

mf



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Begum
Respondent: London Borough of Tower Hamlets
Heard at: East London Hearing Centre
On: 7 September 2017
Before: Employment Judge Russell
Members: Mr P Quinn
Professor J Ukemenam

Representation

Claimant: Mr J Dixey (Counsel)
Respondent: Mrs H Winstone (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:

- (1) The applications for reinstatement and/or re-engagement are refused.
- (2) The Claimant would have been dismissed fairly by reason of her conduct after a period of 4 weeks.
- (3) There shall be a 90% reduction to the basic and compensatory awards by reason of the Claimant's conduct.
- (4) There shall be a 10% uplift to the awards to reflect the Respondent's unreasonable failure to follow the ACAS Code.
- (5) The Respondent shall pay the following to the Claimant:
 - (a) Basic award of £1,018.82
(19.5 weeks @ £475 = £9,262-90% = £926.20+10%)
 - (b) Compensatory award of £235.40
(4 weeks' pay @ £535 = £2,140-90% = £214+£21.40)

REASONS

1 By a Judgment sent to the parties on 17 May 2017, the Claimant succeeded in her unfair dismissal claim. She was not successful in claims alleging detriment or dismissal because of a protected disclosure, sex discrimination, sexual harassment and/or victimisation. In our conclusions, we accepted that the genuine reason for dismissal was Mr Bamber's belief that the Claimant had committed an act of gross misconduct which had led to a criminal conviction. As set out at paragraph 70 of our Reasons:

"We do not underestimate the seriousness of a conviction of this sort nor of the effect that it can have upon the Council's reputation, particularly concerning as it did a resident's parking permit which it had issued. Given the existence of the Crown Court conviction and the extent of the Claimant's own admissions, we conclude that Mr Bamber genuinely believed that there was misconduct and that such belief was reasonable following a reasonable investigation."

2 At paragraph 72, however, we set out our serious concerns about the procedure adopted by the Respondent. The contents of the Claimant's grievance were not investigated although potentially relevant, no thought was given to whether Mr Bamber was an appropriate dismissing officer, the Claimant was not given notice of the disciplinary hearing, a character reference given by Mrs Rahman was not taken into account, service after the allegations came to light and continued work were not taken into account. We found that all were relevant to whether and to what extent trust and confidence had broken down entirely by the date of dismissal. Whether or not the Claimant would have been fairly dismissed in any event, whether there should be any deduction for contributory fault or ACAS uplift were to be addressed at a remedy hearing.

3 We were provided with an updated agreed bundle of documents relevant to remedy and heard evidence on oath from Ms Belgard (Interim Head of Youth and Community Learning). Mr Dixey indicated that the Claimant wished to be reinstated or re-engaged but if this were not ordered, she sought compensation.

Re-instatement or re-engagement

4 The relevant legal principles to be considered when deciding whether to make an order for reinstatement or re-engagement are summarised at paragraphs 21 to 27 of the judgment in **United Lincolnshire Hospitals NHS Foundation Trust v Farren** [2017] ICR 513 as follows:

- 21. The ET's powers to make reinstatement and re-engagement orders are set out at sections 112 to 116 of the Employment Rights Act 1996 ("ERA"). Section 113 provides that orders may be made for reinstatement or re-engagement. Section 114 specifically defines reinstatement and section 115 re-engagement. By section 116 it is provided as follows:**

"116. Choice of order and its terms

(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for 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.”

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 re-engagement, 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).

5 We accept Ms Belgard’s evidence that since her dismissal there has been a significant restructure of the Claimant’s former team. All the posts then in place in the Integrated Youth Service were deleted and as of today’s date, the Claimant’s previous position no longer exists.

6 There is a new structure which will come into effect on 2 October 2017 and which includes two posts comparable to the Claimant’s former role. There are, however, two current employees who have direct assimilation rights to those positions. If the Claimant were to be reengaged, there would need to be a competitive redundancy situation. We accept the Respondent’s submission that this would cause

create industrial relations issues both with the two current employees but also the wider team. The Claimant was dismissed for gross misconduct arising out of malpractice in connection with a parking permit. There was a significant problem with corruption within the Respondent's Youth Service Team which led to an enquiry. The restructure itself followed from an investigation to address historic shortcomings in the way in which Youth Services were delivered and the problems of fraud and corruption within that team. Given these circumstances, we accept Ms Belgard's evidence that staff morale would be negatively impacted were the Claimant to be reinstated when she was dismissed for reasons which are relevant to the systemic problem of fraud. It is not practicable for the Respondent to comply with an order for reinstatement or for reengagement into one of the new posts in the Youth Service Team.

7 As for possible reengagement into another job, the Respondent is a large employer. Although the Claimant's skills and experience are predominantly in youth work, we find on balance that it is likely that if a search were undertaken there will be some vacancy for which she could be considered. The real issue is whether the Claimant's conduct, which we found contributed to her dismissal, was such that it has destroyed or seriously damaged the relationship of trust and confidence such that it would not be appropriate to expect the Respondent to reengage.

8 Applying **Farren**, we have already concluded that Mr Bamber held a genuine belief of misconduct and that such belief was reasonable following reasonable investigation. It was genuine and founded on a rational basis, not least the criminal conviction for an offence of dishonesty. Whilst Mr Dixey sought to persuade us that the Claimant's error about the parking permit was innocent, we prefer Mrs Winstone's submission that our starting point must be that the Claimant has been found guilty of fraud to the higher criminal standard of proof. For all of those reasons we are satisfied that the relationship of trust and confidence with the Respondent generally and not simply that limited to her former post has been so damaged that it would not be just or appropriate to make an order for reengagement in this case.

Fair dismissal in any event - Polkey

9 Having found that the Claimant has been unfairly dismissed by reason of procedural failings on the part of the Respondent and having refused the applications for reinstatement and reengagement, we considered next the amount of any basic award or compensatory award.

10 Section 123 ERA provides that the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. The award should compensate the employee for loss not penalise the employer.

11 When deciding what if any deduction should be made to reflect whether the Claimant would have been dismissed fairly in any event, we considered the correct approach as set out by Langstaff P in **Hill v Governing Body of Great Tey Primary School** [2013] IRLR 274 as follows:

“First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty that it would not) though more usually will fall somewhere on the spectrum between the two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. The tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly although it did not do so beforehand.”

12 A **Polkey** deduction will not apply to the basic award, **Market Force (UK) Ltd v Hunt** [2002] IRLR 863.

13 In deciding whether the Claimant would or might have been fairly dismissed in any event, we had regard to our findings of fact and conclusions as set out in the liability Judgment.

Paragraph 30: Mr Bamber was a forthright and robust witness clearly exercised by what he felt was corruption within the team and zealous in his dedication to removing it. In deciding the Claimant’s disciplinary hearing, he concluded that the Claimant was an intelligent woman in a very responsible job, the forms were very easy to understand and that she had intentionally defrauded her employer.

Paragraph 38: the acts of misconduct committed and sanctions applied for each of Mr Ali, Mr Uddin and Mr Mohammed.

Paragraph 59: the sole reason for the Claimant’s dismissal was her conduct. Mr Bamber believe that trust and confidence had been severely damaged or destroyed by reason of the Claimant’s conviction for fraud in respect of the resident’s parking permit. Mr Bamber also genuinely believed that her conviction in the Crown Court brought the Respondent into disrepute. Based upon his evidence and the contemporaneous document it was the conclusion of the Employment Tribunal that from the point at which the Claimant was convicted in the Crown Court dismissal was the likely outcome.

Paragraph 60: the Claimant’s conviction was accorded such weight by Mr Bamber that the grievance and its contents had no material influence on the decision to dismiss. Mr Bamber demonstrated a degree of haste to press ahead with the disciplinary hearing being reluctant to postpone and proceeding in the Claimant’s absence. This was consistent with the desire to reach what in his mind, was the inevitable conclusion of dismissal sooner rather than later.

Paragraph 64: Mr Mohammed’s circumstances differed; he was not convicted of an act of dishonesty, he was not an existing employee when convicted and was not subject to an internal disciplinary procedure.

Paragraph 65: the sanctions short of dismissal issued to Mr Ali and Mr Uddin were by a different manager and because their mitigation was more weighty than that of the Claimant.

14 We heard submissions from the parties and we prefer the submissions of Mrs Winstone. Although consideration should have been given to a different disciplinary officer, we are satisfied that the Respondent would (and could fairly) have decided that Mr Bamber was the right person. Applying **Hill**, we must consider what Mr Bamber would have done if he had considered the contents of the grievance, held a disciplinary hearing with the Claimant present, had considered the position of Mr Ali, Mr Uddin and Mr Mohammed, had taken into account the character reference and considered the Claimant's service since the allegations came to light.

15 Having regard to our findings of fact, we are satisfied that even if all of the additional matters referred to above been considered by Mr Bamber, it is certain not only that he would have decided to dismiss but also that decision would have fallen within the range of reasonable responses given the nature of the Claimant's conviction. This is not a case where a percentage approach is required as the case is at the extreme of the spectrum of certainty. The issue is to decide for how long the Claimant should be compensated to reflect the time it would have taken to arrange a disciplinary hearing at which she was present. We take into account that the Respondent is a public authority, there had previously been difficulties with arranging diary dates and practicalities of hearings, particularly as the Claimant was absent due to ill-health. On balance, we conclude that it would have taken four weeks. It is likely that the Claimant would not have attended the reconvened disciplinary hearing but, given the history of attempts to arrange meetings and having given her proper notice of this hearing, it would have been fair in such circumstances for the Respondent to have proceeded in her absence. The compensatory award shall be limited to four weeks loss of earnings and, therefore, it is not necessary for us to consider mitigation.

Contributory Fault

16 Section 122(2) of the Employment Rights Act provides for reduction of the basic award where the Tribunal considered that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce it. Section 123(6) provides that if the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

17 The correct approach to reductions was given in **Steen v ASP Packaging Ltd** [2014] ICR 56. For there to be any reduction, the Tribunal must identify the relevant conduct and find whether or not it is blameworthy. This does not depend upon the Respondent's view of the conduct, but that of the Tribunal. For section 123(6), the Tribunal must find that the conduct caused or contributed to dismissal to some extent. For both sections, it must consider to what extent it is just and equitable to reduce the award. Although not necessarily required, the reduction to each award will typically be the same unless there is a good reason to do otherwise, **Charles Robertson (Developments) Ltd v White** [1995] ICR 349.

18 Mr Dixey on behalf of the Claimant primarily submits that there should be no deduction for contributory fault, in the alternative, any reduction should be relatively small, as the Claimant does not accept that she caused or contributed to her dismissal. Looking at the case in the round, applying a broad brush approach as Mr Dixey

commends us to do, and whatever the conduct of the other employees upon whom he attached great weight, we disagree. We are satisfied that this is a case in which the Claimant was guilty of culpable negligent or otherwise blameworthy conduct within the definition of *Nelson v BBC*.

19 The Claimant had applied for a resident's parking permit by misstating her resident status which had resulted in a conviction for fraud in the Crown Court. This was not an innocent mistake but entirely blameworthy. The sole reason for dismissal was the Claimant's conviction and her conduct. It is quite unrealistic to suggest in a case such as this that there should be no reduction for contributory fault. As to the extent of that contribution, we accept Mrs Winstone's submission that it was contribution by a very large factor justifying reduction on both basic and compensatory awards.

20 We considered whether this may be one of those very rare cases where the appropriate reduction should be 100% given that the Claimant had committed a criminal offence against her own employer. We took into account, however, that whilst a dismissal by Mr Bamber after four weeks would have been within the range of reasonable responses for the purposes of **Polkey** our findings of fact were that he was very much of a closed mind, in terms of conviction equals dismissal. This closed mind and strong belief on his part was a contributing factor which perhaps led to a hardening of his attitude. Whilst not sufficient to have taken a dismissal outside the range of reasonable responses, it and the undue haste to press ahead without the Claimant, were also factors contributing to the dismissal to some, albeit relatively small, extent. In the circumstances, we consider that the appropriate reduction for contributory fault is 90% on both awards.

ACAS Uplift

21 The Tribunal may adjust an award by up to 25% in respect of an unreasonable failure to comply with the requirements of a relevant ACAS Code (here on discipline and grievance procedures).

22 The ACAS Code on Disciplinary and Grievances requires at paragraph 5 that there be necessary investigations to establish the fact of the case. At paragraphs 11 and 12, the Code requires that there be a meeting held with the employee to discuss the problem. The Guidance, which is not binding, deals with circumstances where an employee repeatedly fails to attend a meeting and we have accepted Mrs Winstone's submission that there would have come a time when the Respondent could fairly have proceeded in the Claimant's absence, namely at the disciplinary hearing which would have been arranged within four weeks of the actual dismissal.

23 We found in our liability Judgment that the disciplinary hearing on 24 February 2016 had been set up without a letter of notification being sent to the Claimant. The panel attended on the morning of the hearing but no attempt to contact the Claimant by telephone was made by either Mr Bamber or HR. A disciplinary hearing at which the employee has the ability to attend and set out their case is fundamentally important in a fair procedure, particularly where the allegations if proven are likely to lead to dismissal. Although we accept that there was no deliberate or malicious failure to comply with the Code, insofar as there appears to be administrative mix up we are

satisfied that it was unreasonable, particularly in light of the failure to attempt to contact the Claimant on the morning of the hearing. For those reasons we are satisfied that there should be an ACAS uplift.

24 We are not satisfied that the level of the uplift should be 25% or thereabouts as Mr Dixey submitted; that would fail to take into account the very substantial steps that the Respondent did take to comply with the ACAS Code. There was an investigation. Whilst it may not have been perfect and while some of the information may not have been put before Mr Bamber, we consider that these are matters which fall more naturally to be considered as part of the s.98(4) arguments and as matters which could have been addressed had there been a disciplinary hearing at which the Claimant had a proper chance to attend. We are not satisfied that there was an unreasonable failure to comply with paragraph 5 of the Code. The Claimant was offered an appeal although it did not rectify the deficiencies in the procedure overall. Taking into account the extent to which the Respondent did comply with the Code and the seriousness of the breach, we are satisfied that 10% is the appropriate uplift.

Sums awarded

25 Having determined the points of principle, the actual sums awarded are as follows:

Basic award: as set out in the Claimant's Schedule of Loss, based upon 23 years' service, aged 41 at the effective date of termination and cap on gross weekly pay of £475: $19.5 \times £475 = £9,262$. After 90% reduction for contributory fault, the amount is £926.20. Adding the 10% ACAS uplift, the sum due is **£1,018.82**.

Compensatory award: four weeks' pay at £535 per week net = £2,140. After 90% reduction for contributory fault, the amount is £214. Adding the 10% ACAS uplift, the sum due is **£235.40**.

Employment Judge Russell

28 November 2017