



EMPLOYMENT TRIBUNALS

Claimant: Mr D Maynard

Respondent: Mitie Care and Custody Limited

Heard at: London South Employment Tribunal (by CVP)

On: 25 June 2024

Before: Employment Judge T Perry

Representation

Claimant: In person

Respondent: Mr Harding (Counsel)

REMEDY JUDGMENT

The Tribunal orders that:

1. The Claimant be reinstated under section 114 Employment Rights Act 1996.
2. The order must be complied with by 6 January 2024.
3. The Respondent shall pay the Claimant the net sum of £4,543.23 in respect of benefits he might reasonable have been expected to have had but for the dismissal including arrears of pay but taking into account employment with other employers and overpayment from the Respondent.
4. The Respondent shall restore to the claimant all rights and privileges including his seniority, shares and pension rights.
5. The Claimant shall be treated as if he had benefitted from any improvement in his terms and conditions of employment had he not been dismissed.

REASONS

Evidence

1. The hearing was listed to consider remedy in relation to Mr Maynard's unfair dismissal claim. Mr Maynard had indicated in his claim form that he was seeking reinstatement. This was opposed by the Respondent. Mr Maynard intimated an application for a preparation time order but this was ultimately withdrawn. I informed Mr Maynard that I had no power to award injury to feelings or interest in relation to unfair dismissal.
2. I was provided with a remedy bundle of 104 pages.
3. Mr Maynard gave evidence in chief regarding his earnings since leaving the Respondent's employment.

Findings of fact

4. The Claimant's employment ended without payment in lieu of notice on 8 April 2022. At the time his gross salary with the Respondent was £26,148. This included his flying allowance.
5. On 22 June 2022 he started employment as a secure ambulance driver earning £26,100 a year. The Claimant's 3% employer pension contributions were replicated in his new employment.
6. On 15 August 2022 the Home Office wrote to the Claimant to confirm that his DCO certification suspension had been lifted.
7. In September 2022 he received a pay rise to £27,500 a year. At this point he was earning more than he had (or would have) earned at the Respondent.
8. On 2 November 2022 the Home Office wrote to the Claimant to say that
"On 8 April 2022 you were dismissed by your employer for making racist, offensive or derogatory comments on a work related WhatsApp group chat which amount to gross misconduct.
On 15 August 2022 your certification was reinstated following a review of the information available at the time.

I have reviewed the initial decision in conjunction with additional information that has recently been brought to my attention.

I am rescinding the reinstatement letter which was sent to you on the 15 August 2022.”

9. The letter went on to say that the Claimant could not be considered for re-certification for a period of two years from the date of the letter. The Claimant was offered a route of appeal, which he sought to exercise but received no response. The Claimant would be eligible for consideration for re-certification in November 2024.
10. In April 2023 the Claimant received another pay rise to £31,200. He continued to earn more than he had (or would have) earned at the Respondent.
11. In May 2023 the Respondent increased its salary for escorts to £30,000. The Claimant continued to earn more than he had (or would have) earned at the Respondent.
12. In September 2023 the Respondent increased its salary for escorts to £35,989. This was the first time since finding work after his dismissal that the Claimant would have been earning more had he remained with the Respondent.
13. In December 2023 the Claimant received a £500 bonus.
14. In April 2024 the Claimant’s salary increased to £31,800. It was still below what he would have earned at the Respondent.
15. In May 2024 the Claimant secured new employment as a support worker at a children’s home. His salary was (and currently is) £32,711.

The Law

16. Section 113 Employment Rights Act 1996 provides that a Tribunal may order reinstatement in accordance with section 114 or re-engagement in accordance with Section 115.
17. Section 114 Employment Rights Act 1996 states:
(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.
(2)On making an order for reinstatement the tribunal shall specify—

(a) 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 reinstatement,

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

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

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purposes of subsection (2)(a) 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 reinstatement by way of—

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

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

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

18. Section 116 Employment Rights Act 1996 states:

(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.

19. Although the editors of Harvey express some support for the suggestion that there is a power to reduce back pay when making an order for reinstatement (by reference to **Gray v University of Warwick** UKEAT/0508/09 (unreported)), I do not consider this very compelling. Rather, I consider that a Tribunal is limited in the scope of the awards it may make by way of reinstatement and note that a Tribunal was criticised in **British Airways v Valencia** [2014] IRLR 683 for seeking to replicate a reinstatement award as a re-engagement award in circumstances where a high degree of contributory fault had made reinstatement inappropriate.
20. The assessment of practicability at this stage is provisional. It is an assessment considered at the date that the reinstatement is to take effect. A final decision on this can be taken at a later date if the Claimant is not reinstated.

Conclusions

21. Mr Harding initially did not seek to suggest that there was no vacancy for the Claimant to be reinstated to. He later sought to suggest that, having taken further instructions, there may be reductions to staff numbers depending on the outcome of the general election. Mr Harding focussed his submissions on the question of the Claimant's contribution to his dismissal. He said that actions referred to in paragraph 129 of the liability judgment in this case, although not justifying dismissal, should preclude reinstatement. He also referred to

the bad publicity that the Respondent had suffered and the impact of the litigation on the relationship should the Claimant return.

22. In reaching my decision I considered the factors set out under section 116. The Claimant's wishes were to be reinstated. When we discussed the consequences of the election and whether he might be interested in re-engagement in another role, the Claimant stressed that new staff hired for the Rwanda contract were on different terms to him (as he had been "charter and 2 on 1") and that he would prefer to return to his previous role and terms.
23. Section 116(1) (c) is clearly engaged because I found in the liability judgment as a fact that the Claimant caused his dismissal by the matters listed in paragraph 129 of that judgment. That said, I only consider that the Claimant's conduct can really be said to be culpable or blameworthy in respect of his description of the Whistleblower as "snaking people out" in a WhatsApp chat. I acknowledged in the liability judgment that this could be said to be bullying or victimising the whistleblower.
24. I find it hard to criticise the Claimant in respect of the other comments referred to in paragraph 129 of the liability judgment. My reasons for taking this approach (albeit in the context of the different legal tests applicable at that stage) are set out in the liability judgment.
25. When considering whether it would be just to order reinstatement, I am effectively balancing the Claimant losing a well paid job that he loved (and has not been able to fully replace) with the difficulties the Respondent may face in reintegrating a member of staff who senior staff had implicitly said they did not want. I accept that the matters leading to the claimant's dismissal had some press interest and were sensitive matters for the Respondent. I felt that the disadvantage to the Claimant were I not to order reinstatement would outweigh the disadvantage to the Respondent if I did. I also took into account that the comment that can be said to be blameworthy was a poorly chosen verb in a WhatsApp "snaking". It was objectively significantly less serious in my view than, for example, Mr Lehan's criticism of the whistleblower. This is not to deny Mr Maynard's fault in criticising

the whistleblower but on balance I did not feel it rendered it unjust to order reinstatement. I was also conscious that Mr Maynard had mitigated much of his financial loss through alternative employment so that reinstatement entailed a smaller amount of back pay than in many cases.

26. Turning to the question of practicability, and bearing in mind that this is a provisional assessment and that the Respondent had not really led any evidence on the point, my initial view was that it was practicable. The Respondent is a large organisation. The litigation may have been difficult and sensitive but if Mr Maynard was able to put it behind him and commit to working for the Respondent again, I felt the Respondent's managers could too.
27. There was however one unusual factor to this case, that Mr Maynard is currently not certified by the Home Office and will not be eligible to be considered for re-certification until early November 2022 (currently around 4 months away). As at today, that makes it not practicable for him to be reinstated. However, I am conscious that the terms of the letter rescinding his certification refer to him having been dismissed for "*making racist, offensive or derogatory comments on a work related WhatsApp group chat.*" In light of the liability judgment in this case, there may be a possibility that the Home Office might reassess its view on re-certification when the Claimant becomes eligible in November 2022. If he were re-certified, I consider that reinstatement would be practicable. This may or may not happen but my assessment at this stage is only provisional. In order to allow a period of time for the re-certification to be considered I am ordering reinstatement to be complied with by 6 January 2025. I stressed to Mr Maynard that, should the Home Office deny his re-certification, it would be very likely that the Respondent would be able to show that reinstatement would not be practicable.
28. During the course of deliberations, I initially considered the possibility of not requiring the Respondent to pay the Claimant back pay from the date of this hearing until early January 2025. However, on reconsideration of the authorities and statutory provisions, I did not consider that I had the power to do this under an order for reinstatement. At that point, I

reconsidered whether it was just to order reinstatement on those terms. However, having reviewed the relatively small cost to the Respondent given the relatively small difference between the Claimant's current salary and the salary he would be reinstated on, I remained satisfied that it was just to order reinstatement.

29. The calculation of the sums payable to the Claimant by way of back pay were discussed with the parties and are summarised in the table appended to this judgment. This led to a total gross loss of £9,777.38. From this there needed to be deducted the amount of £500 to reflect the Christmas 2023 bonus the Claimant received and an overpayment (effectively an ex gratia payment) of £2,596.16. This led to a total gross figure of £6,681.22. At the Claimant's marginal tax rate of 32% (20% income tax and 12% NIC), this resulted in a net sum of £4,543.23.

Employment Judge T Perry

Date 28 June 2024

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

Start date	End date	Annual salary at Respondent	weekly_salary salary at Respondent	Claimant's_annual_Salary at new employment	Claimant's weekly salary at new employment	weeks_in_period	Difference in gross salary per week	TOTAL Difference in gross salary
08/04/2022	21/06/2022	£26,145.00	£502.79	0	0	10.6	£502.79	£5,315.21
22/06/2022	31/08/2022	£26,145.00	£502.79	£26,100.00	£501.92	10	£0.87	£8.70
01/09/2022	31/03/2023	£26,145.00	£502.79	£27,500.00	£528.85	30.1	-£26.06	-£785.52
01/04/2023	30/04/2023	£26,145.00	£576.92	£31,200.00	£600.00	4.1	-£23.08	-£95.62
01/05/2023	31/08/2023	£30,000.00	£576.92	£31,200.00	£600.00	17.4	-£23.08	-£402.25
01/09/2023	31/03/2024	£35,989.00	£692.10	£31,200.00	£600.00	30.3	£92.10	£2,789.31
01/04/2024	31/05/2024	£35,989.00	£692.10	£31,800.00	£611.54	8.6	£80.56	£690.51
01/06/2024	06/01/2025	£35,989.00	£692.10	£32,711.00	£629.06	31.3	£63.04	£1,972.25
								£9,777.38