EMPLOYMENT TRIBUNALS

Claimant: Mr G Marsh

Respondent: Openreach Limited

Heard at: Manchester **On:** 27 and 28 February 2024

Before: Employment Judge Cookson
Mr B Rowen
Mr A J Gill

REPRESENTATION:

Claimant: Mr A Marshall (Solicitor)
Respondent: Miss M Martin (Counsel)

JUDGMENT having been sent to the parties on 17 April 2024 (having been delayed while the tribunal awaited further information from the parties) 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. The tribunal judgment in this case dealing with remedy orders that the claimant be re-engaged by the respondent and makes associated orders for compensation to be paid. The amounts of compensation were agreed with the parties. These reasons explain why the tribunal concluded as it did that the compensation payable to the claimant should be reduced by 10% and why a reengagement order was made when the respondent had resisted such an order.

2. This remedy hearing follows a liability judgment which was promulgated on 5 January 2024. The claimant was found to have been unfairly dismissed in that judgment. The claimant had indicated that he was seeking reinstatement or reengagement following his unfair dismissal.

3. In determining remedy in this case, the tribunal was assisted by an evidence file that ran to 74 pages. We also received witness evidence from the claimant and from Mr Culshaw on behalf of the respondent, and oral submissions from both parties. In preparation for the remedy hearing the tribunal carefully re-read the liability judgment in this case, alongside other documentary evidence before hearing the evidence. The focus of the submissions which we heard were primarily on re-employment of the claimant, either by way of re-instatement or re-engagement.

Law

4. The remedies of re-instatement and re-engagement are provided for by sections 112-116 of the Employment Rights Act 1996. Section 115 is the provision relating specifically to re-engagement.

5. Section 115 of the Employment Rights Act 1996 provides that:

(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—

(a) the identity of the employer,

(b) the nature of the employment,

(c) the remuneration for the employment,

(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,

(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(f) the date by which the order must be complied with.

(3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of re-engagement by way of—

(a) wages in lieu of notice or ex gratia payments paid by the employer,

(b) remuneration paid in respect of employment with another employer

and such other benefits as the tribunal thinks appropriate in the circumstances.

6. s.116 of the Employment Rights Act 1996 provides the powers the tribunals has in respect of the choice of order and its terms. It provides:

> *(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.

7. We received limited submissions on the underlying caselaw, but we have taken into account the following broad principles in deciding how we should approach this issue.

8. That when considering whether re-employment is practicable, the tribunal should adopt a broad common-sense view of the question and consider whether, having regard to the industrial relations realities, reinstatement or reengagement is capable of being put into effect with success.

9. When considering whether re-employment is practicable, and whether trust and confidence has been broken so as to act to a barrier to such a remedy, 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 employee. Contributory conduct is relevant as to whether it is "just" to make an order but there is no reason in principle why a tribunal should not make a re-employment order even where there is a large degree of contributory conduct, provided it forms a reasonable view that the circumstances warrant it.

10. A loss of trust and confidence may render re-instatement or re-engagement impracticable. For example, where there is a breakdown in trust between the parties and a genuine belief of misconduct by the employee on the part of the employer.

11. That in deciding whether it is practicable to make an order for re-engagement, the Tribunal is not tasked with making a final determination on practicability. At this stage we only need make a provisional assessment until an enforcement hearing. Indeed, the Tribunal can make an order for re-employment to test the employer's claims on practicability and whether they are justified [see *Timex Corporation v Thompson* [1981] IRLR 522].

12. The question of practicability in s.116(3)(b) is to be taken account of as at the date when a re-employment order is being considered. This is the first stage of consideration (it is open to the employer to re-argue the question of practicability at the further remedy stage under s 117(4)) and is undertaken on a provisional basis only, as explained by Baroness Hale in *McBride v Strathclyde Police Joint Board* [2013] IRLR 297: "At the stage when it is considering whether to make a reinstatement order, the tribunal's judgment on the practicability of the employer's compliance with the order is only a provisional determination. It is a prospective assessment of the practicability of compliance, and not a conclusive determination of practicability. This follows from the structure of the statutory scheme, which recognises that the employer may not comply with the order. In that event, s 117 provides for an award of

compensation, and also the making of an additional award of compensation, unless the employer satisfies the tribunal that it was not practicable to comply with the order. Practicability of compliance is thus assessed at two separate stages - a provisional determination at the first stage and a conclusive determination, with the burden on the employer, at the second."

The Issues

13. The first issue which the Tribunal considered as part was the question of contributory conduct on the part of the claimant which had not been determined at the liability stage. We made an assessment on the extent to which there was culpable or blameworthy conduct on the part of the claimant which caused or contributed to his dismissal.

14. We accept the respondent's submissions in that we cannot find that the claimant was entirely lacking in fault. There was some blameworthy conduct on his part in the events that led to his dismissal as described in our findings on liability. There was animosity between the claimant and Mr Collins who raised the grievance against which led to the disciplinary process. It was suggested to us by Ms Martin that a significant assessment of contributory fault should be made, in the region of 30%. We did not accept, however, that we should assess contributory conduct at that level. Our primary reason for that was that, (as our liability findings make clear) we were entirely satisfied that although there had been blameworthy and culpable conduct on the part of the claimant, there had also been blameworthy and culpable conduct on the part of Mr Collins – in the words of the manager in evidence at the liability hearing it had been "six of one and half a dozen of the other", but there is no evidence that any disciplinary action at all was taken against Mr Collins. We found that although it is just and equitable to make some reduction for the claimant's contributory conduct, that reduction should not be significant and an appropriate reduction of 10% was just and equitable in the circumstances.

15. We then went on to consider whether we should make an order for reinstatement in accordance with section 114 or an order for re-engagement in accordance with section 115, taking into account whether it is just and equitable to do so bearing in mind what we have found in relation to the claimant's conduct.

16. We considered that it was significant that there were others involved in the events which led to the claimant's dismissal, not only Mr Collins but others too, whose employment had continued. The events in this case do not seem to have been an impediment to their employment and we concluded that there was no reason in this case why we should not consider exercising our discretion to order reinstatement or reengagement.

17. In terms of whether it is practicable for the respondent to either reinstate or re-engage the claimant, we have taken into account the submissions that we heard which were on a number of grounds:

(1) that it would not be appropriate in light of an alleged the breakdown of the relationships between the claimant and his colleagues, and in particular in light of the concerns set out by Mr Culshaw in his statement that had been expressed to him by Mr Collins; and also

(2) in light (we are told) of the potential impact of things that the claimant said in his evidence about his managers;

(3) the claimant may not be fit to return to his previous duties;

(4) that reinstatement or reengagement is not practicable because of structural changes in the workplace and

(5) there has not been a need to permanently replace the claimant and his duties are being adequately covered.

The relationship with Mr Collins

18. In relation to the concerns we are told Mr Collins has raised we made a number of findings in our Liability Judgment about his apparent culpability in the events that led to the claimant's dismissal. We have not received any evidence suggesting a satisfactory investigation into his actions, and we were no clearer at the remedy hearing on what the true position was than we had been at the liability hearing.

19. At the liability stage we had been struck by the fact there had been significant delay between the events which were found to justify dismissal and the claimant's suspension. He had been unaware of Mr Collin's grievance for much of that time and there had been no evidence of any tension or confrontations during that time. In addition the evidence was that, in the main, there should be no reason for the hoist drivers to come into contact with each other to any great extent. This is not a situation akin to a shop floor or office where the claimant would be working side by side with Mr Collins all the time and they would inevitably be in constant or frequent contact with each other.

20. It is important to make clear that we had heard no evidence at any stage from Mr Collins and we can only make decisions on the evidence that we were presented with. However, in light of the findings we had made about Mr Collin's conduct, we could find no just or equitable reason why Mr Collins should be given an effective right of veto over the Tribunal's exercise of powers.

21. We noted that Mr Culshaw, who gave us evidence about the potential for conflict and Mr Collin's views on the claimant's reinstatement, had not read the liability judgment and was unaware of our findings and seemed to know little about the background to events. We were not satisfied that he was in a position to give us informed evidence to assist us reach our conclusions. That is not a criticism of him and we found him to be a candid witness, it was simply that he was unable to address the most relevant issues.

The claimant's relationship with other managers

22. In relation to what the claimant had said about attaching blame to managers within the respondent's organisation (something he was asked to speculate on in the course of his evidence at the liability hearing), we do not think that is something which will put in place any sort of barrier to him returning to the respondent's workforce. There was no animosity apparent between the claimant and his immediate line manager at the time of his dismissal, Mr Prior. The disciplinary process had been dealt with by managers who come from a different part of the country. The respondent

has a very large organisation organised into regions. The managers who dealt with the disciplinary stages had had no previous contact with the claimant and there is no reason to think that any future contact would be necessary. We were satisfied that in an organisation like the respondent there was no reason to conclude that there had been a breakdown in the relationship between the claimant and management which would impact on his ability to return to work.

The claimant's health

23. It was also suggested to us that we should not exercise our discretion to make a reinstatement or re-engagement order because of the claimant's health. It is suggested to us that the claimant's disability statement provided for the liability hearing appears to show that the claimant will not be fit enough to his job. However the respondent did not suggest at the liability hearing that there was evidence to suggest that the claimant would have been dismissed on grounds of his capability if he had not been dismissed for misconduct. The claimant has some mobility issues, but he was doing his job until the start of his suspension, there was no suggestion that any of his managers believed he was incapable of doing his job nor is there a suggestion that the claimant's health has since deteriorated to the extent he would not be fit to work.

24. At the time of his dismissal the claimant had in place an adjustment (the provision of the 4 x 4) which of course was part of the respondent's responsibilities under the Equality Act 2010 to make reasonable adjustments for the claimant's disability. The fact the claimant is disabled is not a reason why he should not be re-engaged or reinstated and there is no evidence before us to suggest the claimant's position now is materially different from what it was at the time of his dismissal. We think it is likely that he will be able to return to his previous duties, but of course if that proves not to be the case that would be a reason for the respondent to return to this issue at the next stage of the process.

Changes in the respondent's workforce

25. We received evidence from Mr Culshaw that changes have taken place within the respondent's workforce in the time since the claimant's dismissal. We were told that there have been some significant reductions in the respondent's workforce and in light of the reducing requirement for support for engineers engaged to support "copper technology", that it would not be practicable for the respondent to reinstate or re-engage the claimant. The claimant worked as a hoist driver supporting engineers working on what is a disappearing network of copper technology which is being replaced.

26. We found Mr Culshaw to be a candid and credible witness in terms of the evidence he gave us about the restructuring of the respondent's workforce, but we drew an adverse inference from the lack of any documentary evidence which has been disclosed by the respondent in relation to impact of restructuring on the claimant's previous role and the reducing requirement. It appeared to be suggested to us that it was clear that the respondent's need for employees to do work of the kind undertaken by the claimant has substantially reduced, but if that is true it seemed unlikely to us that there would be no relevant documents which would demonstrate that, given the respondent's consultation obligations and the internal planning which would not doubt

arise from such significant structural changes. No such documents have been disclosed.

27. The tribunal panel accept that there is a reducing requirement for particular sorts of engineers as technology changes, but in fact the evidence given to us was about a reduction in the need for so called "frame engineers". We accept that where may be a need to reduce the number of engineers working with copper in the future but the evidence before us was speculative – at some future stage the claimant's role and others like it, may be redundant but we were not told when this be the case or precisely what the impact will be. To date the reorganisation and restructuring of those teams that has been necessary has been done on a voluntary basis. There is nothing in what we have been told that suggest this means the claimant could not return to his old job at least in a broad sense, subject to some changes to the size of the "patch" where he worked.

The fact the claimant had not been replaced

28. Finally in terms of the claimant having been replaced, we received evidence that the respondent has not found it necessary to permanently replace the claimant and we should take that into account as a reason *not* to exercise our discretion to re-engage.

29. We found this to be a somewhat surprising submission. The statutory provisions anticipate a situation where an employer says it is unable to reinstate because it *has* replaced a dismissed employee. The purpose of section 116(5) is of course to prevent employers avoiding or creating impossible hurdles to the exercise of Tribunal powers by saying "we can't have that claimant back because there is a permanent replacement now in post". Here that is turned on its head. The respondent says to us because it has been able to manage without a permanent replacement it should not have to re-employ the claimant. The statutory language suggests that were where an employer knows it has an Employment Tribunal that may result in an order requiring to reemploy an employee it should not permanently replace somebody and find other ways of covering the post in the meantime unless that is impossible. We find it curious that because the respondent has been able to do precisely what is expected of it, we should find that is a reason not to order reinstatement or reengagement.

30. The fact is there is an employee undertaking hoist duties in the area which used to be covered by the claimant. It seems that in the period since his dismissal there have been some changes to how work is organised and to "patch sizes". The precise arrangements or job description for that employee are not precisely the same as for the claimant but the evidence was that essentially this was the claimant's "old job". We could see no reason why the claimant should not be able to return to that.

31. When the panel weighed the evidence before us, we also reminded ourselves that in terms of exercising our powers of reinstatement and re-engagement, that was always intended by Parliament to be the primary remedy for unfair dismissal even though it may be a power which in reality is exercised relatively rarely by the Employment Tribunals in practice.

32. Having considered all of what we considered to be the relevant factors, we concluded that we should exercise our powers and make an order that the claimant

should be re-employed. We then had to consider whether we should make a reinstatement or a re-engagement order.

33. We are somewhat hesitant about making a reinstatement order, but only for the following reasons. From what we are told by Mr Culshaw that have in a strict sense been some changes to the claimant's patch and how work is organised. Unfortunately it also appears that the respondent has failed to ensure that appropriate updates have been issued to the claimant to ensure his contract and statement of employment particulars is up to date so the document before us which was purportedly the claimant's current contract was clearly incorrect. In consequence the tribunal was concerned that in a strict sense it may not be possible to say that the claimant could be re-engaged. We were wary of making an order which in a technical sense could not be complied with.

34. Instead what we have concluded we should do is to make an order for re-engagement, but to be clear it may be that the best way for that re-engagement order to be met is for the claimant to go back to his previous job.

35. In terms of the details of the terms of reengagement order we required some additional information from the parties. The judgment issued to the parties reflect the information provided by them and accordingly these reasons simply record and repeat the information provided to us.

36. In terms of remuneration, the claimant is to receive remuneration at the annual gross figure of £31,612 which was his pay at the time of his dismissal, and an additional sum which reflects any uplifts to take account of annual increases to pay and any other uplifts which would have been applied had he not been unfairly dismissed.

37. We also ordered that the claimant should be allowed the reasonable adjustment of the provision of the 4 x 4 vehicle which had previously been allocated to him as a reasonable adjustment and as recommended by Occupational Health.

38. After clarification was received from the parties the judgment it was also ordered that the claimant the reinstated to the respondent's Pension Scheme and share save schemes.

39. The claimant had been in receipt of some state benefits and therefore in addition it was ordered that the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 would apply in this case.

40. Finally after discussion with the parties about practicalities for re-engagement and in particular recognising that some time may be required for the parties to put in place adjustments, arranging the correct equipment and so on, re-engagement was ordered by 29 April 2024, the date being agreed by the parties

41. The terms on which reengagement was ordered were therefore (from 29 April 2024)

a. The identity of the employer: Openreach Limited (s.115(2)(a) ERA).

b. The nature of employment: an engineer allocated to hoist driver duties located at a depot in the North Manchester area.

c. Remuneration: at an annual gross figure of £31,612 (claimant's pay at time of dismissal) plus any uplifts, to take account any annual increases to pay and any other uplifts that would have been applied to the claimant had he not been unfairly dismissed (s.115(2)(c) ERA).

d. Amount payable to the claimant for the period between date of termination and date of re-engagement (s.115(2)(d) ERA):

    i. The net sum from: gross pay of £93,093.49, (which reflects increases to pay during the affected period) minus 10% for contributory fault.

    ii. The respondent will be responsible for grossing up the figure for the purpose of making any necessary deductions (tax, pension contributions etc).

e. The claimant be reinstated to the BT Retirement Saving Scheme ("BTRSS") as if he had not been dismissed. The respondent shall make whatever employer contributions are necessary to give effect to this order (s.115(2)(e) ERA).

f. The claimant be reinstated to yoursave share scheme as if he had not been dismissed. The respondent shall make whatever employer contributions are necessary to give effect to this order (s.115(2)(e) ERA).

g. The claimant to be instated to the directsave share scheme as if he had not been dismissed. The respondent shall make whatever employer contributions are necessary to give effect to this order (s.115(2)(e) ERA).

h. The claimant be reinstated to the BT Retirement Saving Scheme ("BTRSS") as if he had not been dismissed. The respondent shall make whatever employer contributions are necessary to give effect to this order (s.115(2)(e) ERA).

i. The claimant to be allowed the reasonable adjustment of the provision of the 4 x 4 vehicle which had previously been allocated to him as a reasonable adjustment and as recommended by Occupational Health

42. As the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 (as amended) apply to this award (see annex for further details). For the purposes of those Regulations:

    a. The monetary award is: £83,784.14

    b. The prescribed element is: £78,355.94

    c. The prescribed period is: 27 July 2021 to 28 February 2024

    d. The monetary award exceeds the prescribed element by: £5,428.20.

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Employment Judge Cookson

Date: 8 May 2024

REASONS SENT TO THE PARTIES ON
Date: 14 May 2024

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FOR THE TRIBUNAL OFFICE

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