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EMPLOYMENT TRIBUNALS

Claimant: Mr S Wood
Respondent: Holroyd Howe Limited
Heard at: East London Hearing Centre
On: 20 February 2017
Before: Employment Judge Goodrich

Representation

Claimant: Mr Joanne May (Solicitor)
Respondent: Ms Sarah Bowen (Counsel)

JUDGMENT/ORDERS AT REMEDY HEARING

The judgment of the Tribunal is that:-

1. The Claimant's application for reinstatement is refused.
2. The Respondent is ordered to re-engage the Claimant on the terms set out below.
3. The Respondent is ordered to pay the Claimant £21,421.
4. The Recoupment Regulations apply. The period to which the Recoupment Regulations apply is 23 March-25 April 2016. The recoupable amount is £449.05. The sum payable to the Claimant is £20,975.95.
5. The terms of re-engagement are as follows:
6. The identity of the employer: Holroyd Howe Limited.
7. The nature of the employment: General Manager Catering.
8. The remuneration for the employment: £40,000 per annum gross.

9. **Other rights and privileges to be restored to the Claimant: the Claimant be re-engaged on the same terms and conditions as those contained in his contract of employment provided in pages 41 – 49 of the Tribunal’s bundle of documents.**
10. **Date by which the order must be complied with: 20 April 2017.**

REASONS (judgment was given orally to the parties)

Background and the Issues

1 This is a remedy hearing following on from a hearing of the Claimant’s unfair dismissal claim last October 2016.

2 My judgment on the case was reserved and promulgated on 15 December 2016. The judgment I gave was that the Claimant was unfairly dismissed. I ordered that, unless the parties could agree remedy, a remedy hearing would take place on 20 February 2017 (today).

3 Full written reasons for my judgment were given and in paragraphs 88 – 89 I gave a provisional indication of my views on remedy in order to seek to assist the parties to settle remedy themselves.

4 The parties have not been able to agree remedy, so that this hearing is needed.

5 Further background as to what the Claimant was seeking at this remedy hearing is as follows.

6 The Claimant’s Employment Tribunal claim was presented on 18 May 2016.

7 In box 9.1 of the Claimant’s claim form the box was ticked for seeking compensation only. The boxes for seeking reinstatement and for seeking re-engagement were not ticked.

8 It remained the Claimant’s position at the hearing in October that compensation was what he was seeking if successful in his unfair dismissal.

9 A few weeks ago, late in January 2017, however, the Claimant changed his position. I understand that he notified ACAS that he now seeks reinstatement or re-engagement.

10 At the outset of the hearing I clarified the issues with the parties.

11 Mrs May, on the Claimant's behalf, confirmed that the Claimant seeks reinstatement; failing that re-engagement; failing that compensation.

12 Ms Bowen, on the Respondent's behalf, had prepared skeleton arguments on the Respondent's behalf, setting out the Respondent's case on remedy.

13 In summary the Respondent's position was as follows:

13.1 Reinstatement or re-engagement was opposed. The Respondent's case was that they had recruited a replacement that had been in the position held by the Claimant since June 2016. Additionally they submitted that the Claimant having breached the Respondent's safeguarding guidelines this had impacted on trust and confidence on their part towards the Claimant. Additionally, they submitted that the Claimant having criticised the Respondent, making criticisms of poor management, he himself had lost trust in the Respondent. The same arguments applied as to re-engagement, except that they accepted that they had a vacant post elsewhere, in particular at a school in Hertfordshire.

13.2 The Claimant had caused or contributed to his dismissal so it would be inappropriate to order reinstatement or re-engagement.

13.3 Additionally there was a 25 percent chance that the Claimant would have been fairly dismissed if fair procedures had been applied.

13.4 Should it be necessary to consider the making of a compensatory award, she made submissions that the Claimant had failed to take reasonable steps to mitigate his losses since October and disputed that any future losses should be awarded.

13.5 The Respondent accepted, however, as they had at the hearing in October, that the mathematical calculations of the Claimant in his schedule of loss were correct.

14 The issues for me to determine, therefore, were whether to order that the Claimant be reinstated; if not, whether to order that he be re-engaged; if not, whether or what compensation to award.

15 In the course of today's hearing I permitted various adjournments, at the Respondent's request, in order for them to take instructions from the head teacher of the school where the Claimant worked; and to obtain clarification as to a recruitment being sought at a school in Cambridge. The result of these enquiries was not, however, conclusive, as explored below.

The Relevant Law

16 Section 113 Employment Rights Act 1996 ("ERA") provides that a Tribunal may make an order for reinstatement in accordance with Section 114 ERA; or an order for re-engagement in accordance with section 115.

17 Section 116 sets out the statutory provisions for the Tribunal's consideration as to whether to make an order for reinstatement. These involve:

- 17.1 Whether the complainant wishes to be reinstated
- 17.2 Whether it is practicable for the employer to comply with an order for reinstatement and
- 17.3 Where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

18 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.

19 The considerations to take into account are similar as regards practicability and contributory fault as to the considerations when ordering reinstatement. For re-engagement, a Tribunal shall also take into account any wish expressed by the complainant as to the nature of the order to be made.

20 In the case of *Port of London Authority v Payne & Others [1994] IRLR 9 CA* guidance was given that the determination of practicability of re-engagement is at the first stage provisional. The final conclusion as to practicability is made when the employer finds out whether they can comply with the order in the period prescribed. Guidance was also given that the test of practicability is not possibility. The employer does not have to show that re-engagement was impossible. It is a matter of what is practicable in the circumstances of the employer's business at the relevant time. Although an Employment Tribunal should carefully scrutinise the reasons advanced by the employer, due weight should be given to the commercial judgment of the management.

21 In the case of *Nothman v London Borough of Barnet (No2) [1980] IRLR 65 CA* a lack of confidence in the Respondent and its management suggest that an employee would not be a satisfactory employee if reinstated.

22 Where an employer relies on a breakdown in trust and confidence as making it impracticable for an order of reinstatement or re-engagement to be made, the Tribunal will need to be satisfied both that that the employer genuinely has a belief that trust and confidence has broken down in fact but also that its belief in that respect is not irrational.

23 The issue of practicability is pre-eminently an issue of fact for the Tribunal.

The Evidence

24 On behalf of the Claimant I heard evidence from the Claimant, Mr Stephen Wood, himself.

25 On behalf of the Respondent I heard evidence from Ms Tanya Burgess, Regional Resources Manager for the Respondent.

26 In addition I considered the documents to which I was referred in the bundle of documents provided to me (the same bundle as had been provided for the liability hearing together with a few additions to bring the bundle up to date).

Findings of Fact

27 These findings of fact need to be read in conjunction with my findings of fact at the previous hearing. I rely on these findings and do not set them out again.

28 Having in mind that the Claimant has not until a few weeks ago sought reinstatement; and the Respondent has filled his post; is it any longer reasonable for the Respondent to arrange for the dismissed employees work to be done by a permanent replacement? I understand that the manager concerned was an internal recruit and the Claimant's representative submitted that it would be practicable for her to return to her previous post.

29 I find that it is not practicable to order reinstatement for the following reasons:

29.1 The Claimant seeks reinstatement. He therefore fulfils the first part of the statutory test.

29.2 The Claimant has applied very late for reinstatement. Many months had passed since he was dismissed and since he submitted his Employment Tribunal claim. If he had stated in his claim form that he wanted to be reinstated he would have had a better case for expecting the manager recruited to replace his position to return to the position she once held.

29.3 It was reasonable for the Respondent to recruit permanently on the basis that, win or lose his Employment Tribunal case, the Claimant did not want his previous job back.

29.4 The position now is that a permanent recruitment has taken place. The new person has been in post for approximately 8 – 9 months. I have no reason to believe that she has not settled into her new position.

29.5 I consider that it would not be reasonable, as submitted by the Claimant, to remove the replacement from the position she holds into a previous position she held. I am not aware of the contractual position with the individual, so unable to decide whether it would be a breach of her contract of employment. Whether or not it would be a breach of contract to return the Claimant's replacement to the role she previously held, it might be a factor affecting trust and confidence for the individual concerned. She would have had no reason to believe that she had not been permanently recruited to that role.

29.6 Reinstatement would probably be more difficult for the Claimant than making a fresh start in a different position. He would be returning to a post from which he had been suspended and then dismissed and where others, such as the Head Teacher at the school where he was manager for the

catering service being provided, knew that he had been dismissed.

30 Having rejected the application for reinstatement I have gone on to consider re-engagement having in mind the cases presented to me today. In particular:

- 30.1 The Claimant wishes to be re-engaged. He again fulfils the first part of the statutory test.
- 30.2 The Claimant is willing to travel about 1 to 1 ¼ hours each way and up to 45 miles each way in order to be re-engaged.
- 30.3 There is at least one job that is currently vacant, at a place which is within the distance from his home that the Claimant has indicated he would be willing to travel to. He has worked there in the past with the Respondent. There has been no dispute that he has the necessary qualifications and experience to perform the role, albeit he would need the Respondent's usual induction procedures and management support if he were to move into that, or a similar role.
- 30.4 Is it practicable to order re-engagement because of the Claimant's feelings towards his managers, in particular the line manager he had at the time that he was dismissed, Ms Alison Bowden?
- 30.5 In particular Ms Bowen highlighted paragraphs 20 – 23 of the Claimant's previous witness statement, in which he referred to having been treated very badly and not getting the help and understanding he needed; referred to not getting a job after an interview that he thought had gone well but that the interviewer had told him that she and Alison Bowden were old pals and the subsequent got no further response. In addition attention was drawn to criticisms made by the Claimant of Ms Bowden as to the support he had received following the death of his parents in New Zealand.
- 30.6 The Claimant's evidence today, however, was that he would swallow his pride and work to resolve any difficulties he had had in his relationship with Ms Bowden. Even if this might be influenced with a degree of frustration at having been unable to obtain a similar employment, I accept that the Claimant is genuine in his evidence on this. With the passage of time and the realisation that he is finding it difficult to obtain employment in a similar role, I find that so far as the Claimant is concerned trust and confidence has not been broken down to the extent where it will be impracticable to re-engage. This is not the kind of case like the Nothman case where wild conspiracy theories were being advanced by the Claimant in that case.
- 30.7 In this case, as in any case where an employee is dismissed for gross misconduct the reasons they feel are unfair, they are bound to have some upset feelings towards those responsible for dismissing them and not feel warmly disposed towards them.

- 30.8 In the Claimant's case the criticisms he was making of Ms Bowden in the disciplinary and grievance processes were not ones that could be described as particularly unreasonable. To some extent they formed part of why the dismissal was held by me to be unfair.
- 30.9 In any event, in my experience, employees do from time to time complain about their managers. Many who do so continue to work for the employer, some for many years alongside the complaints they make.
- 30.10 I do accept that there was an inference from the Claimant's part that Ms Bowden had given the Claimant a bad reference so as to cause him to lose his job and might give him a bad reference in future. This was part of his case on mitigation of loss.
- 30.11 The context of this was, however, that the Claimant had been claiming jobseekers allowance and this was stopped because the Respondent, in response to an enquiry from the relevant government department, notified the department that he had been dismissed for gross misconduct. Not long afterwards he attended an interview that he had thought had gone well, only to be told that the interviewer was a friend of Alison Bowden; and then was not offered the job. In the circumstances it was entirely understandable that he might have feared that the subsequent failure of the prospective employer to contact him again or offering the job might have come from a bad reference; whether or not this was the case (I do not know one way or the other).
- 30.12 Would it be practicable to re-engage the Claimant because of the Respondent's case that they have lost trust and confidence in him because of his failures to follow their procedures designed to ensure the safeguarding of children at the schools?
- 30.13 The assertion of this on an employer's part is one that needs to be examined critically. I recollect a previous President of the Employment Appeal Tribunals describing such an assertion as being a "mantra" often used on the employer's part. In this case, however, Ms Burgess fairly and appropriately accepted the following points when cross-examined in her evidence. She accepted that the Respondent had no problems with how the Claimant had done his work up to the time of the events that gave rise to his dismissal. She accepted that the failings he displayed might have been caused by bereavement stress. She also accepted that now that the Claimant is better there is no reason to believe that similar problems would occur again.
- 30.14 I find therefore that the Respondent has not made out their case on this point and consider that it is not an issue such as to prevent re-engagement. I am not satisfied either that the Respondent genuinely believes that there has been a breakdown in trust and confidence so as to make re-engagement impracticable, or that the belief is rational, in view of the particular circumstances of the Claimant at that time and Ms Burgess's evidence.

- 30.15 As regards contributory conduct I gave my provisional indications in my judgment on liability particularly in paragraphs 94 – 95 of my judgment. I concluded that the Claimant's failures were not done wilfully or in a grossly negligent way; but that it was arguable that the Claimant did contribute to his dismissal by culpable behaviour.
- 30.16 I indicated that the level of award of reduction if I were to make one would not be sufficient to prevent re-engagement.
- 30.17 Having heard all the evidence I took into account both at the hearing last October and today I consider re-engagement to be an appropriate option.

Closing Submissions

31 In the course of her closing submissions Ms Bowen gave additional oral submissions to supplement the typed skeleton argument she had previously provided. These included that reinstatement was not practicable, with someone "in situ"; he had made attacks on his manager both in his grievance; and in his suggestions that she had given him a bad reference so as not to be offered a job where he had attended an interview; he had contributed to his dismissal by a figure she put at 25%; additionally there should be a "Polkey" reduction of award;

32 Mrs May gave oral submissions. These included that reinstatement would be practicable as the new manager could return to her previous post; and, although the Head Teacher had expressed views about the Claimant in an email, he had previously had a good relationship with the Claimant and there was no reason why he could not do so again. Nor was it clear that he had received the Employment Tribunal's judgment. If reinstatement was not ordered, re-engagement could be. The Claimant had previously worked at the school in question. The Respondent's case on loss of trust and confidence should be rejected. The Claimant had previously worked to a high standard and had recovered from his illness. His conduct was not wilful or grossly negligent. If fair procedures had been followed, the Claimant would not have been dismissed but would have been supported. She also made submissions as to mitigation of loss.

Conclusions

33 For the reasons set out in my findings of fact I refuse an order of reinstatement and I grant an order of re-engagement.

34 As to the terms of the re-engagement order I have decided to make a reduction of 15% to the wages to be paid to the Claimant on the basis of contributory fault, for the reasons given in paragraphs 93-95 of my judgment at the previous hearing. I was satisfied, after listening to submissions that the Claimant did, to a minor extent, engage in conduct that was culpable or blameworthy that did contribute to his dismissal.

35 I declined to make a reduction of award on "Polkey" grounds, pursuant to section 123(1) ERA, for the reasons given in paragraph 96 of my judgment at the liability hearing. It is also doubtful that I would have any power to reduce the amount of earnings to be awarded for re-engagement on "Polkey" grounds (see, for example *Arriva London Ltd v*

Elefteriou UKEAT/0272/12/LA.

36 I was invited by Ms Bowen, on the Respondent's behalf, to make a reduction of an award on the basis that the Claimant had not appealed against his dismissal and thus been in breach of the code of practice on disciplinary procedures. I declined to do so. Firstly, I did not consider that the provisions of section 207A Trade Union and Labour Relations (Consolidation) Act 1992 applied to re-engagement, in view of section 124A ERA. This appears to allow only for the compensatory award to be reduced. Even, however, if I had such power, I would have exercised my discretion not to make a reduction, in view of the fragile mental state the Claimant was in at the time.

Terms of Order

37 After I had given my judgment I asked the parties about the terms of the order for re-engagement. Helpfully, they were able to agree terms for re-engagement and the terms set out in my order at the start of this judgment are the agreed terms.

38 Additionally I have ordered the Respondent to repay the Claimant's Employment Tribunal fees. Ms Bowen accepted that, in view of my judgment, such an order would be appropriate.

Other matters

39 Two days after the hearing Ms May sent an email to the Tribunal and the Respondent to correct the figures the Claimant had given for the Job Seekers Allowance he had received. She notified the Tribunal that the Claimant had checked his records and had received payments between 23 March 2016 and 25 April 2016 amounting to £449.05. Previously the figures he had given were of receiving benefits from 16 February to 18 April, amounting to £292.40. So far as I am aware the Respondent did not respond to her email with this information.

40 I have, therefore, amended the terms of the re-engagement order agreed between the parties to reflect the amount of the award that is recoupable being a different figure to that initially indicated to the Tribunal.

Employment Judge Goodrich

23 March 2017