

THE INDUSTRIAL TRIBUNALS

CASE REF: 14129/18
16100/18

CLAIMANT: Emma Walsh

RESPONDENT: The Governing Body of Belfast Metropolitan College

JUDGMENT ON REMEDY

The unanimous judgment of the tribunal is that it will not make a reinstatement order or a re-engagement order. The case will now be listed for a hearing on financial remedy.

CONSTITUTION OF TRIBUNAL

Vice President: Mr N Kelly

Members: Mr E Grant
Mr B Heaney

APPEARANCES:

The claimant was represented by Mr Peter Bunting.

The respondent was represented by Mr Sean Doherty, Barrister at Law, instructed by Judith Blair Solicitors.

1. The claimant alleged that she had been unfairly dismissed by the respondent. A judgment on liability issued to the parties on 6 January 2020.
2. The unanimous decision of the tribunal in that judgment was that the dismissal of the claimant by the respondent had been automatically unfair and unfair for the purposes of the statutory test in the Employment Rights (Northern Ireland) Order 1996. That judgment should be read together with the current judgment on the question of remedy. The first issue to be dealt with is the claimant's application for reinstatement/re-engagement.

RELEVANT LAW

3. Article 150 of the 1996 Order provides:-

“(1) In exercising its discretion under Article 147, 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) *whether the claimant 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 his 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 Paragraph (3)(c) it shall, if it orders re-engagement, do so in 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 Paragraph (1)(b) or (3)(b) whether it is practicable to comply with an order for reinstatement or re-engagement.*
- (6) *Paragraph (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 employee engaged the replacement it was not longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.”*

4. It is clear that the tribunal must, first, ascertain the wishes of the claimant. The wishes of the claimant, expressed directly by the claimant in terms of her oral evidence and expressed on her behalf by Mr Bunting, were perfectly clear. She wishes to be reinstated in the job from which she had been unfairly dismissed. Under Article 50, the tribunal must first then consider such an order for reinstatement. It must then consider the matters set out in Article 150(1)(b) and (c). The claim forms lodged by the claimant were clear that the claimant only wanted to be reinstated.
5. She did not want to be re-engaged to another job or post. The position did not change either in the course of the substantial hearing or in the course of this Remedy Hearing. The claimant did not put forward any evidence of any alternative post which was either available or which would have been of interest to her. That, of course, does not remove the duty under Article 150(2) to consider a re-engagement order.
6. Therefore the tribunal must consider under Article 150(1)(b) and (c), whether it is practicable for the employer to comply with an order for reinstatement, and whether, having regard to contributory conduct, it would be just to order reinstatement.
7. The EAT stated in **Arriva London Ltd v Eleftheriou [UKEAT/0272/12]** that:-

“The statute is prescriptive as to the order in which a tribunal is obliged to consider remedy. It must consider reinstatement before it considers compensation.

As to reinstatement it has a wide discretion. It follows that unless it can be said that the tribunal failed to take into account any matter which it should have done or took into account matters which it should not have done or reached a conclusion which was wholly unreasonable, effectively perverse, an exercise of its discretion must stand.”
8. It is clear the practicability of reinstatement has to be considered at the time of the Remedy Hearing, ie at the end of the tribunal process and not at any earlier point in time. In the case of **Rembiszewski v Atkins Ltd [UKEAT/0402/11]** the EAT determined at Paragraph 49(3), in relation to a re-engagement order, that:-

“Whether an order for re-employment is to be made is to be judged as at the date that any such re-employment would take effect. In practice that is likely to be on the date on which the Employment Tribunal has received all the material on this issue put before them by the parties.”
9. It cannot be the case that a reinstatement order is to be considered impracticable simply because of a degree of bad-feeling between the parties. It is a condition precedent to any reinstatement order that there will have been an unfair dismissal and it is almost inevitable, in such cases, that both parties will have taken entrenched positions in a prolonged dispute. If that were sufficient on its own to rule out a reinstatement order, the legislation would not have provided for such an order.
10. In **Central and North West London NHS Foundation Trust v Abimbola [UKEAT/0542/08]** the Employment Appeal Tribunal considered an order for

reinstatement made by an Employment Tribunal in respect of a psychiatric nurse. The Employment Appeal Tribunal determined that the Employment Tribunal had failed to take into account relevant factors in the exercise of their discretion and set aside the Employment Tribunal's order for reinstatement.

In the **Abimbola** case, a psychiatric nurse had been dismissed following an incident in which he and nursing colleagues attempted to restrain a patient. Security men from a private company did not intervene. The security men alleged that the claimant had placed the patient in a headlock. The claimant and his colleagues alleged that he had not. The Employment Tribunal determined that he had been unfairly dismissed. The Employment Tribunal had determined that the evidence had not been sufficient to support a reasonable belief in the alleged misconduct. The Employment Tribunal ordered the reinstatement of the claimant by the respondent as a Band 5 psychiatric nurse in a female ward in Hillington Hospital effective on 8 September 2008 and it further directed that he would be paid arrears of salary and pension rights less £900.00 pay earned by the claimant in the interval by working at a carwash. It also ordered an interim payment of £2,000.00.

11. The Employment Appeal Tribunal in **Abimbola** stated:-

- “14 *Although orders for reinstatement or re-engagement are the primary remedy for unfair dismissal, we believe that historically only about 3% of successful unfair dismissal claims result in an order for re-employment in one or other of these forms. By Section 114(1) of the Employment Rights Act 1996, an order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed. That is precisely the effect of the Employment Tribunal's order in this case. Re-engagement, with which we were not concerned, requires the employer to re-employ the claimant on comparable, but different terms from those he enjoyed prior to dismissal.*
- 15 *Employment Tribunals have a wide discretion in determining whether or not to order reinstatement. It is essentially a question of fact for them. However they must take into account three factors under Section 116(1) ERA; (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 his dismissal whether it would be just to order his reinstatement.*
- 16 *In the present case the claimant asked for reinstatement; he was found not to have contributed to his dismissal, therefore the sole mandatory issue before the Employment Tribunal was whether it was practicable for the respondent to comply with an order for reinstatement.*
- 17 *As the Court of Appeal made clear in **Port of London Authority v Payne [1994] IRLR 9**, the scheme of the legislation involves a two-stage approach. At Stage One (the first remedy hearing) the Employment Tribunal must make some determination as to the practicability of reinstatement (Ber Neill LJ, Paragraph 46). However*

such a determination is provisional at that stage. If the employer fails to comply with an order for reinstatement, at a second stage remedy hearing, in addition to making an ordinary compensatory and basic award for unfair dismissal, the Employment Tribunal shall also make an additional award of between 26 and 52 weeks pay unless the employer proves on the second stage that reinstatement is in fact impracticable. At that stage the Employment Tribunal will make a final determination of the practicability question. (ERA Section 117(3)).”

12. In the same case the EAT stated:-

*“20 What does practicability mean in this context? Practicable means more than possible. For example, in **Coleman v Magnet Joinery Ltd [1975] ICR 46**, where re-engagement of the unfairly dismissed employees, although possible, would have led to industrial strife, the Court of Appeal held that re-engagement was not practicable. Further, loss of a necessary mutual trust and confidence between employer and employee may render re-employment impracticable. **ILEA v Gravett** is a relevant example.”*

13. The EAT quoted from the **Gravett** decision as follows:-

“21 The tribunal ordered a re-engagement and are criticised by the appellant employer for what they submit is a wholly perverse decision upon all the facts of this case. It is a possible view of that decision, but we do not seek nor do we need to go that far. An essential finding in the present case was that the authority had a genuine belief in the guilt of the applicant. It is said with accuracy that this is the largest education authority in the country and that it has a vast area to cover and a vast variety of posts into the applicant can be fitted. It is, however, a common factor in any of those posts that the applicant would have the care and handling of young children of both sexes. Bearing in mind the duty of care imposed on the authority and the very real risks should they depart from the highest standard of care, we take the view that this tribunal failed adequately to give weight to those factors in the balancing exercise carried out in order to reach their decision on re-engagement.”

14. In linking the **Gravett** case to the **Abimbola** case the EAT stated:-

*“Pausing there, we accept Mr Morton’s submission that the duty on the respondent in the present case for the care of vulnerable patients is not dissimilar from the duty on the educational authority in the **Gravett** case.*

15. The EAT considered the issue of practicability of reinstatement in paragraphs 22-27 of the decisions in **United Linconshire Hospitals NHS Foundation Trust v Farren [2016] UK EAT/0198/16**.

“22. It is common ground before us that an ET is to determine the question of reasonable practicability as at the date it is considering making a re-employment order; at which stage, it has to form a preliminary or provisional view of practicability (per Baroness Hale at paragraph 37,

McBride v Scottish Police Authority [2016] IRLR 633 SC). The Respondent has a further opportunity (section 117(4)) to show why a re-engagement order is not practicable if it does not comply with the original order and seeks to defend itself against an award of compensation and/or additional award that might otherwise then be made under section 117(3).

23. More generally, Mr Ohringer has helpfully summarised the principles relevant to an ET's approach to a re-engagement order at paragraphs 16 to 23 of his skeleton argument:
 - "16. Under s.112 of the Employment Rights Act 1996 ... a tribunal must enquire whether an unfairly dismissed claimant seeks orders for reinstatement or reengagement in preference to compensation.
 17. In ss. 113 and 116 of the ERA 1996, the tribunal is given a broad discretion as to whether to order reinstatement, reengagement or neither and directed to take into account various factors. In relation to reengagement, those factors are:
 - (a) any wish expressed by the complaint [sic] as to the nature of the order to be made,
 - (b) whether it is practicable for the employer ... to comply with the order for reengagement, and
 - (c) where the complainant caused or contributed to some extent to the dismissal, whether to make an order for re-engagement, and if so on what terms.
 18. Reinstatement and reengagement are the 'primary remedies' for unfair dismissal (**Rao v Civil Aviation Authority [1992] ICR 503**, unsuccessfully appealed to the Court of Appeal on other grounds **[1994] ICR 495** and **Central & North West London NHS Foundation Trust v Abimbola (UKEAT/0542/08)**, para. 14).
 19. A Tribunal has a wide discretion in determining whether to order reinstatement or reengagement. (... Valencia ... para. 7)
 20. If the employer maintains a genuine (even if unreasonable) belief that the employee has committed serious misconduct, then re-engagement will rarely be practicable. (paras. 10-11 citing **Wood Group Heavy Industrial Turbines Ltd v Crossan [1998] IRLR 680**).
 21. However as stated in **Timex Corporation v [Thomson] [1981] IRLR 522**, cited with approval by the Supreme Court in McBride ... the Tribunal need only have 'regard to' whether reengagement is practicable and that is to be considered on a provisional basis only.
 22. Simler J stated that contributory conduct is relevant to whether it is just to make an order. She emphasised that contributory fault, even to a high degree, does not necessarily mean it would be impracticable or

unjust to reinstate. (Valencia, para. 12, citing **United Distillers & Vintners Ltd v Brown (UKEAT/1471/99)**, para 14).

23. Although the Tribunal is entitled to take into account contributory conduct in deciding whether to order reinstatement or reengagement, the question of whether the Claimant's employment would have been fairly dismissed in any event (applying the **Polkey [v A E Dayton Services Ltd [1987] IRLR 503]** principle) is irrelevant. This was the conclusion of the EAT in **The Manchester College v Hazel & Huggins (UKEAT/0136/12, para. 40)** which was upheld by the Court of Appeal **[2014] ICR 989, para. 43.**"

24. In this case, the ET's approach to the question of trust and confidence and how this might impact on its discretion to order re-engagement has been key. This has put the focus on the test that an ET is to apply in determining practicability, which was addressed by the EAT when overturning an order for re-engagement in **Wood Group v Crossan [1998] IRLR 680:-**

"10. ... we are persuaded in this case that it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations. It may seem somewhat incongruous that where a tribunal goes on to categorise the investigations into the belief as unfair or unreasonable, nevertheless, the original belief can found a decision as to remedy and the practicality of re-engagement, but it is inevitable to our way of thinking that when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist between an employer and employee, inevitably broken by such investigations and allegations can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee. Even if the way the matter is handled results in a finding of unfair dismissal, the remedy, in that context, invariably to our minds will be compensation.

25. Before us, the parties have approached the test of practicability at the first stage as one in respect of which there is a neutral burden of proof. They see the burden shifting to the employer if and when it seeks to avoid the making of an additional award of compensation under section 117 **ERA**. That said, where an employer is relying on a breakdown in trust and confidence as making it impracticable for an order for re-engagement to be made, the ET will need to be satisfied not only 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 (see paragraph 14 **United Distillers v Brown UKEAT/1471/99**).

26. In the case of **Valencia Simler J** revisited the question as to how an ET was to undertake its task on the making of a re-engagement order, giving the following guidance:

“7. It is accordingly clear that tribunals have a wide discretion in determining whether or not to order reinstatement or re-engagement. It is a question of fact for them. However, whereas an order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed, an order for re-engagement is more flexible and may be made on such terms as the tribunal may decide

8. The statute requires consideration of reinstatement first. Only if a decision not to make a reinstatement order is made, does the question of re-engagement arise. In making a reinstatement order the tribunal must take into account three factors under s.116(1) ERA: the complainant’s wish to be reinstated; whether it is practicable for the employer to comply; and where the complainant caused or contributed to his dismissal whether it would be just to order his reinstatement.

9. Practicable in this context means more than merely possible but ‘capable of being carried into effect with success’: **Coleman v Magnet Joinery Ltd [1974] IRLR 343 at 346** (Stephenson LJ).

10. Loss of the necessary mutual trust and confidence between employer and employee may render re-employment 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, reinstatement or re-engagement will rarely be practicable: see **Wood Group Heavy Industrial Turbines Ltd v Crossan [1998] IRLR 680 at [10]** (Lord Johnston) in the context of misconduct involving drugs and clocking offences:-

‘in this case it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations ... when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist ... can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee.’

11. Similarly in **ILEA v Gravett [1988] IRLR 497** (albeit on very different facts) the EAT accepted that a genuine belief in the guilt of an employee of misconduct, even if there were no reasonable

grounds for it, was a factor that had to be weighed properly in deciding whether to order re-engagement:-

'21. The tribunal ordered re-engagement and are criticised by the appellant employer for what they submit is a wholly perverse decision upon all the facts of this case. It is a possible view of that decision, but we do not seek nor do we need to go that far. An essential finding in the present case was that the authority had a genuine belief in the guilt of the applicant. It is said with accuracy that this is the largest education authority in the country and that it has a vast area to cover and a vast variety of posts into which the applicant could be fitted. It is, however, a common factor in any of those posts that the applicant would have the care and handling of young children of both sexes. Bearing in mind the duty of care imposed upon the authority and the very real risks should they depart from the highest standard of care, we take the view that this tribunal failed adequately to give weight to those factors in the balancing exercise carried out in order to reach their decision on re-engagement.

12. *So far as contributory conduct is concerned, this is relevant to whether it is just to make either order and in the case of a re-engagement order, on what terms. In cases where the contribution assessment is high, it may be necessary to consider whether the level of contribution is consistent with the employer being able genuinely to trust the employee again: **United Distillers & Vintners Ltd v Brown UKEAT/1471/99**, unreported, 27 April 2000 at paragraph 14."*

27. *Although we have just cited passages from two cases in which different divisions of the EAT overturned ET orders for re-engagement, more generally we note as follows: (1) questions of practicability under section 116 are primarily for the ET and are likely to be difficult to challenge on appeal (see **Clancy v Cannock Chase Technical College [2001] IRLR 331 EAT**); and (2) ETs have a wide discretion in determining whether or not to order reinstatement or re-engagement; it is essentially a question of fact (see **Central & North West London NHS Foundation Trust v Abimbola UKEAT/0542/08**, at paragraph 15)."*

PROCEDURE

16. Following the decision on liability in the present claim, a Case Management Preliminary Hearing was conducted by telephone on 11 February 2020. The claimant was represented by Mr Peter Bunting and the respondent was represented by Mr Sean Doherty Barrister-at-Law. At that stage, a Remedy Hearing had been arranged for 18 and 19 February 2020. However it became apparent in the course of that telephone hearing that no actuarial evidence had been prepared by either party in relation to this matter. The claimant had been a member of a final salary pension scheme and, clearly, actuarial evidence was going to be a vital component in determining financial compensation, should an order for reinstatement not be

made. It was surprising that neither party had turned their minds to this issue, one week before the remedy hearing.

17. On that basis, it was directed that the Remedy Hearing should proceed in relation to the question of reinstatement/re-engagement only and that the issue of financial compensation would be stayed until a separate hearing, if, and only if, an order for reinstatement was not made or, if made, not complied with by the respondent. It was stressed to both parties that it was vital that, in those circumstances, should they arise, actuarial evidence should be provided by both parties to assist the tribunal in the calculation of financial compensation.
18. The Remedy Hearing in relation to the possibility of reinstatement/re-engagement proceeded on 18 February 2020.
19. The tribunal heard evidence from Ms Gillian Magee on behalf of the respondent. Ms Magee was the Director of People, Policy and Planning in the respondent college. She had not been a decision maker in relation to the disciplinary proceedings against the claimant. The tribunal also heard evidence from Ms Susan Clarke, the mother of a student, and from Ms Katherine Clarke, a trade union representative.
20. It became apparent in the course of that Remedy Hearing that the evidence put before the tribunal by the parties was seriously deficient and had not been directed towards the statutory tests for reinstatement which have been set out above.
21. In particular, the practicability of reinstatement had not been addressed in any proper form. No clear evidence had been provided in relation to Ms Gillespie's current and future employment relationship with the respondent. There appeared to be a dispute as to whether she had been retired at the time of the Remedy Hearing. There had been insufficient evidence about what had happened to the claimant's post or what had happened in relation to any relevant recruitment competition. The staffing of the respondent college, or more particularly the staffing of the relevant section of the respondent college, had not been properly addressed. It also became apparent in the course of cross-examination that a number of casual lecturers had been employed in the relevant section of the college. That had been clearly relevant to the question of practicability and it had not been disclosed or addressed at all by the respondent.
22. The tribunal reconvened the Remedy Hearing and, in a written record of the hearing, made the following specific directions:-

Either party may submit further written statements for that Preliminary Hearing. However, the respondent is directed that it needs to provide evidence in relation to the following matters:-

- "i. Ms Gillespie's current and future employment relationship with the respondent college. That should specify whether the employment relationship was at any time a casual (zero hours) relationship, whether it was, is, or will be part-time, whether it was fixed term and part-time, or some other category of employment. The evidence should state precisely what Ms Gillespie has done and will do since the claimant's dismissal. It should state where she has done it and*

where she will do it. It should state what hours Ms Gillespie has worked and will work. It should state whether Ms Gillespie has any management or supervisory responsibilities and at what grade she is currently engaged or will be engaged in the future. It should state what Ms Gillespie's plans are, if any, for future employment. It should state in particular what contact there might reasonably be between the claimant and Ms Gillespie, should a reinstatement order issue.

- ii. It should describe in detail Ms Gillespie's retirement and pension status. It should state precisely when she retired (if she has retired) and whether or not she is in receipt of a pension.*
- iii. It should state in detail what happened to the claimant's post. It should describe in detail the conduct and outcome of the recruitment competition which apparently started in relation to that post. It should state precisely who Ms Eimear Lineghan is and what role she has undertaken, currently undertakes and will undertake in the respondent college. It should state precisely what role Ms Lineghan has, if any, in relation to the post once occupied by the claimant.*
- iv. It should state precisely what the current position and future position is in relation to the staffing of the travel tourism and hospitality section of the respondent college. It should state precisely the number and role of casuals who have been employed or have been employed and will be employed in the relevant section. It should state precisely the number and role level of full-timers, part-timers and other types of employees who have been, are being, or will be employed in the relevant section. It should state precisely who is currently performing the duties previously performed by the claimant and in what manner."*

23. The Remedy Hearing, which was specifically to address the possibility of a reinstatement/re-engagement order, was relisted for 6 March 2020 and the parties were directed to the law in relation to such an order. They were referred to reported decisions of this tribunal in which the relevant law had been set out. Those decisions were readily available on the tribunal's website. On 4 March 2020, two days before the relisted hearing, the respondent's solicitors wrote to tribunal indicating:-

"Having taken instruction from the respondent it has become apparent that in theory there are teaching hours which could be allocated to the claimant in the next academic year (commencing in September 2020) across the Belfast business school.

In light of same, in respect of opposing the claimant's request for reinstatement, the respondent will be relying on the following arguments only, namely that:-

- it is not practical to reinstatement the claimant due to the loss of trust and confidence (under Order 150(1)(b) of the Employment Rights (Northern Ireland) Order 1996.*

- *has the claimant caused or contributed to her dismissal to some extent it would be unjust to order her reinstatement under Article 150(1)(c)."*

24. The respondent made no attempt whatsoever to comply with the clear and specific directions which had been given to it by the tribunal in the record of 18 February 2020 and notified to the claimant and the respondent immediately thereafter.
25. As with the approach to the earlier Remedy Hearing, the line taken by the respondent in this letter, was seriously deficient. Firstly, the acknowledgement that it was "*in theory*" possible to allocate teaching hours to the claimant in the "next" academic year was irrelevant to the statutory tests in relation to an order for reinstatement/re-engagement, which had been painstakingly explained to the parties by the tribunal. Furthermore the reference to not being "*practical*" to reinstate the claimant was incorrect. The correct test is whether or not it is "*practicable*".
26. Importantly, a Deputy Director of the respondent college in her witness statement at the earlier Remedy Hearing had given the clear impression that there were no or limited posts available. That witness had stated specifically "*the options for reinstatement or re-engagement are limited. At present there is no vacancy within the travel or tourism Department or within the wider Belfast business school in which this Department is based.*"
27. When the deficiencies in the letter of 4 March 2020 were put to Counsel for the respondent college, the respondent college immediately conceded that posts were currently available and not simply available "*in theory*" in the "*next*" academic year. That concession is directly at variance with the letter of 4 March 2020 and with the clear evidence given to this tribunal at the first Remedy Hearing. It called into question the credibility of that evidence and the attitude of the respondent to this litigation.
28. Furthermore the evidence given at the earlier Remedy Hearing had been:-

"There is no question that if she was reinstated or re-engaged that she would come into contact with Ms Gillespie. The travel and tourism Department currently employs 16 lecturers (five full-time, six associate and five part-time) including Ms Gillespie. It is predominately based in the Titanic Quarter."
29. That evidence obscured the issue of the use of casual lecturers. It did not mention that Mrs Gillespie had been retired. It did not mention what became clear in the second Remedy Hearing ie that Ms Gillespie had been employed, after her retirement, on a casual basis in the Castlereagh campus, not the Titanic Quarter, and that the possibility for contact between the claimant and Ms Gillespie had been minimal at best. In fact, on the basis of the respondent's cross-examination of the claimant in the second Remedy Hearing, it was likely to be limited to the few occasions when all the relevant staff, both permanent and casual and wherever based, would be called together to attend a meeting. That is not the very clear impression which had been given by the respondent college to this tribunal in the course of the first Remedy Hearing or in the letter of 4 March 2020.

30. In the second Remedy Hearing, the claimant gave evidence by way of witness statement and was cross-examined. The respondent chose not to call any further evidence and, as indicated above, had chosen not to follow the very clear and specific directions which had been given to it by this tribunal. The tribunal concludes that the respondent college has behaved in a somewhat casual fashion towards this tribunal and has, as it has done throughout this litigation, behaved as if the requirements of employment law are not a matter of any particular concern to it. Specifically, it did not produce any witness statement or seek to call any witness to give oral evidence in relation to Ms Gillespie's current employment status, what hours she works, where she works and specifically how often, if at all, she would come into contact with the claimant if the claimant were to be reinstated.
31. The respondent college has belatedly, and reluctantly, conceded that teaching hours are available for the claimant currently and in the forthcoming academic year. It now argues that reinstatement is not practicable because of a loss of trust and confidence and because of the contributory conduct of the claimant.
32. The respondent produced one witness statement at the first Remedy Hearing. That witness statement emphasised what was stated to be the concerns of the respondent college about the claimant's future conduct towards Ms Gillespie, should the claimant be reinstated. The witness statement stated:
- "I am concerned that without this insight, Ms Walsh's behaviour towards Ms Gillespie would continue unabated. The college and I do not have trust or confidence that Miss Walsh would modify her behaviour towards Ms Gillespie in the future. I am concerned about the level of disregard she has shown Ms Gillespie."*
33. As indicated above, that witness statement went on to say:
- "At present there is no vacancy within the travel and tourism Department or within the wider Belfast Business School in which the Department is based (this school is one of only five schools within the college). However, even if there was, there is no question that if she was reinstated or re-engaged that she would come into contact with Ms Gillespie. The travel and tourism Department currently employs 16 Lecturers (five full-time, six associated and five part-time) including Ms Gillespie. It is predominantly based in the Titanic Quarter. The college and I do not have trust or confidence that Ms Walsh would behave appropriately towards Ms Gillespie."*
34. As indicated above, the respondent chose not to produce further evidence by way of witness statement or indeed otherwise, at the second Remedy Hearing in relation to the potential contact between the claimant and Ms Gillespie should the claimant be reinstated. It emerged from submissions on behalf of the respondent and indeed from questions put on behalf of the respondent that there is no dispute that Ms Gillespie has now officially retired from the respondent college. She works, to the extent she works at all, on a casual basis, apparently in the Castlereagh Campus which appears to be physically separate from the location at which the claimant would be employed if she were to be reinstated. There is no evidence before the tribunal as to the frequency at which Ms Gillespie is employed on a casual basis or the frequency at which she is expected to be employed on that basis in the future. Although it has not been addressed at all by the respondent in

its evidence, it seems equally clear that there is absolutely no possibility that Ms Gillespie would ever be the claimant's line manager or curriculum manager at any stage in the future. It also seems clear, although the respondent again chose not to specifically address this, that the physical locations would be separate. From the questions put on behalf of the respondent in cross-examination at the second Remedy Hearing it would appear that the only possible contact between the claimant and Ms Gillespie which can be predicted would be at any meeting of all staff, including casual staff, which might be called in the relevant Department. Any such meeting would be a meeting at which Ms Gillespie, or indeed the claimant would not be in a managerial or supervisory capacity over each other. Any such meeting would be a meeting at which several members of staff would be present and at which Ms Gillespie and the claimant would not be left on their own. Given that Ms Gillespie, to the extent that she works at all in the respondent college, would be working on a casual basis, the scope for any dispute in relation to curriculum appears to be exaggerated and the concerns expressed by the respondent college that previous behaviour would continue "*unabated*" seem to be exaggerated. The conduct of the claimant related to a particular course put forward by Ms Gillespie as the Curriculum Manager. Those particular circumstances would not arise again.

35. The tribunal therefore concludes that the concerns expressed by and on behalf of the respondent college that contact between the claimant and Ms Gillespie would be unavoidable and would result in unnecessary friction, are overstated. That however does not answer the questions before the tribunal.
36. The first statutory test is whether the claimant wishes to be reinstated. That is satisfied. The second statutory test in relation to reinstatement is one of practicability. Practicability is more than what might simply be possible: any reinstatement Order has to be capable of being carried into effect with success. It has to be workable.
37. In the present case, the claimant has long service with the respondent college. Any difficulties which she has had were difficulties with Ms Gillespie. Ms Gillespie has never given evidence in relation to this matter. As indicated above the tribunal has not been given any clear evidence in relation to the extent or indeed the precise locations at which she might be employed in the future. However it seems clear that Ms Gillespie has retired and to the extent that she is employed at all, she is currently employed on a casual basis at, apparently, a different location.
38. It is clear that there is a deep rooted conflict between the claimant and Ms Gillespie. It is equally clear that the respondent college, of its own volition, entered into a "*clean break*" agreement on 24 June 2016 and that it attempted to resolve the issue at that stage. It is equally clear that the claimant had suggested mediation and equally clear that Ms Gillespie, not the claimant, had refused to enter into such mediation. Ms Gillespie is no longer either the line manager or the curriculum manager for that Department. She is retired and works only on a casual basis. She would not come into significant contact with the claimant if the claimant were to be reinstated.
39. However the question of the claimant's relationship with Ms Gillespie and the possibility of further conflict between the claimant and Ms Gillespie is not the only relevant issue in relation to "*practicability*".

40. The level of trust and confidence which must exist between an employer and an employee has broken down in this case. Looking at the facts objectively, the tribunal cannot conclude that it would be "*practicable*" for the respondent college to reinstate the claimant in her original post, or indeed to re-engage her in another post.
41. The failings of the respondent college in relation to the dismissal process and in relation to the dismissal decision have already been set out in detail in the liability decision and do not need to be repeated. The manner in which the respondent has conducted the litigation has also already been set out in detail and does not need to be repeated.

However the actions of the claimant must also attract considerable criticism. In particular:

- (i) The claimant's relentless criticisms of the course designed by Ms Gillespie. Those criticisms had been entirely unwarranted, had been based on no evidence or research and had simply been a continuation of the claimant's earlier dispute with Ms Gillespie.
 - (ii) The claimant's failure throughout the disciplinary process and indeed throughout the tribunal hearing to acknowledge any fault; her repeated assertion that she had been the victim and her failure to apologise properly to Ms Gillespie.
 - (iii) The claimant's conduct of the tribunal's litigation including repeated objections to the respondent's choice of solicitor and naming unnecessary respondents to two claims.
 - (iv) The claimant's suggestion during the disciplinary process that Ms Gillespie should be retired and that Ms Gillespie did not accept responsibility for her own actions.
42. The tribunal is therefore unable to conclude that the reinstatement of the claimant would be practicable. Even if contact with Ms Gillespie were to be minimal, the previous actions of the claimant as set out in the liability decision are such that continued employment would be unlikely to be successful. The respondent college has, reasonably, lost all trust and confidence in the claimant. The claimant has, reasonably, lost all trust and confidence in the respondent college. Indeed, it was apparent to this tribunal that the management of the respondent college and the claimant completely distrust and dislike each other. The tribunal must consider whether a reinstatement is more than theoretically possible. It must consider whether it is practicable: whether it would work. The level of dislike and indeed distrust between the parties is far beyond the normal level of distrust or dislike in a standard dismissal case. Directing a reinstatement in this case would simply not work.
 43. The application for a reinstatement order must therefore be refused. The claimant and the respondent simply cannot work together. In the absence of any evidence or relevant submission from the parties, the tribunal is hampered in its consideration of a re-engagement order. However, there is in reality no way in which such an order would be practicable. For the reasons set out above, it would not work.

44. If it had been necessary to separately consider the third statutory test; contributory conduct, the tribunal would have refused reinstatement and indeed re-engagement on that ground alone.
45. The claimant's actions, as set out above, in pursuing her campaign against the course designed by Ms Gillespie, without any proper basis for her concerns and without conducting proper research, had clearly been culpable behaviour which had led directly to her dismissal. Her actions amounted to significant contributory conduct.
46. The degree of contributory conduct was not addressed by the parties in either Remedy Hearing. Nevertheless, the tribunal can determine that it had not been minimal and that, if it had been necessary to consider this matter in relation to reinstatement, it would have been sufficient to mean that reinstatement or indeed re-engagement would not be just.
47. None of this detracts from the criticisms which the tribunal has made of the respondent's conduct which have been set out both in the judgment on liability and above. However, the tribunal cannot conclude that reinstatement or indeed re-engagement is practicable in all the circumstances of this case.
48. The matter will be listed for a further Remedy Hearing at which financial compensation will be determined. That will include both the assessment of financial loss, including pension loss, and the assessment of contributory conduct.

The parties are directed to ensure that actuarial evidence is available at that Remedy Hearing to fix the amount of pension loss and further directed that they must be in a position to consider the issue of contributory conduct on the amount of financial compensation. Up to date evidence on earnings and on efforts to find alternative employment must also be provided.

49. The parties are also reminded of the statutory maximum compensatory award which may be made in this case and are directed to consider whether that could impact on the need for any further hearing in this matter. That is not a matter on which the tribunal can currently express a view.
50. The determination of this issue had been unavoidably delayed. The Covid-19 lockdown prevented a panel meeting taking place until 29 July 2020. It is therefore important that both parties cooperate in expediting this matter to a final conclusion.

Vice President:

Date and place of hearing: 18 February 2020 and 16 March 2020, Belfast.

This judgment was entered in the register and issued to the parties on: