



EMPLOYMENT TRIBUNALS

Claimant: Mr P Smith

Respondent: City of Bradford Metropolitan District Council

Heard at Leeds by CVP

On: 18 March 2024

Before

Employment Judge Davies

Appearances

For the Claimant:

Ms N Twine (counsel)

For the Respondent:

Ms H Perry (solicitor)

JUDGMENT on remedy having been given to the parties on 18 March 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This was the hearing to determine the remedy to be awarded to the Claimant following my reserved judgment of 16 November 2024 upholding his unfair dismissal complaint. The Claimant was represented by Ms Twine (counsel) and the Respondent was represented by Ms Perry (solicitor). I heard evidence from the Claimant on his own behalf and from Mr Galthen for the Respondent.
2. The Claimant was seeking reinstatement pursuant to s 114 Employment Rights Act 1996. The issues to be decided in that respect were:
 - a. Should an order for reinstatement be made, taking into account whether it is practicable for the Respondent to comply with such an order, and, given that the Claimant contributed to his dismissal, whether it would be just to order his reinstatement?
 - b. If an order for reinstatement is made, is any amount payable to the Claimant under s 114(2), taking into account any sums earned by the Claimant by way of remuneration with another employer between his dismissal and reinstatement?

Findings of fact

3. These reasons must be read with my detailed judgment and reasons on liability.
4. Since his dismissal the Claimant has obtained work with a number of different employers. His earnings from that work exceed what he would have earned if he had remained employed by the Respondent. He still wishes to be reinstated because he has to work longer hours in his new work and has shorter holidays and a less generous pension scheme.
5. Mr Galthen has been the Respondent's Head of Fleet and Waste for around three years. He has never met or managed the Claimant. His witness statement addressed two main areas:
 - 5.1 The extent of the Claimant's wrongdoing and the Respondent's loss of trust and confidence in him; and
 - 5.2 The practicability of reinstating the Claimant, particularly given the Respondent's difficult financial position and lack of current vacancies.
6. As to the extent of the Claimant's wrongdoing and the Respondent's loss of trust and confidence in him, the starting point is the findings in the liability judgment, which have not been appealed. Mr Galthen said in his witness statement that since the Claimant's dismissal, members of staff at Harris Street had approached him and other managers to say that they were scared of the Claimant and that it was common knowledge that he had been bringing large amounts of waste belonging to himself and others to the depot for 15 to 20 years. Nobody was prepared to report his conduct previously. Mr Galthen also produced statistics showing a reduction of 5 tonnes per week in the amount of deposited waste in the Claimant's area since his dismissal. Mr Galthen said that the Respondent's view was that the fact that this coincided with the Claimant's suspension pointed towards the Claimant's absence being a contributing factor. He did acknowledge that the action taken against the Claimant will have acted as a deterrent to other staff. Mr Galthen referred to evidence brought to management's attention since the Claimant's dismissal about "the extent of [his] illicit waste disposal" and the "intimidating and bullying behaviour" he had displayed to colleagues whilst employed. Mr Galthen gave no further detail or specifics of any of the allegations about the extent of the Claimant's wrongdoing or the nature of his alleged bullying and intimidating behaviour. He did not identify anybody who had made such a report or allegation or provide any written statement, letter, email, file note or evidence. The Claimant denied these bare assertions in his cross-examination. He described them as "absolute nonsense." Mr Galthen was asked about the allegations in cross-examination. He said that there had been "various hearsay rumours around the depot." That is different from named people making specific reports directly to Mr Galthen, as was suggested in his witness statement. Mr Galthen was asked about his evidence that people had reported that the Claimant had a history of depositing waste for his own gain for many years. He said that it was, "based on the evidence previously and rumours since his suspension." He was asked what he meant by "evidence previously" and he said, "this investigation", i.e. the matters for which the Claimant was dismissed. Mr Galthen was therefore asked whether he had read the findings in the liability judgment in

relation to that. He then said that it was, "More so the rumours since." He confirmed that he was not giving any names or providing any specific evidence in relation to those "rumours." He confirmed that there still had not been any investigation into the allegations of wrongdoing made by the Claimant against others during his disciplinary process.

7. In those circumstances I do not accept Mr Galthen's evidence that the Claimant's wrongdoing extended any further than the matters set out in the liability judgment. Nor do I accept that he bullied, intimidated or threatened anybody. I accept his evidence that he did not. While Mr Galthen's witness statement pays lip service to the liability judgment, it is clear from his evidence in cross-examination that the Respondent's position has not changed from the stance it took at the disciplinary hearing since that judgment was promulgated. It is not clear that the Respondent has reflected on the concerns or shortcomings identified. It clearly has not carried out further investigations in relation to any custom and practice. It says that it cannot do so because it does not have evidence. As noted in the liability judgment, the Claimant and his witnesses provided detailed and specific evidence that could have been investigated. Moreover, it is notable that the Respondent's conclusions about the Claimant's wrongdoing are apparently based on *less* specific and reliable evidence. Mr Galthen does not put forward any more reliable evidence about wrongdoing by the Claimant than was relied on during the disciplinary process and at the Tribunal hearing. His view appears to rest on unspecified, unsubstantiated and uninvestigated "rumours around the depot." The statistics about the reduction in waste deposited since the Claimant's suspension are of no probative value whatsoever. They are equally consistent with the Claimant's contention that there was a widespread custom and practice throughout the depot, which would no doubt have come to a swift end when the Claimant was suspended and ultimately dismissed.
8. I therefore approach matters on the basis that the Claimant's wrongdoing was limited to the matters set out in the liability judgment. On 26 June 2022 he brought his own car and trailer into the depot on three occasions and deposited bathroom waste and other items on two of them. He put the items in the back of a caged vehicle belonging to the Council. This was in breach of the Council's Code of Conduct, and fell within the definition of gross misconduct. However, it was done against the background of a long-standing culture of operatives and management bringing personal waste to the depot and disposing of it in the Council's vehicles. Managers participated and the Claimant's own line manager effectively condoned it on one occasion. The Claimant did too much of what was unofficially tolerated, rather than doing something that was not tolerated at all. Secondly, he performed an extra hour's duties, unpaid but in breach of policy, and again in the context that operatives regularly adjusted their weekend hours to suit and that this was unofficially condoned. The suggestion that the Claimant's wrongdoing went any further than those matters simply does not, on the evidence before me, have a rational foundation.
9. The Claimant wishes to be reinstated and is happy to work at any of the Respondent's depots. He does not agree that his relationships with colleagues have been damaged, and says that he has been friends with many of them for decades. He gives an assurance as to his future conduct. He points out, and it has

certainly been my experience, that he has behaved with dignity throughout the proceedings and that relationships have been cordial throughout. Mr Galthen's evidence that "the Respondent" has lost all trust and confidence in the Claimant is not based on a consideration of the wrongdoing identified in the liability judgment and accepted by the Claimant from the outset, nor on the context for that wrongdoing as explained in detail in the liability judgment. It appears to be based on what the Respondent's view was at the time of the disciplinary proceedings, with no reflection in the light of the liability judgment, together with "rumours in the depot." No reliable evidence is put forward of any damage to relationships.

10. Turning to the practicability of reinstating the Claimant, there is no dispute that contractually the Claimant could be deployed to any of the five depots from which Driver Coordinators operate. The Claimant confirmed that he would be happy to work from any of them.
11. I accept Mr Galthen's evidence that the Council is currently in a precarious financial position. It has to achieve savings of £45 million in 2024-2025. All Council services are being restructured. Section 188 notices have been served on some staff but not yet the Driver Coordinators. That is likely to happen in the near future. The Claimant acknowledges that if he is reinstated, he will be subject to the same risk of redundancy that he would have faced if he had never been dismissed in the first place.
12. In purely financial terms, the costs of reinstating the Claimant would be limited. He would have to be reinstated into his pension, but no other payment would be required to be made to him for past losses. He would simply be entitled to his future wage, for performing the role. If it were necessary to reduce Driver Coordinator headcount in the near future, the Claimant would be subject to the process in the same way as everybody else. That might entail a financial cost by way of redundancy payment. If he is not reinstated, his basic award will be £13,667.94 and he is likely to be awarded the maximum compensatory award of around £29,000, because of his pension losses.
13. Mr Galthen's evidence was that the Council does not currently have vacancies for Driver Coordinators. However, that is because there is a recruitment freeze in place. In cross-examination Mr Galthen confirmed that the Claimant's role still existed. He had not been replaced. The Respondent employs around 50 Driver Coordinators across its depots. Most recently, one Driver Coordinator had retired last week and another had left in January. The position is therefore that there is work for the Claimant to do as a Driver Coordinator were he to be reinstated. At least three people's roles (including his own) have not been filled. Reinstating the Claimant would not be prohibited by the recruitment freeze – he would not be recruited; he would be treated as if he had never been dismissed.

Legal principles

14. The remedy of reinstatement is the primary remedy for unfair dismissal. It is governed by s 113, 114 and 116 Employment Rights Act 1996.
15. The Tribunal has a discretion whether to order reinstatement. In exercising that discretion, it must take into account whether the individual wishes to be reinstated,

whether it is practicable for the employer to comply with an order for reinstatement, and, where the individual contributed to their dismissal, whether it would be just and equitable to make the order. When making an order for reinstatement, the Tribunal must specify any amount payable to the employee which they might reasonably be expected to have had but for the dismissal, including arrears of pay. However, any sums earned by a Claimant from another employer during the period between dismissal and reinstatement are to be offset.

16. Whether reinstatement is practicable is a question of fact for the Tribunal, which must look at all the circumstances and take a broad, commonsense view: *Meridian Ltd v Gomersall* [1977] ICR 597, EAT. Practicability is about whether reinstatement can be “carried into effect with success”, not whether it is merely possible: *Coleman v Magnet Joinery Ltd* [1975] ICR 46, CA. When deciding in the first place whether to order reinstatement, the Tribunal must simply take practicability into account, making a provisional determination on the evidence before it. If it makes an order and the employer refuses to comply, the Tribunal will then need to make a definitive determination about whether reinstatement was practicable: *Port of London Authority v Payne* [1994] ICR 555, CA. There is no presumption of practicability – at the first stage the Tribunal must determine the issue in the light of the circumstances as a whole: *First Glasgow Ltd v Robertson* EATS 0052/11. Personal relationships with colleagues are a relevant factor when assessing the practicability of reinstatement. A breakdown in trust and confidence may also mean that reinstatement is not practicable. The Tribunal should consider whether the employer “genuinely and rationally” believed that the employee was guilty of the conduct alleged: *Wood Group Heavy Industrial Turbines v Crossan* [1998] IRLR 680, EAT. The question must be approached from the perspective of the employer in question: *United Lincolnshire Hospitals NHS Foundation Trust v Farren* [2017] ICR 513, EAT; *Kelly v PGA European Tour* [2021] ICE 1124, CA.

Application of the law to the facts

17. Applying those principles to the findings of fact set out above, my conclusions in respect of reinstatement are as follows:
- 17.1 The Claimant’s wishes are clear.
 - 17.2 Approaching the question of practicability on a provisional basis, it appears to me to be practicable for the Claimant to be reinstated so far as availability of roles and the Council’s financial position are concerned. There are roles available and there is work for him to do. The effect of a reinstatement order is for him to be treated as if he had never been dismissed, so his reinstatement is not precluded by the recruitment freeze. Given the likely level of basic and compensatory award if he is not reinstated, and the limited immediate costs associated with reinstatement, the financial impact of reinstatement is not clear cut. If redundancies are required in due course, the Claimant will not be treated differently from anybody else.
 - 17.3 If there is a concern about relationships with colleagues based on the fact that during his disciplinary process Mr Smith made allegations and named people he said had done similar things, there is the option for him to be deployed to one of the other depots. He agrees to that happening. It seems to me that his reinstatement can be carried into effect with success in those circumstances.

- 17.4 Turning to the other element of practicability – trust and confidence – I remind myself that this must be approached from the perspective of this employer. However, on the information before me the Respondent's belief that trust and confidence has been irreparably breached does not have a rational foundation. It is not based on the misconduct that actually took place, in accordance with the Claimant's admissions and the detailed findings of fact I made based on evidence. As explained above, it is based on vague and uninvestigated rumour, and in circumstances where the detailed allegations made by the Claimant and his witnesses have not been investigated.
- 17.5 That brings me to the question of justice, in the light of the contributory fault that I found. Honesty is important and I have considered that element carefully. However, the starting point must be the express finding that there was a custom and practice of many people doing this at the time and management turning a blind eye to it; what the Claimant did was no different in principle from what many other people were doing. That is an important piece of context in deciding what is just and also what is practicable in terms of reinstatement and trust and confidence.
- 17.6 It seems to me that it is just for the Claimant to be reinstated in circumstances where he was dismissed for conduct that he admitted all along, and that other people were doing, including management, and in the absence of any rational supporting foundation for the suggestion that in fact he was guilty of sustained wrongdoing over many years.
- 17.7 Taking into account all those factors, my view at this stage is that reinstatement is practicable and in accordance with the Claimant's wishes, and that it is just and equitable to make an order for reinstatement.
18. There is no dispute that no sum is payable to the Claimant under s 114(2)(a) Employment Rights Act 1996, because his earnings from other work exceed what he would have earned if he had not been dismissed. However, he must be reinstated into the Respondent's pension scheme.

**Employment Judge Davies
26 April 2024**