause the Respondent to have more SCs than it needs, obliging it consider either making redundancies or being left in an "overmanning" situation;
    (e) Even if there were an available vacancy for a SC, the Claimant would not be able to be placed into that role without first being re-certified which will take 6 to 12 weeks. The next course is this month and it is full. It is unlikely that there will be another course until well into 2024; and
    (f) The Respondent submits that it no longer has trust and confidence in the Claimant, because: (i) Mr Curtis has no confidence in the Claimant's ability to provide a reliable and consistent level of attendance; (ii) Mr Curtis genuinely believes that reinstating (or re-engaging) the Claimant would be severely detrimental to staff morale, because they have previously had to cover his many, regular absences; (iii) The Claimant mistrusts the Respondent and Mr Curtis; (iv) the RMT union did not support the Claimant's Tribunal claim and, in his view, does not support his request for reinstatement or re-engagement because it would have a detrimental effect on its members and staff morale generally.

36. The Claimant submitted he had not lost trust and confidence in the Respondent or Mr Curtis and wanted to work for and with the Respondent and Mr Curtis again. He stated that there was regular attrition of SCs from the relevant depots and that he could therefore be accommodated without any real disadvantage. He disputed that there was any issue with staff morale or union support and that there was no evidence of either.

Conclusions

37. The Claimant has strongly expressed his wish to be reinstated, hence the power to make such an order under s.112(3) ERA 1996 applies. We

consider reinstatement first, given that re-engagement only becomes relevant if reinstatement fails.

38. We have to consider whether reinstatement to the role of SC at Bletchley is practicable (under s.116(1)(b) ERA 1996). We note that the Respondent is not arguing that the Claimant caused or contributed to his dismissal such that s.116(1)(c) ERA 1996 does not arise.

39. Having heard the Respondent's evidence about minimum service levels and the fact that a shortfall in SCs could lead to some services not running, in addition to the difficulty in covering a shortfall through overtime only, and the period of time since the Claimant was dismissed, we accepted that it was not practicable for the Respondent to keep the Claimant's role open. The Respondent could face financial penalties if services are cancelled and it could lead to passenger disruption (affecting the passengers' work and family lives) and loss of confidence in the franchise. We note also that the replacement for the Claimant was recruited in September 2022 and the first time the Claimant indicated his desire for reinstatement in the legal proceedings was of course in his ET1 form submitted on 6 December 2022. Accordingly, under s.116(6) ERA 1996 we are permitted to take this fact into account when determining whether it would be practicable for the Respondent to comply with an order for reinstatement.

40. On the issue of practicability, we remined ourselves we are required to consider all relevant circumstances and that the determination of practicability is a provisional one at this stage, for which neither party bears any burden of proof. There is no presumption for or against reinstatement. The Tribunal must look at the evidence as a whole and decide whether it reasonably thinks based on the evidence that at the time at which the order would take effect it is likely to be practicable for the employer to comply with the order, specifically whether such order is capable of being carried into effect with success.

41. We find that it is practicable on the following bases:

    (a) The Claimant genuinely and enthusiastically wants to return to his role as a SC with the Respondent. This was very clear at both the liability and remedy stage and indeed he has sought reinstatement since he presented his claim form. Further, he has applied almost exclusively for roles on the railway since his dismissal. He is passionate about a career on the railway. Further, he genuinely appears to harbour no ill-feelings towards the Respondent, Mr Curtis or Mr Kirk. He considers that they made a mistake with respect to the decision to dismiss him. We therefore do not find that the Claimant has lost trust and confidence in the Respondent or any of its senior managers;

    (b) Although there are no current SC vacancies, this is not a barrier to an order for reinstatement and Mr Watson for the Respondent sensibly accepted that he could not suggest the law required there to be a vacancy before reinstatement could be ordered. Further, he accepted that there was no legal bar to the Tribunal considering evidence as to the likely availability of roles in the near future when considering practicability. His submissions on this point were that the evidence

provided in respect of this was simply too vague to be relied upon rather than that it was impermissible. We think this is correct, given that the authorities invite Tribunals to consider all the relevant facts and circumstances of reinstatement in a common sense manner;

(c) Whilst there are no SC vacancies at present, there is likely to be attrition of SCs across the two depots at Bletchley and Northampton at a rate of approximately 1.25 SCs per month according to the Respondent's evidence. Accordingly, by the time the Claimant has undertaken his retraining, there is more likely than not to be a need for SCs at Bletchley, statistically speaking;

(d) Even if we are wrong about that, the Respondent has a practice of overstaffing above the EST in any event. Given that there are currently two staff "acting up" as SCs at Bletchley, the Respondent must consider that a percentage staffing of 102.7% at Bletchley (as is currently the case) is necessary and this must have has been justified to DFT (since there have been no disallowable costs to date). If one or both of the two individuals acting up are returned to their substantive posts, the Claimant can fall within that percentage tolerance without pushing the percentage higher. In the event that the "acting-up" arrangements prevent the Respondent from returning the employees to their substantive posts by the time the Claimant is retrained, or there is some other impediment to this, we find that in any event there is adequate space for the Claimant to be added back as an SC at Bletchley since it would push up the percentage against EST to approximately 104.05% (77 SCs against an EST of /74). Set against an average percentage staffing level of 104.09% across all depots, we consider this to be practicable. Given the likely attrition rate of SCs at Bletchley, the percentage overstaffing is unlikely to last long (if at all) given the need for the Claimant to retrain which may take 4-12 weeks (by which time, one to two SCs are statistically likely to have left their SC role at Bletchley in any event).

(e) We have had due regard to the Respondent's commercial judgment and have not taken the decision lightly or capriciously when concluding that the Claimant can be accommodated. We do not question the Respondent's decision as to the EST and we accept that a Respondent is entitled to decide on appropriate staffing levels. Instead, we have looked at those levels and how the Respondent has a practice of overstaffing against EST in any event and considered what levels of overstaffing it typically caters for. We have factored in the fact that the staffing levels are not an exact science, that the Respondent operates at an average of 104.09% overstaffing across all depots and that there appear to be practical ways to accommodate the Claimant without even needing to go above the existing 102.7% at Bletchley. We have had regard to the size and resources of the Respondent and considered the risk of funds being "disallowable costs". However, we do not accept there is any real risk of this in the present case. This is because even if the Claimant is slotted back into Bletchley alongside the existing "acting up" staff, the percentage overstaffing is below the average across the depots and further, the Respondent can inform the DFT that the reinstatement was by order of the Tribunal. We consider that this factor is likely to carry weight with the DFT when deciding

whether the costs are "justified". We have also noted that the Respondent's witnesses have not suggested that there would need to be redundancies or that people would be displaced from their roles if the Claimant was reinstated;

(f) As to the timing of training, we do not accept that the Respondent is unable to facilitate re-training. Where staff are off sick for a period of time or take time off for statutory leave for example, there must be ways to provide up-skilling training to enable a return to work without a significant waiting time. We were given no evidence as to why the Claimant could not be re-trained and we do not accept that he would have to wait "well into 2024" for the next course. We can see no reason why he cannot be re-certified by way of a bespoke programme given his past experience. The Respondent's own rules requiring otherwise (simply because it has a policy of destroying the electronic training records for leavers) cannot be used as a barrier to reinstatement. Even if there is a wait for him to be fully-certified, this does not render reinstatement impracticable;

(g) We do not find that any of the Respondent's managers have lost trust and confidence in the Claimant's ability to carry out his specific role or be employed generally. The Respondent accepted he was a good employee when he was at work. We noted that Mr Curtis stated that he had been "troubled" by the Claimant's allegations of race discrimination against him and the Respondent. However, we noted that the allegations were not ones that we held had been fabricated in any way (i.e. that facts had been advanced which were untrue for example). The claim advanced by the Claimant was for an act which did happen (dismissal) but the reason for the dismissal was not held to be in any way due to the Claimant's race. Therefore, there is no suggestion, nor can there be any fear that the Claimant has been dishonest or malicious. He was merely mistaken as to Mr Curtis' and Kirk's reasons. When being cross-examined on the race link, the Claimant's case went no higher than that he was aware of others being treated differently, such that he could only assume the reason was his race. He did not, for example, advance facts of alleged race discrimination that were held to be fabricated or false or which would amount to harassment (even in true). He did not have a particularly strong conviction in his race discrimination case in the sense that he accepted there was no evidence to suggest race was a cause of his dismissal, simply that he could not think of any other reason for the difference in treatment (as he saw it). The allegation of race discrimination was advanced relatively cordially in the circumstances. There was minimal (if any) discernible animosity or tension between the Claimant and Mr Curtis in the liability hearing, given the circumstances. In any event, when Mr Curtis gave evidence at the remedy hearing that he had been "troubled" by being accused of race discrimination, he went on only to state that he assumes from the allegations that the *Claimant* must have lost trust and confidence in him, *not* that he had lost trust and confidence in the Claimant. Therefore, despite the failed race discrimination claims, we find that there is no loss of trust and confidence on either side. Given Mr Curtis' new role covering all depots, he is likely to have limited day to day interaction with the Claimant in any event;

(h) There is no evidential basis to suggest the Claimant's sickness absence will be at an unacceptable level. In the liability judgment, we held that whilst Mr Curtis may have genuinely believed that the Claimant's attendance would not improve, this was neither reasonable, nor reached after reasonable investigation. On the unusual facts of this case, by the date of termination, the main reason for the majority of the Claimant's absences had fallen away – namely the need to isolate when pinged by the NHS Covid-19 app and/or being exposed to someone with Covid or catching it. We therefore held that it was outside the range of reasonable responses for the Respondent to conclude that the Claimant's absence levels would not decrease after the change in the law on self-isolation. His Tesco payslips indicate a low level of sickness absence and this is in a role that is more physically demanding. We consider therefore that there is no reasonable basis for a belief that he will be unreliable in his attendance;

(i) As to the suggestion that reinstatement will detrimentally affect staff morale, the Respondent's witnesses could go no higher than saying that certain unnamed people, who had not provided statements had indicated irritation that they had had to cover the Claimant's missed shifts and might have to do so in the future if reinstated. We consider these to be low-level every-day sorts of grumbles that workers make. We do not think there is any evidence to suggest that reinstating him would cause a morale problem in the workplace. Given our conclusion that the Claimant is unlikely to have high levels of absence in the future, this concern is ever less weighty; and

(j) There was conflicting evidence as to whether the RMT union actively did not support the Claimant's request for reinstatement. The Claimant and Mr Craddock (of the RMT) stated they were not aware of this and Mr Craddock says he would have been made aware if this was the case. The Respondent's witnesses indicated they had been told this was the case. There is no independent evidence to corroborate either side's account. On balance, we prefer the evidence of the Claimant and Mr Craddock. We consider that Mr Craddock would be best placed to know if the RMT union had any opposition to the Claimant being reinstated.

42. For all these reasons, we find that it is practicable for the Claimant to be reinstated to his role as SC at Bletchley and it is just and proper to make such an order. Directions shall be made for the parties to liaise to agree and submit draft wording for such an order.

Employment Judge Dobbie

Date 9 February 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

16 February 2024

....

....

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/