Case No: 3314511/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr S Ali

Respondent: West Midlands Trains Ltd

Heard at: Cambridge (by video) **On:** 11 April 2025

Before: Employment Judge Dobbie, sitting with Mr Sutton and Mrs Bray

Representation
Claimant: In person
Respondent: Mr A Watson (Counsel)

RESERVED REMEDY JUDGMENT

1. For the reasons set out below, the Respondent shall pay to the Claimant compensation for unfair dismissal, and failure to comply with the reinstatement Order, in the sum of **£75,058.77** made up as follows:
   (a) £72,203.77 by way of the Compensatory Award, in accordance with s.124(4) ERA 1996 and the award under s.114 ERA 1996, made on 11 November 2024; and
   (b) £2,855.00 by way of the Basic Award.

2. The recoupment provisions do not apply because the Claimant did not claim any benefits.

REASONS

Introduction and process

1. This hearing was convened to finally determine the remedy for the Claimant's successful unfair dismissal claim.

2. The Claimant sought reinstatement as his primary remedy (or re-engagement as a secondary position) from the date of issuing his claim form, and he persisted in this throughout the litigation.

3. Following a remedy hearing (the first remedy hearing) on 9 and 11 January 2024 (the latter day in chambers only) the tribunal ordered the Respondent (in an Order sent to the parties on 16 February 2024) to reinstate the Claimant and for the parties to write to the tribunal once a date had been agreed. This was to allow time for the Claimant to hand in his resignation and work his lawful notice with his new employer, and for the Respondent to make arrangements for his return.

4. There was some correspondence with the tribunal to agree a date and then on 19 March 2024, the Respondent informed the Claimant that it had decided not to reinstate the Claimant. The matter therefore came back before the tribunal for a further hearing for the reinstatement order to be formally made in accordance with statutory requirements so that the matter could progress. This led to a hearing on 11 November 2024.

5. At the hearing on 11 November 2024, the Respondent maintained that it would not reinstate the Claimant but that the legislation required the tribunal to make an Order with a compliance date, so that the correct statutory mechanisms could follow and there was an end date to the calculation of loss. The tribunal therefore Ordered reinstatement by 12 November 2024 (which was an arbitrary date used to achieve the purpose of having a date to allow an order to be made), with a payment of £72,203.77 as back pay, calculated to that date according to an agreed appended schedule.

6. The Respondent, true to its word, did not reinstate the Claimant on 12 November 2024 or at all, and the matter therefore came back to the tribunal at this hearing to finally assess the Claimant's damages.

7. We were provided with:
   (a) A remedy bundle;
   (a) Claimant witness statement;
   (b) Witness statement from Mr Stephen Craddock (of the RMT union);
   (c) Three statements from Mr Curtis (for the Respondent);
   (d) A statement from Mr Kirk (for the Respondent);
   (e) Statement from Grace Thompson;
   (f) WMT current job vacancies document; and
   (g) A skeleton argument from each side

8. Only the Claimant and Grace Thompson gave live evidence. The other statements were ones that had previously been taken into evidence and in respect of which the witnesses had already been cross examined and findings of fact made.

9. Overall we found Ms Thompson's evidence largely unhelpful given that she almost invariably accepted that the information she advanced was solely based on having read Mr Curtis' prior statements.

10. Based on the evidence provided, both at the prior remedy hearings and this hearing, the Tribunal unanimously made the following findings of fact:

Findings of fact

11. When the Claimant attended work, he was a good employee with no performance concerns.

12. Where a Senior Conductor (SC) has been out of their post for some time, they require retraining to be certified. The Respondent's witnesses stated at the first remedy hearing that where the employee has continued to be employed, their digital training record is retained and this shows the modules or tests that are out of date such that re-training can be done on that basis (bespoke to the individual) rather than a complete re-training. This would be the case for a SC even if they have been out of the role for months or even a few years (perhaps on union duties or off sick for example). However, where someone has left the business altogether, the digital training record is deleted and only the original paper record of the initial training is retained. In such a case, the employee would need to undertake full retraining which would take approximately 6-12 weeks. The Claimant says that where people have remained in employment and returned to the role after time away from active duties, the bespoke re-training plan can take as little as 4-7 weeks and this was not challenged. He stated he should only be required to undergo such training (not complete re-training).

13. The Respondent decides what is called the EST for each depot, being the number of staff they think they need as a minimum to ensure efficient running of all services from that depot. This EST number takes into account suspected rates of attrition (through retirement etc) and expected levels of sickness absence and other sorts of leave.

14. There is a relatively high turnover of SCs because of various factors, such as moving to different railway franchises, taking up roles as drivers, retirement and leaving the railway.

15. Mr Curtis stated at the first remedy hearing, and we accepted, that "workforce planning is not an exact science. We are not able to predict exactly how many will leave and how far above the EST we need to be to operate the service. We have regular meetings with the resources department to look at leavers to try and predict how many may be leaving. EST figures are not based just on our diagram numbers (i.e. the exact hours per day that need to be covered to cover all lines) it takes into account other factors such as sickness and number of cover days for each conductor when they have failed to attend and we base this on predictions and information about proposed retirements and make a prediction about how far to go over EST to be comfortable but have to justify it to the DFT to be cost effective." The DFT is the Department for Transport.

16. Mr Curtis explained at the first remedy hearing, and we accepted his evidence, that each depot is unique and they have to consider individual factors relevant to each depot including if that depot is exclusively responsible for a unique line (such as Birmingham New Street, Bletchley

and Watford) or historically has a higher level of sickness absence (such as Watford).

17. Mr Curtis also stated at the first remedy hearing (which we accepted) that the Respondent aims to staff depots above the EST, but how far above the EST depends on the individual circumstances of the depot, including the absence levels, lines covered etc. He also stated that Bletchley is historically one or two heads over the EST. At the time of the first remedy hearing, the EST at Bletchley was 74, so the staffing level would have been 75 or 76 SCs. At the time of this hearing, we were informed that the EST was 72, so we expect the staffing levels to be approximately 74.

18. In order to ensure that the EST can continue to be met for each depot, the Respondent places interested applicants for the role of SC in what is called the "Talent Pool" which is a holding place for when there is a role they can be trained into. Once in the talent pool, the applicant is not in any way engaged by the Respondent, they are simply waiting to be offered a role and training for the role once one becomes available. There is no obligation to pay or advance the training into the role within a specific period.

19. There were no applicants in the SC talent pool for the Bletchley or Northampton depots at the time of the first remedy hearing because there was no need for them. However, there must have been various staff progressed through the talent pool between that hearing and this hearing. We know this because of historic rates of attrition (and we were not told this had slowed) and because there was no new evidence to gainsay the earlier evidence. Further, we were informed that by the date of this hearing, there were 4 trainee SC's at Bletchley. They must have come through the talent pool. We were also informed of the fact that the roles had been advertised various times.

20. The number of SCs and trainee SCs at each depot was shown to us at the first remedy hearing. It indicated the EST for each depot and the percentage staffing against the EST. From this it is clear that the Respondent has a practice of overstaffing above the EST (at that time, by up to 12.96%). The average staffing levels across the depots at that time 104.9%. At that time, there were 14 trainee SCs due to progress to work as SCs. This would have taken the total SCs to 625 against an EST of 587, meaning the staffing levels were on average 106.47% against EST at that time, if there was no attrition before each trainee commenced the role. We were not taken to any new statistics which would show that the situation had materially changed since the first remedy hearing.

21. The Respondent's witnesses at the first remedy hearing acknowledged this data and stated it was necessary to have that buffer or resilience because if there were too few SCs, this could lead to cancellation of services. Ms Thompson also mentioned staffing above EST. At the time of the first remedy hearing, the Bletchley depot had an EST of 74 SCs, but had 76 operative SCs and one in training. So the percentage above the EST was 102.7% and would have been 104% once the trainee was working (assuming no other attrition).

22. At the date of the first remedy hearing, we were provided with a list of vacancies up to date as of 5 January 2024. On that list, there were no vacancies for SCs across the business, nor were there vacancies to enter the talent pool for SCs. At this hearing, we were shown that there were no live vacancies for SCs. However, we were not shown how many SC vacancies had arisen between the dates of the first remedy hearing and this hearing.

23. Between the date of the Claimant's dismissal and the first remedy hearing, there had been approximately 20 SCs engaged across the Bletchley and Northampton depots and Mr Curtis for the Respondent stated in his evidence at the first remedy hearing that this was indicative of the average sort of attrition / recruitment for those depots. This accounted for a period of approximately 16 months (from 7 September 2022 to 9 January 2024). Accordingly, we held and continue to hold that the attrition rate of SCs is approximately 1.25 SCs per calendar month for those two depots combined. We can therefore find on balance of probabilities, based on the statistical attrition rates, that there would have been many such vacancies in the period from the first remedy hearing to this remedy hearing, in the region of 10+ based on the statistics provided.

24. In her witness statement, Ms Thompson stated "I am aware that, as at the ordered date of reinstatement and until 30 November 2024, there was an advertised vacancy for a Trainee Senior Conductor at Bletchley. This advert, which was for 8 positions at Bletchley was live on and off between February and November 2024, with the final successful candidate applying on 29th October." This tends to suggest 8 such roles were available at Bletchley alone, between the dates provided. By the date of this hearing (another 6 months or so) we find that there would likely have been a further 4-5 vacancies (if the same rate of recruitment continued).

25. Mr Kirk explained at the first remedy hearing, and we accepted, that the Respondent is funded by the Department for Transport (DFT), because train operators would not have survived during the pandemic and the DFT takes all the revenue and pays all outgoings and the operator is then paid a fixed fee for running the services, such that it is public money being spent on staff costs and the Respondent has to justify such costs. In the event that a cost is deemed to be unjustified by the DFT, there is a risk that the DFT will refuse to cover that cost and deem it a "disallowable expense". When giving evidence at the first remedy hearing, Mr Kirk stated that he was not aware of the DFT having ever refused to pay an expense to date. He specifically confirmed that Birmingham New Street, Worcester and others that were overstaffed above the EST by more than 10% each were not subject to disallowable expenses. We were not presented with any new evidence to suggest that being above the EST by a margin such as this would or had led to disallowable costs.

26. A permanent replacement had been recruited to the Claimant's old role by the date of the first remedy hearing. This was done shortly after his dismissal.

27. Since the Claimant's EDT, there is of course no longer a legal obligation to self isolate in the event of contracting covid-19 or being in contact with

someone who has. As stated in the liability judgment, this was the main reason for the majority of the Claimant's absences before his dismissal.

28. The Claimant's Tesco payslips in his new employment show that he has had very modest sickness absence. The Respondent sought to argue at the first remedy hearing that the references to "unpaid leave" on the payslips indicated further sickness absence, but the Claimant explained that this was referable to times he had finished his duties early in the shift (i.e. he had done all the deliveries allocated to him) and was permitted to and did clock off from work earlier than the allotted shift time. In such a case, his pay was reduced by the time he had not worked. The Respondent did not challenge this and we accepted it.

29. Since the EDT, the Claimant has applied for many jobs "on the railway" aside from his delivery job with Tesco. He has applied to a number of railway franchises including roles with the Respondent.

30. The Claimant indicated he would be willing to be reinstated as a SC at Bletchley, Watford or Northampton, but that the other depots would be too far for him to travel to.

31. He stated that he loved his job and has no ill feelings towards Mr Curtis or anyone else. He described that Mr Curtis had made a "simple mistake" in respect of the dismissal. By the date of this hearing, we were informed that Mr Curtis is no longer Area Conductor Manager and is no longer based at Bletchley.

32. Since the Claimant's dismissal, there has been a pay deal agreed of a 5% increase on pay backdated to April 2022. Respondent counsel accepted that this would apply to basic pay and overtime. If the Claimant had remained employed, he would have had this uprating of back pay.

Relevant legal principles

33. Orders for reinstatement and re-engagement are dealt with under sections 112-117 ERA 1996. Section 114 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).

34. 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).

35. Section 116 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.

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

37. As stated by the Respondent's Counsel, 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.

38. 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.

39. 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. As the EAT put it, '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.

40. We reminded ourselves of and broadly accepted Respondent Counsel's submissions on the law (with a few adjustments) made at the first remedy hearing, 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).

41. As indicated above, the issue of reinstatement and re-engagement is considered in two stages. It will be open to a respondent to argue at the second stage that although the order was made, it was not practicable to comply with it. In considering practicability at this second stage, again the tribunal cannot take into account the fact that the employer has engaged a permanent replacement unless the employer shows that it was not practicable for the dismissed employee's work to be done otherwise (s.117(7) ERA). If the respondent succeeds in establishing that it was not practicable to comply at the second stage, then the tribunal will simply award monetary compensation by way of a basic and compensatory award in the usual way.

42. However, where the tribunal concludes that it was practicable to comply with the order, and the respondent has wholly failed to do so, the tribunal will

calculate compensation in the normal way, but also, pursuant to s. 117(3) ERA, it may award additional compensation. The statutory cap may be exceeded where the arrears of pay exceed the capped aggregate of the compensatory and additional awards. However, under s.124(4) the statutory cap can only be exceeded to the level of the award previously made under s.114 ERA.

43. In MacKenzie v University of Cambridge, [2019] IRLR 324 Underhill LJ observed that an order for re-engagement does not impose an absolute and indefeasible obligation on the respondent to re-engage or reinstate. Rather, it creates a situation in which the respondent must either re-employ or (subject to the practicability defence) become liable for the awards specified by s.117(3) ERA, which include an additional award on top of what it would have to pay if no order had been made.

Conclusion

44. The Claimant has maintained throughout the proceedings his strong desire to be reinstated.

45. We have to consider whether reinstatement to the role of SC at Bletchley was practicable.

46. We note that the Respondent is not arguing that the Claimant caused or contributed to his dismissal.

47. We concluded at the first remedy hearing that reinstatement was practicable and that the Claimant should be reinstated. All that was required was for the parties to liaise to agree a start date and inform the tribunal of this. This was to allow the Claimant to resign and work any notice he was lawfully bound to in his existing job and to enable the Respondent a bit of time to build the Claimant's return into its succession planning, since this would have required some training and might have meant not advancing someone from the talent pool that it might otherwise have done so etc. However, this never happened and the matter came back to the tribunal as set out above.

48. We now have to reassess practicability based on *all* the evidence we have heard. We have been careful to take into account new evidence and ensure we do the assessment afresh. However, given that we have taken past evidence into account, and the evidence provided at this hearing did not change or alter many aspects of the evidence previously heard, we make extensive reference to that evidence throughout.

49. Whilst we note that the question of practicability must be assessed at the time of the Order, we are also mindful that we specifically invited the parties to agree a date that would be most convenient for both sides at the first remedy hearing in early 2024. Therefore, we consider that the Respondent's strict focus on the date of 12 November 2024 (a date which was only ever made arbitrarily, much later, to provide a date to satisfy the statutory requirements of an order that the Respondent had already decided it would not comply with) was inapt and artificial in terms of the legal test.

50. We considered it more apt to consider whether reinstatement was practicable within a reasonable period after the first order, when the Respondent knew it was under a legal obligation to reinstate him, but chose not to take steps to do so. In the alternative, in case we are wrong on that point, we have considered the situation as at 12 November 2024. Either way, we have unanimously held that it was practicable to reinstate him for the following reasons:

51. As to the Claimant's specific post / role, we held at the first remedy hearing that it was not practicable to keep his role vacant for him after the dismissal. We held that having heard the Respondent's evidence about minimum service levels and the fact that a shortfall in SCs could lead to some services not running, in addition to the difficulty in covering a shortfall through overtime only, and the period of time since the Claimant was dismissed, it was not practicable for the Respondent to keep the Claimant's role open. The Respondent could face financial penalties if services were cancelled and it could lead to passenger disruption (affecting the passengers' work and family lives) and loss of confidence in the franchise. We note also that the replacement for the Claimant was recruited in September 2022 and the first time the Claimant indicated his desire for reinstatement in the legal proceedings was of course in his ET1 form submitted on 6 December 2022.

52. We then remined ourselves we are required to consider all relevant circumstances. There is no presumption for or against reinstatement. The tribunal must look at the evidence as a whole and decide whether it reasonably thinks, based on all 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, specifically whether such order was capable of being carried into effect with success. We reviewed the earlier evidence and notes taken in earlier remedy hearings and received into evidence new statements and heard cross examination, as above. We have taken all of it into account.

53. The Claimant genuinely and enthusiastically wants to return to his role as a SC with the Respondent. This was very clear at both the liability and remedy stages of the proceedings and indeed he has sought reinstatement since he presented his claim form. Further, he has applied almost exclusively for roles on the railway since his dismissal. He is passionate about a career on the railway. Further, he genuinely appears to harbour no ill-feelings towards the Respondent, Mr Curtis or Mr Kirk. He considers that they made a mistake with respect to the decision to dismiss him. We therefore do not find that the Claimant has lost trust and confidence in the Respondent or any of its senior managers.

54. Mr Curtis expressed that the Claimant was a good worker when he attended work. This was advanced in Mr Curtis' statement at the liability hearing and he confirmed he still held the same view in his live evidence at the first remedy hearing. Ms Thompson did not challenge that during this hearing and she admitted that all she knew in respect of the Claimant's abilities she drew from Mr Curtis' witness statements. She had no other knowledge to draw on. Ms Thompson's assertion that the Claimant could not be trusted to do a safety critical role was, she accepted, based entirely on the fact that she believed him to be unreliable

because of his past absence. However, she was unable to say what his level and frequency of absence had been and admitted that the only information she had to go on was what had been stated in Mr Curtis' statement. Her evidence in that respect amounted to nothing more than non-expert opinion evidence. It held little or no weight accordingly. This was a common theme of her evidence. Although Ms Thompson proffered her view that the senior staff at Bletchley no longer had trust and confidence in the Claimant, she admitted in cross examination that this assertion was also exclusively based on Mr Curtis' statement.

55. When asked by the bench whether it is fair to label someone as "unreliable" and "untrustworthy" if the majority of the absence was due to the legal requirement to self-isolate from proven covid communication (i.e. being 'pinged' by the NHS app to isolate, testing positive oneself, or being in contact with someone who tested positive) Ms Thompson stated "If it was a legal obligation to stay home and self-isolate I cannot say he was being unreliable because he was doing what was legally obliged of him at the time." We agreed with Ms Thompson.

56. We did not hear any evidence from the four managers remaining at Bletchley who are said to have lost trust and confidence in the Claimant, or their reasons for it. We cannot therefore hold, on balance of probabilities, that they do hold such a view. We therefore do not find that any of the Respondent's managers have lost trust and confidence in the Claimant's ability to carry out his specific role or be employed generally. Even if they do, if such views are based on the same erroneous assumption as Ms Thompson's view (which she resiled from when challenged about the legal obligation for the Claimant to self-isolate) they too should be disabused of such a view. We were not provided with any other basis on which any managers at Bletchley would have legitimate cause to have lost trust and confidence in the Claimant.

57. We reminded ourselves that in respect of Mr Curtis, in an earlier statement he stated that he had been "troubled" by the Claimant's allegations of race discrimination against him and the Respondent. However, we reminded ourselves that the allegations were not ones that we held had been fabricated in any way (i.e. that facts had been advanced which were untrue for example). The claim advanced by the Claimant was for an act which did happen (dismissal) but the reason for the dismissal was not held to be in any way due to the Claimant's race. Therefore, there is no suggestion, nor can there be any fear, that the Claimant has been dishonest or malicious. He was merely mistaken as to Mr Curtis' and Kirk's reasons.

58. The allegation of race discrimination was advanced relatively cordially in the circumstances. There was minimal (if any) discernible animosity or tension between the Claimant and Mr Curtis in the liability hearing, given the circumstances. In any event, when Mr Curtis gave evidence at the first remedy hearing that he had been "troubled" by being accused of race discrimination, he went on only to state that he assumes from the allegations that the *Claimant* must have lost trust and confidence in him, *not* that he had lost trust and confidence in the Claimant. Therefore, despite the failed race discrimination claims, we find that there is no loss of trust and confidence between those two. Given Mr Curtis' new role, he

is likely to have limited day to day interaction with the Claimant in any event.

59. Although there were no SC vacancies at the date of the first remedy hearing, we held that even at that time it was not a barrier to an order for reinstatement and Mr Watson for the Respondent sensibly accepted at that hearing that he could not suggest the law required there to be a vacancy before reinstatement could be ordered. Further, he accepted that there was no legal bar to the tribunal considering evidence as to the likely availability of roles in the future when considering practicability. His submissions on this point were that the evidence provided in respect of this was simply too vague to be relied upon rather than that it was impermissible. We held, and continue to hold, that it is permissible and correct to consider the likely future events, given that the authorities invite tribunals to consider all the relevant facts and circumstances of reinstatement in a common sense manner.

60. We previously held (in the early 2024 judgment) that whilst there were no SC vacancies at that time, there was likely to be attrition of SCs across the two depots at Bletchley and Northampton at a rate of approximately 1.25 SCs per month according to the Respondent's evidence at that time. We were not shown any new evidence at this hearing to suggest that the attrition rate had slowed. This tends to suggest that within a month of any reinstatement order we made (in February 2024 and November 2024) a vacancy would have come up. Based on the above, we hold that at Bletchley alone, there is likely to have been something in the region of 12-13 vacancies between the date of the first remedy hearing and this hearing.

61. Further, the Respondent has and had a practice of overstaffing above the EST in any event. At the time of our original remedy judgment, the staffing levels were 102.7% against the target EST at Bletchley. This must have been regarded as justified and acceptable to DFT (since there have been no disallowable costs to the date of the early 2024 judgment and we heard no new evidence on this aspect at this hearing).

62. Ms Thompson stated in this hearing that as at November 2024, there were 73 qualified SCs and 4 trainees against an EST of 72 (we noted that the EST at Bletchley had dropped from 74 (at the time of the first remedy hearing) to 72 at this hearing). If the 4 trainees had qualified before any existing SCs left, that would mean there would be staffing levels of 106.94% SCs against the EST for the depot at the time (77 against an EST of 72). However, Mr Watson stated in his submissions that the reason 4 trainees were being trained up was due to anticipated attrition, so we do not find that all 77 would have been working at the same time, quite the opposite. The only reason there were 4 trainees was because there was expected attrition.

63. In any event, between the early 2024 hearing and this hearing, the Claimant could and should have been one of the SCs to be retrained and slotted into a vacancy. Even if there had been a slight overstaffing for a time, given the attribution rates, the Claimant would quickly have fallen within an acceptable ratio within a month, since there was only one person (him) to accommodate outside of the normal succession planning and

there was an average attrition rate of 1.25 per month across both depots (or 0.8 for Bletchley alone). It is not an exact science and we are not saying that this definitely would have been the attrition rate, merely that the staffing levels are dynamic and imprecise and that there is evidence of a high degree of turnover.

64. Had the Respondent heeded the original reinstatement order, it would and could have seamlessly introduced the Claimant back into the workforce at a time that fit its succession plans, allowed for re-training and giving time for him to work any notice at Tesco that he was bound to by law. Even if we are wrong to focus on the earlier 2024 date (when we made the first reinstatement order in principle, without a date for compliance) we find that even as at 12 November 2024 it would have been practicable to accommodate reinstatement of the Claimant. He would have needed some training (which we address below) and this would have given the Respondent some sort of a time buffer to factor him into its succession planning, perhaps meaning a candidate that might otherwise have been picked out of the talent pool remained in the talent pool a bit longer to allow the Claimant to take up the role.

65. We have had due regard to the Respondent's commercial judgment and have not taken the decision lightly or capriciously when concluding that the Claimant can be accommodated and could have been accommodated either in early 2024 or within a reasonable period after 12 November 2024. We do not question the Respondent's decision as to the appropriate EST and we accept that a Respondent is entitled to decide on appropriate staffing levels. Instead, we have looked at those levels and how the Respondent has a practice of overstaffing against EST in any event and considered what levels of overstaffing it typically caters for. We have factored in the fact that the staffing levels are not an exact science, and that, on the date provided at the first remedy hearing, the Respondent operated at an average of 104.09% overstaffing, averaged across all depots.

66. We have had regard to the size and resources of the Respondent and considered the risk of funds being "disallowable costs" by the DFT. However, we do not accept there is any real risk of this in the present case. This is because even if the Claimant is slotted back into Bletchley the percentage overstaffing is not so far outside the normal threshold tolerance across the depots and further, the Respondent can inform the DFT that the reinstatement was by order of the Tribunal. We consider that this factor is likely to carry weight with the DFT when deciding whether the costs are "justified". We have also noted that the Respondent's witnesses have not suggested that there would need to be redundancies or that people would be displaced from their roles if the Claimant was reinstated.

67. As to re-training, we do not accept that the Respondent is unable to facilitate re-training rendering reinstatement not practicable. Ms Thompson stated that where Senior Conductors have been out of work for a long time, they might need complete retraining, including a training course run in the academy, rather than just on the job upskilling. However, she accepted this was not a rigid regulatory requirement, more an internal policy.

68. Ms Thompson accepted that there is a process of local assessment and bespoke re-training for those who had previously undertaken the role but had been out of the role for some time. When asked whether someone away for two years would definitely need full retraining, she stated "It depends on the training needs of the individual". She was unable to contradict the Claimant's assertion that someone had been out of active duties for three years (on union duties) and had been retrained locally (without needing to attend academy training). She accepted that one option for the local retraining would be to go out with a Senior Conductor and be observed / assessed as fit to carry out duties. In any event, Ms Thompson stated that the academy training is run 9 times a year and whilst we accept it gets booked up, there would be nothing stopping the Respondent from prioritising the Claimant for one place at such a course within a reasonable period of the early 2024 Order or the 12 November 2024 Order.

69. In any event, we do not accept that the Claimant would have needed full retraining. No one had assessed him nor were we presented with any evidence to show that any of his certificates were expired / out of date. The Respondent had simply deleted them. Based on his past experience, we see no reason why he could not be re-certified by way of a bespoke programme 'on the job' done locally. The Respondent's own rules requiring otherwise (simply because it has a policy of destroying the electronic training records for leavers) cannot be used as a barrier to reinstatement. This does not render reinstatement impracticable.

70. Mr Thompson stated that the Claimant had applied for a new role in the intervening period since dismissal and this hearing and had failed the psychometric tests ('OPC tests'). It was argued by the Respondent that this meant it was not practicable to re-employ him in a role that now requires psychometric tests for new recruits. We did not accept that. We were informed that people who had remained employees but taken time out of the role would not be obligated to undergo these tests upon returning to the role – the tests were for new recruits only. Indeed, Ms Thompson stated that even internal hires moving from another role into the role of Senior Conductor for the first time would not be obliged to take the OPC tests. Therefore, had the Claimant been reinstated as he should have been, there would have been no need for him to sit or pass a psychometric test. This was therefore a 'red herring' so to speak. Ms Thompson was also unable to say when the psychometric tests were introduced. Therefore, it would not have been possible to hold that even *new* recruits to the role of Senior Conductor would have been required to pass the OPC test in any event, at the time for compliance with the reinstatement Order.

71. There is no evidential basis to suggest the Claimant's sickness absence will be at an unacceptable level going forward. In the liability judgment, we held that whilst Mr Curtis may have genuinely believed that the Claimant's attendance would not improve, this was neither reasonable, nor reached after reasonable investigation. On the unusual facts of this case, by the date of termination, the main reason for the majority of the Claimant's absences had fallen away – namely the need to isolate when 'pinged' by the NHS Covid-19 app and/or being exposed to someone with Covid or catching it. We therefore held that it was outside the range of reasonable

responses for the Respondent to conclude that the Claimant's absence levels would not decrease after the change in the law on self-isolation. His Tesco payslips indicate a low level of sickness absence and this is in a role that is more physically demanding. We consider therefore that there is no reasonable basis for a belief that he will be unreliable in his attendance.

72. There was conflicting evidence, at the earlier remedy stage as to whether the RMT union actively did not support the Claimant's request for reinstatement. The Claimant and Mr Craddock (of the RMT) stated they were not aware of this and Mr Craddock says he would have been made aware if this was the case. The Respondent's witnesses indicated they had been told this was the case. There is no independent evidence to corroborate either side's account. On balance, we prefer the evidence of the Claimant and Mr Craddock. We consider that Mr Craddock would be best placed to know if the RMT union had any opposition to the Claimant being reinstated, given his role.

73. For all these reasons, we find that it was (and remains) practicable for the Claimant to be reinstated to his role as SC at Bletchley and it is and was just and proper to make such an order.

74. The Respondent has not complied with such an Order, therefore damages must now be awarded under s.117 ERA.

75. We accepted the Respondent's submissions that the sums which the Claimant would be entitled to, even if we awarded the maximum sum for the additional award, would not exceed the sums we had previously assessed as falling due, for arrears of pay from the EDT to 12 November 2024 (the date for reinstatement in the Order).

76. This is because his compensatory award for the unfair dismissal claim would be capped at 52 weeks' pay which would be calculated using the statutory formula, excluding overtime that was not compulsory / obligatory. The Claimant's annual salary at the EDT was £33,885.00. We accept that he earned more than that, by taking on overtime. However, we were informed, and we accept that at the EDT, the Claimant was only obliged to work 15 or 16 Sundays per year. This would entitle him to an additional annual sum of up to approximately £4,000.00. His total annual gross pay that would fall within the concept of a week's pay, would therefore be approximately £38,000.00. This would be the applicable statutory cap for the compensatory award for his claim for unfair dismissal.

77. Even if we awarded the full 52 weeks' pay for the additional award, this would be a maximum of £29,692.00 (based on 52 weeks' pay at the sum capped by statute at the relevant time for a week's pay). Therefore, the total maximum award the Claimant would get, if we assessed it, would be less than £70,000. Given that we have previously calculated his losses as being £72,203.77 in the Order made in November 2024, s.124(4) ERA requires us to instead award that sum. Therefore, we do award that sum and do not need to separately assess his losses.

78. The only additional sum to be assessed is the Basic Award, which has not yet been assessed and which will fall due in addition to the sum above.

The correct Basic Award for the Claimant based on his age, length of service and the correct rate of pay for the EDT is £2,855.00.

Approved by:

Employment Judge Dobbie

Date 21 May 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON

17 June 2025

FOR THE TRIBUNAL OFFICE

Notes

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