



EMPLOYMENT TRIBUNALS

BETWEEN

Mr Fahad Aziz (Claimant)	and	Jaguar Land Rover Limited (Respondent)
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Held at: Birmingham

On: 11 April 2018
30 April 2018 (in chambers)

Before: Employment Judge T Coghlin QC, Mrs D Hill and Mr J Reeves

Representation:

Claimant: Mr W Horwood, counsel

Respondent: Mr A Rozycki, counsel

REMEDY JUDGMENT

- (1) The respondent is ordered to reinstate the claimant by no later than 28 May 2018.
- (2) Pursuant to section 114(1) and (2) of the Employment Rights Act 1996, the sums owed by the respondent are as follows:
 - (a) 39 weeks' pay, based on a gross weekly rate of £603 but subject to appropriate deductions for tax and national insurance, in respect of the period from 1 February to 31 October 2017;
 - (b) 25.86 weeks' pay, based on a gross weekly rate of £629.53 but subject to appropriate deductions for tax and national insurance, in respect of the period from 1 November 2017 to the date of this judgment (30 April 2018);

- (c) pay, based on a gross weekly rate of £629.53 but subject to appropriate deductions for tax and national insurance, on an ongoing basis from the day after the date of this judgment until such time as the respondent complies with the order for reinstatement;
 - (d) however the sums referred to in (b) above are to be reduced by the sum of £1,050 being the amounts earned by the claimant by way of mitigation during the relevant period.
- (2) The respondent is ordered to pay the claimant compensation for injury to feelings in the sum of £13,000.
- (3) The respondent is ordered to pay the claimant interest on the award for injury to feelings in the sum of £1,181.70.

REASONS

Introduction

1. This remedy judgment follows, and should be read alongside, the tribunal's judgment on liability dated 14 March 2018.
2. The tribunal heard evidence from the claimant himself, and from Mr Carl Tronier for the respondent. The tribunal was also provided with a small bundle of documents, to which a further document was added during the course of the hearing by the respondent, which we agreed to admit into evidence for reasons which were given orally during the hearing.
3. The parties were represented, as before, by Mr Horwood for the claimant and Mr Rozycki for the respondent. The tribunal is grateful for their assistance, and for the helpful and realistic way in which they presented their cases. We are particularly grateful to them, and to those who instructed them, for making reasonable concessions and agreeing matters so as to reduce the areas of dispute.

Reinstatement

4. The first issue which we had to address was the question of reinstatement.

The law

5. Sections 112 to 117 of the Employment Rights Act 1996 (ERA) provide for the remedies of reinstatement and re-engagement. The tribunal has a discretion as to whether to make such an order and as to what order to make: see sections 112(3), 113 and 116(1) ERA.
6. Section 116(1) sets out, at paragraphs (a)-(c), three matters which the tribunal must take into account when exercising its discretion as to whether to order reinstatement: whether the claimant wishes to be reinstated, whether it is practicable for the employer to comply with an order for reinstatement, and, where the claimant caused or contributed to his dismissal, whether it would be just to order his reinstatement. This list of potentially relevant factors is not exhaustive, but the parties did not suggest that there were any other relevant factors which the tribunal ought to weigh.
7. The claimant has confirmed that he does wish to be reinstated. His evidence, which we accept, was that he enjoyed his work at the respondent, he felt it "became home" for him, the people he worked with were "great" and he enjoyed his time there. Although he has now obtained an offer of employment in a call centre in a bank, which he is due to start in July 2018, that work is less well paid, it is not in his normal field of work and would not utilise the skills he has built up over the years.
8. Mr Rozycki made it clear that, although the tribunal has found that the claimant did contribute to his dismissal, the respondent did not contend that this was a matter which the tribunal should take into account on the particular facts of this case.

9. The only remaining issue was the factor identified in section 116(1)(b) namely practicability. Considerations of practicability potentially come into play twice in such cases: first, when the tribunal is considering ordering reinstatement, and second, if reinstatement is ordered and the employer fails to comply with the order.

10. In **Timex Corporation v Thomson** [1981] IRLR 522 the EAT (Browne-Wilkinson P presiding) said this:

"In our judgment there is no need for an [employment] tribunal to reach a final conclusion that re-engagement is practicable before making any such order. If, having made an order for re-engagement, it proves not to be practicable to perform it there are no adverse consequences for the employer. If the employee asks for compensation by reason of the failure of the employers to re-engage, no order for additional compensation can be made under [s 106] if the employer satisfies the tribunal that it was not practicable to comply with the order. Therefore at that stage the [employment] tribunal will have to decide, looking at the matter in the knowledge of the actual facts which have occurred, whether or not it was practicable to carry out the order. At the stage when the order to re-engage is being made, it is not in our judgment necessary for the [employment] tribunal, looking at future possible events, to make a definite finding that the order for re-engagement was practicable. They must have regard to the question of practicability and if they are satisfied that it is unlikely to be effective, they will no doubt not make an order. The only strict requirement is that they should have regard to practicability'."

11. The Court of Appeal approved that analysis in **Port of London Authority v Payne** [1994] ICR 555. The court held that

"... some determination has to be made at stage 1. But the determination or assessment is of necessity provisional. The final conclusion as to practicability is made when the employer finds whether he can comply with the order within the period provided for reinstatement or re-engagement. At this second stage the burden of proof rests firmly on the employer'."

12. While the burden of proof rests with the employer at the second stage, there is at the first stage, no such burden on the employer, and there is no statutory presumption of practicability: **First Glasgow Ltd v Robertson** UKEATS/0052/11/BI at [11]; **Lincolnshire County Council v Lupton** [2016] IRLR 576 at [19].

13. In the course of submissions Mr Rozycki suggested that the question of practicability was one for the employer to decide, and that the tribunal should only interfere with that assessment if it was one which fell outside the range of responses open to a reasonable employer. We do not consider that that is the law. The question of practicability is a question of fact for the tribunal, albeit that the tribunal should give due weight to the commercial judgment of the management unless the employer's evidence be disbelieved: **Port of London Authority v Payne** at p574. The position is probably different where the relevant issue as to practicability related to the existence or otherwise of trust and confidence between the parties (see **United Lincolnshire Hospitals NHS Foundations Trust v Farren** [2017] ICR 513) but that is not the issue here. Mr Rozycki accepted, rightly in our view, that in this case no issue arises of any breakdown in trust and confidence as between the claimant, on the one hand, and the respondent, his colleagues, or his managers, on the other.

14. The relevant test is not one of possibility but of practicability: "The employer does not have to show that reinstatement or re-engagement was *impossible*. It

is a matter of what is practicable in the circumstances of the employer's business at the relevant time": **Port of London Authority v Payne** at p574. Practicability means more than merely possible, and means "capable of being carried into effect with success": **Lincolnshire County Council v Lupton** [2016] IRLR 576 at [18]. A broad, common-sense view should be taken as to practicability: **Meridian Ltd v Gomersall** [1977] ICR 597.

15. Practicability is to be assessed as at the date the order will take effect: **Great Ormond Street Hospital v Patel** UKEAT/0085/07/LA at [18].
16. Section 116(5) ERA provides that the fact that the employer has engaged a permanent replacement is not a factor to be taken into account in determining whether reinstatement or re-engagement is practicable unless the employer can show one of the following two things, set out in s116(6):
 - (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 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 that when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.
17. However, it was common ground between the parties that section 116(5) is not relevant in this case, since the respondent did not engage a permanent replacement for the claimant; rather the claimant's work was done by reassigning another existing worker from elsewhere within the respondent's operation.
18. A key issue here is the question of whether the reinstatement of the claimant would or might result in overmanning.
19. In **Lincolnshire County Council v Lupton** [2016] IRLR 576 the EAT (Simler P) said this:

"Re-engagement is not to be used as a means of imposing a duty to search for and find a generally suitable place within the ranks for a dismissed employee irrespective of actual vacancies. That, as the council contends, puts the duty too high. An employer does not necessarily have a duty to create space for a dismissed employee to be re-engaged. The question at the end of the day is one of fact and degree by reference to what is capable of being carried into effect with success."
20. In **Freemans plc v Flynn** [1984] ICR 874 the EAT, when considering an appeal against a tribunal's order at the second stage (ie after the employer had failed to re-engage the applicant), rejected the argument that the effect of a re-engagement order was to impose a duty on the employer to find a place for the dismissed employee irrespective of whether there were vacancies: that would place too high a duty on employers.
21. In **Cold Drawn Tubes Ltd v Middleton** [1992] ICR 318, another appeal against a tribunal's order at the second stage, the EAT held, that, on the facts of that case,

“The only reasonable inference, in our view, is that it was not practicable for the employers to reinstate the employee. It is very difficult to see how reinstatement could become a practicable option, because it would result either in a redundancy process or in significant overmanning. It would be contrary to the spirit of the legislation to compel redundancies, and it would be contrary to common sense and to justice to enforce overmanning.”

22. In **Port of London Authority v Payne** [1994] ICR 555, another second stage case, the Court of Appeal held that a tribunal, in rejecting the employer’s argument that a lack of vacancies had made it impracticable to comply with re-engagement orders and in holding that the employer should have invited applications for voluntary severance from the existing workforce, had applied too high a standard.

The facts

23. The respondent’s case on reinstatement was simple: that there was now simply no position available for the claimant, and that his position had now been filled (and it was common ground that this was not a fact which the tribunal was obliged to disregard by s116(5) of the Employment Rights Act), and that his reinstatement was simply not practicable.

24. The respondent relied on an email from Annie Osborne from Manpower, the respondent’s recruitment agent, dated 7 April 2018, and sent to a Beverley Fairbank who works for the respondent (though we were not told in what role). It read:

“Hi Beverley

I can absolutely confirm we have no open vacancies at Jaguar CB [Castle Bromwich]. Our current agreement is that we still allow registration of interest for any future opportunities. Currently this allows a candidate to register their name and e-mail address and IF we have any new opportunities we e-mail to say that we are going live.

We may even be taking the registration down as it does not look likely that any of the midlands plants will have any opportunities this year. I am waiting on a meeting with Mark Wilson on Monday [ie 9 April 2018] to confirm.

Also I can confirm that we have now released all but 4 of the Manpower Associates from CB. The remaining 4 have specific skills.

If you require any further information or copies of our e-mail communication [*sic*] please let me know.

Thanks

Annie”

25. The respondent’s only live evidence on the question of the practicability of reinstatement came from Mr Tronier. During the claimant’s employment Mr Tronier had been a Production Manager at Castle Bromwich, and responsible for the manufacture of all Body in White D7a products. He was responsible for some 170 production operatives. The claimant was in his team. However by the time of the remedy hearing before us, Mr Tronier had moved to the role of Lead Production Manager in the D7a Body in White Body Shop 3 at the

respondent's Solihull site. Given this change in role, he could give little useful evidence as to the respondent's staffing levels.

26. The claimant's work in the latter stages of his employment was on a part of the respondent's process called the Door Cell. As the name suggests, this involved working on the process of assembling car doors. The claimant's work involved not only assembly work as such but also quality inspection (QI) of the doors, checking for small cracks and deformities in the doors. This was specialised work.
27. The Door Cell was staffed by 12 members of staff (known as associates), of whom the claimant had been one, plus a Group Leader. When the claimant left the respondent's business in February 2017, his role was immediately filled by another employee, due to the respondent's operational requirements. This replacement employee was not newly engaged by the respondent, however: he was simply redeployed from an unassigned "pool" of workers who were working on other things.
28. The evidence was, and we find, that the respondents' workers are expected and required to be flexible and to move from one part of the respondent's operation to another as might be reasonably required. The claimant's job title was broadly defined, as a "welder assembler", and as we have said in the liability judgment, he did not in fact do welding work. He was not employed specifically to work on the Door Cell.
29. The flexibility expected of staff includes being required and expected to move from one site to another, whether on a temporary or permanent basis. The respondent's standard terms and conditions for hourly graded employees provide as follows:

"8. WORK LOCATION

Should it become necessary in order to meet operational needs and/or maximise efficiency you may be required to change work location or work temporarily in other sections.

9. MOBILITY OF LABOUR

Employees can be required to transfer work location on a permanent basis, the Company will require full mobility of all hourly paid employees across all sites within reasonable travelling distance of West Midlands locations. Locations may include but are not limited to: Castle Bromwich, Browns Lane, Solihull, Gaydon, Whitley and MIRA.

Mobility within and between Solihull and Jaguar West Midlands sites

In order to maximise security of employment within Manufacturing in the Midlands and to offset periods of low capacity utilisation in either Solihull or Castle Bromwich, the mobility arrangements allow surpluses in one plant to be transferred to meet requirements in the other.

Whitley and Gaydon sites

Consistent with existing agreements, employees based at Whitley and Gaydon are required to be mobile between the sites.

Transfer assistance will be paid where appropriate."

30. We accept Mr Tronier's evidence that the respondent's employees were flexible and could be deployed to different parts of the business as part of their

role. He said that the claimant could be employed on any process which would fit his abilities, and that he was not employed as a Door Cell worker but as an assembler. He said that associates can be deployed in various roles in different teams depending on the needs of the business. In short, the tribunal was presented with a picture of a very flexible workforce in terms of what they could be required to do, and where.

31. We have already referred to the pool of unassigned workers from which the claimant's replacement on the door cell line was drawn. The number the workers in this pool could fluctuate rapidly. As Mr Tronier explained, at the time of the claimant's dismissal on 11 January 2017, Mr Tronier's team had 8 workers more than were needed (referred to as plus 8 AOR (Actual On Roll)). By February, that number had dropped to plus 1 AOR. Mr Tronier's evidence was that the business would sometimes operate with more staff than were required, and sometimes with less: as he put it,

"if you take a snapshot in time, sometimes you can be under and sometimes over, depending on what's going on around the business."

He said that the answer to the question of whether a worker would be displaced, with no other role to go to, if the claimant returned to work

"depends on the snapshot in time."

32. Mr Tronier was, however, unable to assist the tribunal as to the crucial question of the situation which existed as at the date of the remedies hearing. He said that, having moved to a new and bigger role at Solihull, he did not know whether his old team, in which the claimant had worked, was above or below its required headcount. We therefore had no evidence on this question.
33. We think it is important to distinguish between two potential aspects of over-manning. The first relates to the Door Cell itself, the second is the overall level of manning in the respondent's workforce more widely. Given the evidence as to the high level of flexibility of the respondent's workforce, we do not think that the manning of the Door Cell would be likely to present any significant obstacle to the claimant's reinstatement. If he is moved back to that work and another worker was displaced as a result, the other worker could relatively easily be redeployed to any other work which might be available, or be put back into the unassigned pool.
34. Nor are we persuaded that there would be likely to be overmanning when considering the respondent's workforce more broadly. As we have observed, Mr Tronier's evidence was that actual headcount tends to fluctuate as compared with required headcount, and he was unable to say whether his old team, in which the claimant had sat, was currently under- or over-manned. Mr Tronier's evidence was that had the claimant's appeal been successful in early 2017, he would have been absorbed back into the unassigned pool of workers to which we have already referred.
35. Looking at the workforce as whole, we note that the respondent is a very large employer. According to its ET3 it employs 33,000 staff in Great Britain. This size allows the respondent a greater degree of flexibility in absorbing and redeploying staff than one might expect would be open to a smaller employer.

36. The respondent did not go so far as to suggest that a “bumped” redundancy would be necessary or would occur were the claimant to return to his old job.
37. We have considered the evidence in the form of the email from Ms Osborne. We did not hear evidence from Ms Osborne, who wrote the email, or from Ms Fairbank, to whom it was addressed. We note moreover that the email is directed principally to vacancies at the Castle Bromwich site, and to the use of temporary staff (which we understand Ms Osborne to be referring to by the term “Manpower Associates”) at that same site. The email offers no clear evidence of levels of either temporary or permanent staff at locations other than Castle Bromwich and we heard no evidence as to the outcome of the meeting planned for Monday 9 April 2018 which Ms Osborne referred to in the email.
38. A further factor which the tribunal considers goes to the question of practicability is the claimant’s experience, ability and skills. The respondent made it clear to the tribunal that during his employment the claimant did his job well: there were no issues with his performance. Furthermore the claimant possessed particular skills and experience in quality inspection (QI) which are much in demand. When Mr Tronier gave evidence directed to the question of the claimant’s ability to mitigate his losses in the labour market, he made the point that the claimant had valuable transferable skills. He was asked in cross-examination what he would do if someone applied for a role with the respondent which they couldn’t carry out due to their physical limitations. His evidence was that if the applicant had white panel inspection QI skills (as the claimant does) he would “snap him up” anyway because
- “white panel inspection QI is a skill I desperately need all of the time.”
39. In light of this, the tribunal considers that the respondent is likely to be incentivised to put the claimant’s skills and abilities to use.
40. Weighing all these matters up, the tribunal has reached the conclusion, on balance, that it is practicable for the respondent to comply with an order for reinstatement. We note Mrs Justice Simler’s observation in **Lupton** that the question for us is one of fact and degree. We also bear in mind that our decision at this stage is provisional rather than final. We do bear in mind the terms of Ms Osborne’s email and in particular the fact that Manpower are advertising no vacancies at Castle Bromwich, and the possibility that there may not be other vacancies advertised at other sites, and we have weighed in the balance, so far as we can, the risk that the claimant could not be reinstated without causing an unacceptable level of disruption. But overall we were presented with little useful evidence as to the actual levels of over- or under-manning at the respondent’s various sites. It does not necessarily follow from the fact that vacancies are not being externally advertised that there would not be work found, relatively quickly, for an internally displaced staff member.
41. Bearing in mind in particular the respondent’s large size, the flexibility of its workforce, and the fact that it frequently has a pool, which could fluctuate in size quite rapidly, of unassigned employees, and bearing in mind also the regard in which the claimant’s skills and ability are held and their usefulness to the respondent, we consider that the reinstatement of the claimant is likely not just to be possible but is likely to be capable of being put into effect successfully.

42. We note that the claimant may, on his reinstatement, require some reasonable adjustments to be made to his role in light of his disability. We canvassed with the parties whether, if we were minded to make a re-employment order, the better order would be for re-engagement, with the tribunal stipulating various elements of the role into which the claimant would be re-engaged bearing in mind the effects of his disability, or whether reinstatement would be more appropriate. It seemed to the tribunal, however, and the parties agreed, that reinstatement would be the more appropriate course: the respondent will be under a duty where appropriate to make reasonable adjustments, and these adjustments are best made "on the ground", on the basis of discussions between the parties and with the benefit of tailored, up-to-date occupational health advice.
43. As to the terms of the reinstatement order, it is common ground that the claimant's weekly earnings up to 31 October 2017 would have been £603 gross, equivalent to £470 net, and that from 1 November 2017 he would have benefitted from a pay rise taking his weekly pay to £629.53 gross, £491.14 net. In accordance with section 114(3) of the Employment Rights Act 1996 this pay rise is to be reflected in the sums payable by the respondent to the claimant.
44. In the period since his dismissal the claimant has earned sums totalling £1,050. These earnings came from him buying and reselling cars. Pursuant to section 114(4) of the Employment Rights Act 1996, credit must be given for these sums. This is reflected in the order made by the tribunal.
45. The respondent's position was that the claimant had not taken sufficient steps to mitigate his loss, and we heard evidence and submissions on that point. However the parties agreed (rightly in our judgment) that this would only become relevant were we to make a compensatory award: the sums payable under s114 of the Employment Rights Act are not liable to be reduced even where there is a failure to mitigate: **City and Hackney Health Authority v Crisp** [1990] ICR 95. Since we have ordered reinstatement and so have not made a compensatory award, we do not address this further.
46. It is common ground between the parties, and we agree, that no basic award is payable given that we have ordered reinstatement¹.

Injury to feelings

47. In his witness statement the claimant says he suffered depression following his dismissal. We saw no medical evidence to support a diagnosis of depression, and no claim for personal injury is advanced. We do however accept that the claimant was seriously affected by his discriminatory dismissal. He lost a job which was well-paid, with a well-respected company, and which he enjoyed. His mood, sleep and eating were affected. He became more withdrawn: he went out less and socialised less. He suffered financial difficulties as a result of his loss of income. It took him some time to pull himself together and to gain a positive frame of mind.
48. As the respondent submitted, it is difficult to separate these matters out from other difficulties in the claimant's life: his marital issues (see below) and the

¹ Had a basic award been made, it was common ground that it should be in the sum of £814.30, which allows for a 15% reduction on the basis of the claimant's conduct in accordance with section 122(2) of the Employment Rights Act 1996.

shock and longer-term worry caused by his recent diagnosis with PKD. As the respondent points out, those factors may have contributed to a degree to the claimant's state of mind following his dismissal. Equally, though, a tortfeasor must take its victim as it finds him, and we consider that at the time of his dismissal the claimant was in a vulnerable state precisely because of these other matters. We accept his evidence that his job had helped him to deal with his diagnosis. We consider that these factors increased his vulnerability so that his discriminatory dismissal hit him somewhat harder than it otherwise might have done.

49. We have referred to the claimant's marital issues. In his witness statement he said that the loss of his job resulted in his marriage falling apart. As we think Mr Horwood accepted in the course of submissions, the tribunal is not really in any position, on the very limited evidence which we heard, to form any conclusions as to what are likely to have been the complex reasons for the breakdown of the claimant's marriage, and we do not consider that this element of the claimant's case is proven. On the evidence we did hear, notably the fact that the claimant's wife separated from him about three weeks after his dismissal, we find it difficult to avoid the inference that their marriage must have been in considerable difficulty before he lost his job.
50. Taking everything into account we agree with Mr Horwood's submission that an award in the middle *Vento* bracket is appropriate. The parties' counsel agreed that this bracket, updated in accordance with paragraph 11 of the 2017 Presidential Guidance on awards for injury to feelings, now runs from £8,360 to £22,500. Although it is in one sense a one-off act, a discriminatory dismissal is a particularly serious act with lasting consequences and we are satisfied that the respondent's dismissal of the claimant, who as we have said was already in a vulnerable position, cause him substantial injury to feelings. We consider that the appropriate level of award is £13,000.

Interest

51. The basic approach to the calculation of interest on the award for injury to feelings was agreed between the parties. That agreed calculation took the starting point for the award of interest to be 11 January 2017, being the date of the discriminatory decision to dismiss rather than 1 February 2017 when the dismissal took effect. We think the earlier date is the better one since that is the date when the claimant's injury to feelings began. While the relevant figure and approach was agreed, however, it needs to be updated today given that we were unable to deliver judgment on remedy on the day of the hearing. We calculate that interest has accrued for 474 days at 7% per annum, giving an overall interest factor of $(474 / 365) \times 7\% = 9.09\%$. Applying that to the award for injury to feelings gives a total of £1,181.70.

Other matters

52. Neither party submitted that the award should be adjusted up or down pursuant to s207A of the Trade Union and Labour Relations (Consolidation) Act 1992 by reason of unreasonable non-compliance with the ACAS Code of Practice. No adjustment was contended for in the claimant's schedule of loss or the respondent's counter-schedule.

53. We do not consider it would be appropriate or just and equitable to make any adjustment without either party having sought it or addressed the matter in evidence, in cross-examination or in submissions. That is all the more so given that there might be some difficult issues as to whether the ACAS Code applied at all (given our findings at paragraph 107 of our liability judgment as to the reasons for dismissal), and as to whether sums payable under section 114 of the Employment Rights Act 1996 constitute an “award” which is susceptible to adjustment under s207A.

Employment Judge Coghlin

30 April 2018