



EMPLOYMENT TRIBUNALS

Claimant: Mr P Baniasadi
Respondent: Unipart Group Ltd

Heard at: By CVP
On: 1 September 2023, 14 and 15 December 2023
Before: Employment Judge Eeley

Representation

Claimant: Miss Martin, counsel
Respondent: Mr Nainthy, solicitor

JUDGMENT having been sent to the parties on 25 January 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is the decision in relation to re-instatement and re-engagement in the claimant's case.

Legal principles

2. The principal issue on which I have to make a decision in this case at this stage of the remedy hearing is whether to make an order for reinstatement or re-engagement. The legal principles are derived from sections 113 to 116 of the Employment Rights Act 1996.
3. I note, in brief, that an order for reinstatement is non-negotiable in so far as the employer must treat the claimant in all respects as though he had not been dismissed. Consequently, I cannot alter the terms of employment on an order for reinstatement. A reinstatement order would specify the amount payable for pay and benefits lost between the effective date of termination and reinstatement. It would state the rights and privileges (including seniority and pension rights) which must be restored to the employee. The amount payable would take into account any improvement in terms and conditions for example, by way of pay increase that the claimant would have received had he not been dismissed. That is the nature of an order for reinstatement.
4. Re-engagement is slightly different. It must be on terms which are, so far as reasonably practicable, as favourable as an order for reinstatement. The decision in Rank Xerox v Stryczek [1995] IRLR 568 indicates that a tribunal

will err in ordering re-engagement of an employee into a position which would amount to a promotion; for example, on a significantly higher salary. Pursuant to s.115 I am looking for comparable employment to that from which the employee was dismissed or for other suitable employment. There is a clear distinction in the statutory wording which suggests an 'either or.' I am looking for either comparable employment or for other suitable employment.

5. Any re-engagement order still needs to take into account actual vacancies and should not lead to the respondent needing to make redundancies. The re-engagement order can be for employment with an associated or successor employer. The order for re-engagement would have to specify the identify the employer, the nature of the employment, the level of remuneration, and the arrears of pay and benefits associated with the prior employment for the period between dismissal and the imposition of re-engagement order. I would need to specify the rights and privileges (including seniority and pension rights) which would need to be restored to the employee and, finally, the date by which any re-engagement would take place.
6. In terms of the other applicable legal principles regarding the terms of a re-engagement order, the compensatory award cap would not be applicable to the back pay element of the re-engagement order and the back pay element would have to take into account: deductions for wages in lieu of notice or other ex gratia payments, remuneration received from another employer, and any other benefits which the tribunal considers appropriate. I also note that any back pay for the period up until the date of re-engagement would not be reduced by sums to reflect a Polkey deduction and would not be reduced to take account of a failure to mitigate loss of earnings (although contributory fault, if it had been applicable in this case, would have been a relevant consideration.) I can also make an order in relation to reasonable expenses which have been incurred by the claimant as the result of being unfairly dismissed.
7. So what are the relevant considerations legally? Some, as stated in the legislation, are mandatory. I have to look at what the claimant wants, I have to look at whether it is practicable for the respondent to comply, I need to look at whether it would be 'just' to make any order of this nature where there has been any contributory fault, and I have to consider on what terms it would be 'just' to make a re-engagement order.
8. Those are the mandatory considerations. I am not confined solely to those considerations. I have a general discretion to consider a wide range of other factors including the consequences for industrial relations if the order is complied with. I should not take into account the fact that no compensation would have been awarded under Polkey principles (Manchester College v Hazel [2014] ICR 989; also Arriva London Ltd v Mr K Eleftheriou UKEAT/0272/12/LA).
9. 'Practicability' is a question of fact for me. I am to take a broad, common-sense view. Practicability means more than merely possible; it means capable of being carried into effect with success. The test is one of practicability not one of expediency. There are two stages to the practicability issue. First of all I consider it at this stage, Stage 1, in deciding whether to make a reinstatement or re-engagement order. Secondly, I consider it at

Stage 2, if an order is made and the respondent fails to comply with it. At that stage there will be an onus on the respondent to show that it was not practicable to comply with the order. I consider the issue of practicability as of the date that the order would take effect. I note that, at this stage, there is no onus on the respondent to establish that reinstatement is not practicable, it is to be determined in light of all the circumstances of the case as a whole. The burden of proof only falls on the respondent at the second stage (if we arrive at it.)

10. Reinstating an employee should never necessitate redundancies or significant overstaffing. However, employing a permanent replacement for a dismissed employee will not itself make re-employment impracticable. The tribunal must ignore that replacement save in the circumstances set out in s.116.
11. The personal relationship between the claimant and colleagues is a relevant factor which may affect practicability but not all difficulties or strife between individuals are a bar to employment. I can look at whether there is a breakdown in the relationship of trust and confidence between the parties and whether that therefore impacts on practicability.
12. So, having hopefully briefly stated some of the relevant principles I turn to the issues in this case.

The issues

13. Firstly, I have to consider reinstatement. That is the first in the list of potential decisions I can make, and it is one that the claimant has requested.
14. Unfortunately for the claimant, my findings of fact in this case mean that that is not an order which is reasonably open to me. It is clear, both from my findings of fact at the liability stage and the other documentation presented during the course of the remedy stage, that the claimant's job is no longer available to reinstate him into. It is, so far as one can see, no longer part of the organisation structure. Nor is there any suggestion that the job is present, 'masquerading' as a different job, but in substance the same as the claimant's previous role. I did, of course, previously find that this was a genuine redundancy situation with a clear reduction in 'head count.' Indeed there was a subsequent round of redundancies which has reduced the 'head count' still further. So, I cannot reinstate the claimant to a job which no longer exists and, therefore, I decline to make a reinstatement order.
15. Re-engagement however does not have the same limitations upon it, and I look at it as the next primary remedy. I only pass to consider compensation if it is inappropriate to order re-engagement.
16. I take into account the fact that the circumstances of this case are such that, although it is a redundancy dismissal, it is a case where the claimant's right to work in the UK and his work permit were linked to this job. I also take into account the context of the Covid-19 pandemic. We can see that that has had a significant impact on the claimant's career. It has enforced a career break within a highly skilled and specific career path. I say that as background to the case and to indicate why it is that the claimant has asked for re-engagement which, although it is the primary remedy, it is still seldom

requested by claimants in these tribunals.

17. The claimant clearly wants re-engagement. There is no issue of contributory fault for me to take into consideration. The real issues here are the identification of a suitable or comparable job to re-engage the claimant into, and issues of practicability. I have taken into account what evidence I have that may indicate comparability or suitability. First of all salary: what would be a comparable salary on the facts of this case taking into account the lapse of time between the date of dismissal at the end of 2021 and the date of today's hearing at the end of 2023. I was directed to page 30 of the bundle, which gave a gross annual salary on a 36-hour week of £50,765. If increased to a full-time salary, that would result in £56,400 at 2021 figures. Using the respondent's own salary increases since then we would have to make allowance for a 2% increase in 2022 and a 5% increase in 2023. That would take his previous salary on a full-time basis at 2023 prices to £60,400. So that is the comparable salary which I bear in mind when I look at the available jobs within the respondent for the purposes of re-engagement.
18. I note that the claimant (in his schedule of loss) undertook more complex calculations which were based on publicly available information of more general application, rather than specific information provided in relation to this respondent's business. On that basis, I have decided that it is more realistic to use the figures that the respondent itself has admitted applying within its own business in the two years since the claimant's dismissal. So, I should be looking to see if there is comparable or suitable alternative employment with the respondent at £60,400 on a gross full-time basis.
19. The next indicator of comparability or suitability is the skills and experience both of the claimant and the necessary skills and experience for the job in question. I rely, first of all, on the information and credentials set out at paragraph 35 of the claimant's witness statement. I also have regard to the work permit sponsorship certificate which was to be found at page 11 of the remedy bundle. That included, first of all, a description of the job to which he was being recruited and which formed the basis for the sponsorship. It noted the job title as Optimisation Engineer, something which we already know on the facts of this case. It described the job type as being '2135 IT Business Analysts, Architects and System Designers' and the summary of the job description is as follows:

“Main duties and responsibilities include:

Using technical expertise to design IT systems and develop models to find solutions to various business problems for the external and internal clients; Provide technical analysis of potential solutions to optimisation problems and provide proposals based on the analysis; Work with internal/external clients to formulate requirements for new and existing software solutions; Work towards the deployment of the state-of-the-art optimisation machine learning technology and IT technology for business solutions; Create mathematical and computational models and work with the data science team to implement and deploy these models. Design generalisations to existing solutions to client's needs, to create dynamic and reusable systems for a wide scope of business problems; Conduct operations research and evaluate the algorithmic infrastructure and performance.”

And of course the gross salary there was quoted at £45,000 per annum.

20. I also had regard to the capabilities set out in the document at page 167 of the remedy bundle, which is a letter from Dr Julia Massabuau, the former Head of Data Science at the respondent, who was, of course well placed to comment on the claimant's skills and experience.
21. So, that is the claimant's situation. I have looked, therefore, at the available jobs and the indicators of comparability or suitability there.
22. The respondent has said, in the course of evidence, that it is not looking for further data scientists and that, of course, is the sort of work that the claimant was previously engaged upon. However, I am persuaded by the claimant's argument that to limit the consideration in that way would be to read the situation too narrowly. I am looking for comparable or other suitable roles. The claimant, as an employee, is not defined or limited by the job title of his previous role. Jobs may differ from his previous job role and still be suitable for him within the terms of the statute. He may be very well placed to do them, so I keep an open mind about that. I also note the point that was raised about the selection pool during the redundancy exercise: it included the claimant, two data scientists, a software engineer and a machine learning engineer, presumably on the basis that there was some degree of overlap or interchangeability of skills and expertise between these roles. Otherwise, one would have to question why they were in the same pool. Again, that suggests the need to look more flexibly and broadly at this particular issue rather than to look only for data science roles.
23. I had before me evidence in relation to a number of different potential roles which the relevant witnesses (the claimant and Dr McGorman) were both cross examined on and on which I received submissions. I will go through each of those potential roles and assess if they are comparable or suitable and also consider practicability and other relevant considerations in relation to each of them.
24. First of all, starting at page 253, we have the respondent's list, as it saw it, of potential roles to consider. The claimant has effectively knocked out the last four roles on the list and has agreed that they are unlikely to be suitable. Thus, I will say no more about those. In addition, he asks me to discount the first role on the list, the Senior SAP Function Lead MM. That leaves three more to consider, the first of which is "Blue Yonder Despatcher Functional Consultant" in Nuneaton at £50,000 per annum. The second is "Senior Blue Yonder Despatcher Developer," Nuneaton £70,000. I think it is in relation to that job that we actually have two job descriptions in different parts of the bundle with two different salary brackets. I will return to that in a moment. But the relevant pages in the bundle for the documents are page 245, 102, and 248. There were then some other roles which were not included on the respondent's list. The first of these was a "Software Engineer," pages 251 to 252. The second was a "Java Lead" role, page 249 to 250, and the third was a "Business Intelligence" role which was a late addition to the paperwork at the last hearing date, in September.
25. First of all, some general points about the evidence. I agree there is an inherent lack of objectivity from both sides in relation to this. Their interests and priorities are in stark opposition. I also note that the issue is practicability rather than expediency. I note that the need for some training may not be a

bar to suitability. I also note that the claimant did make some concessions as to where he had no relevant experience and that does, of course, weigh in his favour in terms of credibility.

26. In relation to the respondent's evidence there were more difficulties. The claimant's submission was that the respondent had only provided vacancies in logistics in order to deliberately limit the options for re-engagement. Now, on its own, this evidence may be inadequate to show that this was the motivation. I may struggle to find that that was a deliberate choice. However, it is notable that the claimant did manage to find vacancies within the respondent's business which the respondent did not volunteer for the purposes of the remedy hearing. There should have been, and could have been, more comprehensive evidence from the respondent in that regard. Again, that potentially undermines the credibility of the evidence that the respondent was able to produce.
27. There were also limits on the information that was provided by the respondent for the bundle in so far as there was a lack of job descriptions, grading information, seniority information, organisation charts or some description of essential skills. The information in that regard seems to come, primarily, from the claimant's screen shots of his own research. Again, the respondent was best placed to provide that information but did not do so, and that raises questions as to why that was.
28. The claimant also managed to find additional jobs that were not on the respondent's list. How so? The claimant should not have had to undertake his own search and it may well undermine the confidence of the tribunal as to whether the respondent carried out a full and comprehensive search. Again, it may have an adverse impact on the credibility of the respondent's evidence.
29. Likewise, there was a lack of pre-disclosed information to show when these vacant roles were actually filled. So, for example, I was taken to the Software Engineer role, and it was indicated that the evidence from the respondent was that it was filled recently before the hearing, 10 August or so. But the advertisement was still apparently live on 21 August. Also, the Business Intelligence role apparently 'went live' the night before the first part of the remedy hearing, although there is some evidence, to which I can only give limited weight given the lateness of its disclosure, to suggest that it had been advertised at an earlier date than that. Those elements of the evidence do not assist credibility.
30. The respondent witness supplemented the documents to add, in oral evidence, elements which were not apparent on the job description. For example, in the Business Intelligence role he said that he had spoken to the recruiting manager who had said that it was a minimum requirement to have 'five years coding with SAP,' so the claimant was not suitable. Now, it may well be true that he spoke to this person and got this information, but it is not satisfactory (from the tribunal's point of view) for the evidence to come out in this way. If this was part of the essential elements of the job role, one would expect it to be referred to in the paperwork: either in the documents, which are contemporaneous; or in the witness evidence.
31. The claimant, on the other hand, sought to suggest that there were 2,000

new jobs being added to the respondent's workforce during the course of the year. That, on the face of it, is a considerable overstatement of the position which may not assist him, given that most of these were TUPE transfer roles, rather than vacancies into which somebody else could be recruited. However, even on the respondent's own documents, it is conceded that there was some additional recruitment: see the document at page 253.

32. Finally, I consider that we are at Stage 1 of the process. The Tribunal is doing its best, on the available evidence, to consider practicability. We are not yet at Stage 2 of the process (see above).

33. I am going to consider the job vacancies within the bundle in order of the claimant's preference, to see where that takes us.

33.1 The first (in the order of preference) was the Java role at page 249 to 250. This is a hybrid role working online and in Oxford, £60,000 to £65,000 per annum, so apparently at about the right salary level given increases indicated above. However, it does include line management responsibilities. It is leading a team. Dr McGorman suggested that this was above the claimant's previous level within the organisation and that would certainly seem to be the case looking at the documentation. The respondent also said that the role had recently been filled but it had been left accidentally live as a vacancy, although we have no date now provided for when it was filled. Leaving to one side whether it is still a vacancy, I consider that, because of the line management responsibilities, this can be seen as a higher level role within the organisation that has a leadership function (which is additional to what the claimant would previously have had) and which turns it into a qualitatively different type of role. I do not think it is comparable, I do not think it is suitable. Probably not the best fit for this case.

33.2 I turn then to 'Senior Blue Yonder' role: page 102 and 248. This is the one with the two different pay bands. This was primarily Nuneaton as a location with some remote working. The higher of the two bands is £70,000 to £75,000. Again, it is considerably higher pay than the previous role even if uprated to take account of the passage of time. The documentation at page 247 suggests this is the most senior of three levels of this type of work. It suggests, again, that it is a leadership role, a line management type role. Once again, I would say that that is significantly different to what the claimant previously did and probably not the best fit from a re-engagement point of view.

33.3 Moving on then to the third option, which is the 'standard' Blue Yonder vacancy (if I can call it that) at page 245. It is at a salary of £50,000. It is slightly less (on uprated figures) than what the claimant would have been on in this case had he maintained his previous employment. I went back, however, to look at the evidence in cross examination and I note that this is the job where the claimant was least shaken in cross examination in terms of his ability to meet the requirements of the role. He was taken through the bullet points on the document and explained in evidence how he met the criteria and gave examples. The biggest challenge that was put to him was one regarding whether English as

a second language would be a problem. However, given everything I have seen and heard in this case, it clearly would not be. The claimant explained where some of his knowledge was academic rather than practical but that does not mean that he would not be able to adapt to life at the (so-called) 'coalface.' He also gave interesting information about transferrable skills from work in UFOS to Blue Yonder. I also note that it is not a management role so it is closer to the level in the organisation at which he was previously engaged. I have concluded that, taking into account the information available and bearing in mind the stage of the process that we are at, that it is probably the best fit to the claimant in terms of skills and seniority, although it is at a lower salary. In addition, nobody has suggested, so far as I can see, that the post has been filled. So, if re-engagement is to be ordered then this would seem to be the prime candidate in terms of job roles presented to the tribunal.

- 34 For completeness, but working down the level of priorities and preferences, I have looked at number 4 which is the 'Business Intelligence Engineer' role which was the separate document. Again, that was at a lower level of salary of £40,000 to £48,000. This was the document where, at bullet point 2, the claimant did not have the analytic experience although he maintained that he could acquire it, he might need some training. That might not be a total bar to suitability or comparability but it is perhaps less suitable for the claimant than job number 3.
- 35 Finally, we had the Software Engineer role, page 251. In evidence in chief the claimant was less sure about this, that he could meet the requirements of it. I noted queries about 'Node JS' and the claimant not being a Lead Developer. Again, this role was apparently filled in August and the salary is below the previous amount (at £35,000 to £40,000 per annum). Thus it probably constitutes something of a demotion in status and pay for the claimant.
- 36 My conclusion from the above analysis is that the 'standard' Blue Yonder job at page 245 is suitable and is comparable for the purposes of this case.
- 37 In terms of practicability the claimant says that its location is no bar to its suitability, he says that he will move. I have to take him at his word in that regard.
- 38 I was asked by the respondent to consider whether there was a bar to re-engagement in terms of trust and confidence. I note that there was no evidence put before me to suggest that the claimant, in this role, would be working with any of the individuals that he previously may have had difficulties with. Indeed, this was not a misconduct case (which would perhaps lend itself to a breach of trust and confidence argument) nor some form of discrimination case where there was a personal element which would make it difficult, if not impossible, to return the claimant to the workplace. In every unfair dismissal claim there will be, to some degree or another, a level of bad feeling because of the dismissal. That does not mean, in my view, that there cannot realistically be a return to work within the organisation. To all intents and purposes, this would be a return to a different location, with different individuals, and it should be perfectly possible for an employee of the

claimant's skills, intelligence and qualifications, to distinguish between the respondent's actions as an organisation and the behaviour of individuals. He should also be able to distinguish between conduct during the course of litigation and that which can be said to be 'part and parcel' of day to day management and conduct in the course of employment. He should, therefore, be able to put to one side any difficulties that he has about the way in which the litigation has been defended. So, I do not think there is a breach of trust and confidence or a breakdown in relationships which makes it impracticable to return the claimant to that post.

39 I have looked at the remaining documentation and find that there is nothing to prevent me concluding that the statutory test is met. I conclude that I should, therefore, make an order for re-engagement into that role.

40 I am just going to state now the bullet points for the order that I will make, bearing in mind that we are at the end of the hearing day, and that we have another day tomorrow during which we can finalise and finesse the language.

- First of all, it should be checked but everything before the Tribunal indicates to me that the employer for the job role in question would be Unipart Group Ltd. (I say that because there has been some uncertainty within the business structure and I do not have access to an organogram which would clarify that for me.) So, subject to checking, the employer will be Unipart Group Ltd.
- The job title/description will be Blue Yonder Despatcher Functional Consultant.
- The location will be Nuneaton and remote because it appears to be hybrid working.
- The salary will be £50,000, plus car allowance and health insurance, again taken partially from the claimant's pre-existing terms and conditions and also from the job advert.
- I will need to reinstate access to the pension scheme and I will need to obtain the name of the pension scheme. Although I see one in his previous contract of employment, we need to check that that would still be the applicable one.
- In terms of a date for it to take effect I have taken on board the fact we are potentially about to go into the seasonal close down period. Therefore, to make it practicable, I would say to take effect on 5 February next year.
- As part of the order we will then need to calculate back pay of benefits between the effective date of termination to 5 February and (as previously indicated) that will not require any reductions for Polkey or failure to mitigate loss. Therefore, I have not gone on to consider the mitigation points. Dr McGorman's evidence proved that there was no bonus or profit share payable so that will not be included in any backpay.
- The other thing that will need to be clarified by the parties, is whether the claimant has made any benefit claims which would lead to us

considering recoupment provisions. So those are things that will need to be considered and addressed tomorrow.

[NB: the parties' representatives discussed and agreed the financial calculations and other details of the order with the Tribunal during the course of the hearing on 15 December 2023.]

Employment Judge Eeley

Date: 18 April 2024.

Judgment sent to the parties on

19 April 2024

For the Tribunal office

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/>