EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Open GI Ltd

Heard at: Cambridge by video

On: 7 December 2023 (and 23 January 2024 panel only)

Before: EJ Dobbie, sitting with members Mrs Goding and Mr Allan

Representation
Claimant: In person
Respondent: Miss J Bradbury (Counsel)

These proceedings are the subject of a Restricted Reporting Order and an Anonymisation Order.

RESERVED JUDGMENT ON REMEDY

It is the unanimous decision of the Tribunal that:

1. Reinstatement and/or reengagement is not practicable. Neither order is made;
2. There are no damages for unfair dismissal;
3. The award for injury to feelings for the disability discrimination claim shall be £2,500 in damages plus interest of £305.20, making a total of £2,805.20.

REASONS

Background

1. By a judgment sent to the parties on 19 September 2023, one of the Claimant's disability discrimination claims was upheld and the unfair dismissal claim was upheld but subject to full (100%) deductions under the rule in Polkey and for contribution.

2. A remedy hearing took place on 7 December 2023, at which only the Claimant gave evidence. No other witness evidence was received. The Claimant seeks reinstatement and damages of £16m. The Respondent vehemently resisted reinstatement and asserted that there should be no damages for either claim. The panel met to deliberate on 23 January 2024.

Relevant legal principles

Reinstatement and re-engagement

3. Orders for reinstatement and re-engagement are dealt with under sections 112-117 Employment Rights Act 1996 (ERA). Section 114 ERA 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).

4. 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).

5. Section 116 ERA 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.

6. The requirements of s.116 ERA are mandatory in that tribunals *must* take the factors listed 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).

7. 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.

8. 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 - 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.

9. We summarise the relevant legal principles 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

10. The Respondent's submissions against reinstatement were (in brief) that given the findings of the liability judgment and X's behaviours, the request for reinstatement was "palpably futile" and "impossible for the tribunal to swallow and there must be another motivation for it." Based on her cross examination, Counsel had suggested that X's motivation was to harass employees of the Respondent.

11. X did not make submissions, but in oral evidence had stated that X's behaviour towards the Respondent's employees would not be repeated and therefore that reinstatement was viable. X had applied for roles at the Respondent since termination of X's employment.

Conclusion on reinstatement / re-engagement

12. We do not accept that X's desire for reinstatement was motivated by a desire to harass the Respondent's employees. It was a genuine desire. Given X's expressed desire, we went on to consider whether reinstatement would be practicable, applying the legal principles set out above.

13. In the present case, no evidence was advanced as to whether the Claimant had been permanently replaced. We considered the evidence heard at the liability hearing and the remedy hearing and reminded ourselves of our findings on liability. We are mindful of the need to take a common-sense approach and consider whether any order is capable of being carried into effect with success.

14. In all the circumstances, we unanimously find that neither reinstatement nor re-engagement are practicable. Neither are capable of being carried into effect with success. We make this finding because the Respondent has loss of trust and confidence in X. X made admissions at the final hearing that exacerbated that. It is not sustainable to order an employer to reinstate or re-engage someone they have irretrievably lost all trust and confidence in.

15. Further, we heard evidence that the Respondent's witnesses felt intimidated by X's actions between 17 and 20 August 2022 and we accepted the evidence at the liability hearing that various employees, including X's line manager, were scared to have contact with X. This means that there is likely to be a seriously detrimental impact on workplace relations if X returns to work.

16. Further still, we have made a 100% discount for contribution to damages for unfair dismissal due to the Claimant's actions. Such actions include: (1)

X's behaviour in the meeting on 17 August 2022; (2) sending the parcels to MA; and (3) attending MA's home with a bottle of flammable liquid, all of which X accepted having done.

17. Accordingly, we do not make an order for reinstatement or re-engagement.

Unfair dismissal Compensation

Basic award

18. For a successful claim for unfair dismissal, a claimant can usually claim a basic award and a compensatory award. The basic award is a statutory award calculated in accordance with the provisions of section 119 of the ERA 1996. Section 122 of the ERA 1996 provides for a reduction to the basic award in certain circumstances. If the tribunal finds that the claimant's conduct before dismissal was such that it would be just and equitable to reduce it (section 122(2), ERA 1996). The tribunal's wide discretion enables it to reduce the basic award by up to 100%.

19. The tribunal can reduce the basic award even if the claimant's conduct has not caused or contributed to the dismissal. It can also take into account conduct that is not discovered until after the dismissal. Of course, a just and equitable reduction can also be made to the compensatory award due to the conduct of the employee under section 123(1) of the ERA 1996 (as has been made in this case) but that the test for a reduction to the compensatory award for contributory fault under section 123(6) of the ERA 1996 differs, and requires the employee's conduct to have contributed to the dismissal as a matter of fact.

20. A reduction to the basic award does not automatically follow just because the tribunal has reduced the compensatory award for contributory conduct (Frew v Springboig St John's School UKEATS/0052/10). However, it will be an exceptional case where the percentage reductions are not the same, and the tribunal must give its reasons for applying a different percentage reduction to the basic and compensatory awards (RSPCA v Cruden 1986 ICR 205 (EAT)).

21. In Ladrick Lemonious v Church Commissioners [2013] UKEAT/0253/12, a case involving a procedurally unfair dismissal, where a tribunal awarded the claimant no compensation due to his dishonest conduct (sending emails impersonating other colleagues, and then lying about having done so). The EAT interpreted the judgment in Ingram v Bristol Street Parts UKEAT/0601/06 to mean that a 100% deduction could be applied to both the basic and compensatory awards, even where there have been procedural failings, provided that the procedural failings did not cause or contribute to the dismissal.

22. In the present case, we consider that the same matters which led to a 100% reduction to the compensatory award apply equally to the basic award and that given the seriousness of the matters, it is just and equitable to reduce the basic award by the same percentage, such that there is a 100% reduction and no basic award is due.

Discrimination damages

23. Under s.124 Equality Act 2010 (EqA), a tribunal has the power (but is not obliged) to award compensation to a successful claimant in a discrimination claim. Compensation must be calculated in the same way as damages in tort (s.124(6) and 119(2)(a) EqA). Accordingly, as stated by the EAT in MOD v Cannock and ors 1994 ICR 918: "as best as money can do it, the applicant must be put into the position she [or he] would have been in *but for* the unlawful conduct". Hence, tribunals must ascertain the position that the claimant would have been in had the discrimination not occurred. Another way of looking at it is to ask what loss has been *caused* by the discrimination in question.

24. In the present case, the successful discrimination claim was for a pre-dismissal detriment, not for the act of dismissal. X did not assert that there were any financial losses flowing from the proven act. Therefore, we do not consider there to be any financial losses and we considered general damages only.

25. Awards for injury to feelings should be purely compensatory, it would be wrong for such awards to be used as a means of punishing employers (MOD v Cannock (above)).

26. The award should be just to both parties to reflect the wrong but not punish (para 53 Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318, referencing Prison Service v Johnson [1997] ICR 275).

27. Discriminators must take their victims as they find them. The issue is whether the discriminatory conduct caused the injury, not whether the injury was a foreseeable result of that conduct (Essa v Laing Ltd [2004] IRLR 313).

28. In Vento, at paragraph 65, the Court of Appeal provided guidance, setting out three bands for assessing ITF as follows:

    1. The lower band: 'less serious cases, such as where the act of discrimination is an isolated or one-off occurrence'
    2. The middle band: 'serious cases, which do not merit an award in the highest band'.
    3. The top band: 'the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race'.

    Only in 'the most exceptional case' should an award for injury to feelings exceed the top of this band.

29. The annual guidance issued by the Presidents of the Employment Tribunals uprates the Vento bands for inflation each year. In respect of claims presented on or after 6 April 2022 but before 6 April 2023 (as the Claimant's was) the relevant Guidance (https://www.judiciary.uk/wp-content/uploads/2013/08/Vento-bands-presidential-guidance-April-2022-addendum.pdf) states that the Vento bands shall be as follows:

    (1) 'a lower band of £990 to £9,900 (less serious cases);
    (2) a middle band of £9,900 to £29,600 (cases that do not merit an award in the upper band); and

(3) an upper band of £29,600 to £49,300 (the most serious cases), with the most exceptional cases capable of exceeding £49,300.'

30. It should be recalled that the bands set out in the Guidance include the 10% Simmons v Castle [2013] 1 WLR 1239 uplift.[1]

31. Per Peifer v Southern Education and Library Board 2021 NICA 66, the correct approach is to apply the bands as they were at the relevant time then calculate interest. To apply later bands and then award interest in addition would amount to double counting. It is notable that having added the interest to the sum selected using the old Vento band, the award remained in the correct updated Vento band in force at the time of the remedy hearing.

32. As for the precise level of an award under this head, this is highly fact specific. However, the injury must be demonstrated with evidence, it is not simply a matter for submission (Esporta Health Clubs v Roget [2013] EqLR 877, EAT).

33. In Alexander v Home Office [1988] IRLR 190, CA, it was said that (at paragraph 13):

> "For the injury to feelings, however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life"

34. Factors which are often said to inform the level of injury to feelings damages include:
    The number of acts of proven discrimination;
    (a) The nature of the those acts, ranging from physical / psychiatric injury to less serious matters (Alexander v Home Office);
    (b) The period over which the claimant suffered (Scott v Inland Revenue Commissioners 2004 ICR 1410);
    (c) Whether the acts were deliberate and malicious or inadvertent / subconscious;
    (d) The impact on the claimant including whether they suffered trauma, anxiety, or a psychiatric illness etc;
    (e) Whether the claimant is a vulnerable person;
    (f) How long the employee had been in the role;
    (g) Discriminatory dismissals are often seen as more serious than pre or post-dismissal detriments (Voith Turbo Ltd v Stowe 2005 ICR 543, EAT).

[1] As stated at paragraph 10 of the original guidance: https://www.judiciary.uk/wp-content/uploads/2013/08/Vento-bands-presidential-guidance-5-September-2017.pdf

35. Finally, the award for injury to feelings should only reflect the degree to which the discrimination has caused or contributed to the injury. In Thaine v LSE UKEAT/0144/10, the EAT confirmed that when a tribunal finds that an employee's personal injury has been caused by a number of factors including discrimination for which the employer is liable, it should reduce compensation so that it reflects only the extent to which the unlawful discrimination contributed to the employee's ill health.

36. In the present case, the Claimant has succeeded in one act of discrimination (not multiple). Further, the act was not egregious in relative terms. It was not an act of dismissal. It was the mishandling of a performance improvement plan. We do not find that there was any intention to hurt or discriminate against X. The period of suffering the impact of the act was short, given that the Respondent dismissed X shortly after. X was no longer subject to the performance improvement plan after termination.

37. X did suffer heightened anxiety and distress following the meeting on 17 August 2022 at which X was orally informed X was on a final written warning. Indeed, X attempted suicide on 19 August 2022. However, X did not seek medical assistance, was not detained under the Mental Health Act and it was not long before X was able to and did start setting up a business which started trading in October 2022. Accordingly, whilst the impact was extreme, it appears to have been relatively short in duration. X is vulnerable due to X's disabilities.

38. X brought a number of claims that X was aggrieved about, including the act of dismissal. We are mindful that when assessing the extent of the injury to feelings suffered, claimants are often unable to delineate between specific acts and artificially "salami slice" the hurt referable to each. This is understandable given that this is not how human emotion r memory works. However, given that the dismissal and other acts were held not to be discriminatory, we have had to do our best to ascertain what extent of the hurt was caused by the act we have upheld. We note that the suicide attempt was before termination, and must therefore have been a reaction to prior events. However, even that must be partly due to non-discriminatory acts for claims that were not upheld. Further, the Claimant gave evidence of certain life events that placed him under stress.

39. Taking all of the above into account, we consider that an award for injury to feelings in the lower band of the Vento guidance is appropriate and just for the one act er have upheld, namely in the sum of £2,500. We consider that this is significant enough to indicate the extent of the wrong, without being punitive or compensating for matters that were not upheld.

40. We have considered whether there should be an adjustment to the award under the Acas Code. We find that whilst there was no grievance process in respect of the proven act, neither party unreasonably failed to follow the code, such that there should be no adjustment either up or down.

41. In respect of interest, we calculate 8% annual interest from the date of the act until the date of calculation. The time between 11 August 2022 and 19

February 2024 is 557 days, or 152.60% of a year. The interest due is thus £2,500 x 0.08 x 1.526 = £305.20.

42. Therefore, the total award for injury to feelings is £2,805.20 and no other damages are due.

_____

Employment Judge Dobbie

_____

Date 20 February 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

26 February 2024

FOR EMPLOYMENT TRIBUNALS

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/