EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms A Sodipo		Transport for London

Heard at: London Central **On**: 23 November 2018

Employment Judge: Ms A Stewart
Members: Mr R Mead
Ms E A Flanagan

Representation
For the Claimant: In person
For the Respondent: Miss V Brown of Counsel

REMEDY JUDGMENT

1 The unanimous Judgment of the Tribunal is that the Respondent is Ordered to re-engage the Claimant, within six weeks of the promulgation date of this Judgment, on the following terms:

(i) She shall be re-engaged into any Band 1 post in the Respondent organisation or Transport for London Ltd which is commensurate with her current skills and previous experience in the Respondent's employ, for example such as set out in paragraph 20 of the Tribunal's Reasons hereto, although not limited to those examples, save that she shall not be reinstated into her previous post nor re-engaged into any post within the Visitors' Centre area of the organisation which is under the general management of Mr R Swain, the dismissing officer.

(ii) She shall be re-engaged at an annual salary of £29,813.00 plus such anti-social hours allowances and other allowances and bonuses as the new post attracts, together with pension and other rights.

(iii) The Respondent shall pay to the Claimant net arrears of pay which she would have received, at the prevailing rate applicable to her previous post, (£28,992.00 rising to £29,813), plus net allowances and bonuses, from the date of dismissal until the date of re-engagement.

(iv) The Respondent shall make up the pension contributions to which the Claimant would have been entitled had she not been unfairly dismissed, from the date of dismissal until the date of re-engagement, so as to restore the integrity of her pension position.

(v) From the sums ordered to be paid at sub paragraph (iii) above, shall be deducted the sum of £17,748.25 plus any further sums earned by the Claimant in other employment between the date of this Hearing and the date of re-engagement, which she shall bring into account.

(vi) From the sum arrived at under sub-paragraph (v) above, shall be further deducted 30%, in order to reflect the Tribunal's finding of contributory conduct.

2 The Respondent shall further pay to the Claimant expenses totalling £253.60.

REASONS

Introduction

1 This Remedy Hearing follows upon the Tribunal's merits Judgment, promulgated on 4 July 2018, whereby it found that the Claimant had been unfairly dismissed, contrary to **section 94 of the Employment Rights Act 1996**, that she had contributed to the extent of 30% by her own conduct to her dismissal and that her complaint that her dismissal was an act of direct race discrimination was not well-founded.

2 The Tribunal heard evidence from the Claimant and from Miss Sheila Fearon-McCaulsky, Interim Senior People Management Advisor, for the Respondent.

3 The Claimant seeks, primarily, reinstatement or reengagement. In terms of compensation, she seeks a total of £32,984.65, including a year's future loss of earnings. This allows for a 30% reduction for contributory conduct and for income actually earned since her dismissal. The Respondent's counter Schedule of Loss contends that no future loss is properly due and assesses the total award payable as £4,407.60.

Conduct of the Hearing

4.1 At the beginning of today's hearing, the Respondent objected to the admission into evidence of the Claimant's single page witness statement on the grounds that it raised new allegations, was unfair and prejudicial to the Respondent and was presented late, prior to the hearing. It also objected to the Claimant seeking to include a few new documents relating to her current work, earnings and training, on the grounds that it had not had the opportunity to consider their relevance and appropriateness and that their admission would be prejudicial and disproportionate.

4.2 After due consideration the Tribunal decided that both the witness statement and the Claimant's subsidiary documents would be admitted and their relevance determined by the Tribunal, having heard both parties' evidence, for the following reasons:
(i) There was nothing unduly prejudicial to the Respondent in the Claimant's statement, and nothing which could reasonably be said to take the Respondent by surprise. She did not seek to re-open the findings relating to liability but was merely setting out what she, as a litigant in person, conceived to be her evidence relating to remedy.
(ii) There was nothing either prejudicial nor particularly onerous in the few additional documents, with which the Respondent would be unable to deal, so far as they were relevant to the issues, in the time available for cross-examination. There would, in any event, be an adjournment of some 45 minutes to allow the Tribunal to read statements and documents, allowing ample time for the Respondent's Counsel to become acquainted with both the Claimant's single page witness statement and few additional documents and to take instructions, if necessary, and thereafter to make any substantive objections regarding their content which might arise. In the event, no such substantive objections were made.
(iii) The Tribunal was mindful that the Claimant is a litigant in person with no experience of Tribunal process prior to the merits hearing in April 2018, when she had the assistance and support of ELIPS at the PH hearing and to a limited extent in relation to the merits hearing.

5.1 The Respondent took the point, in final submissions, that the Claimant had failed to challenge the 'loss of trust' issue relating to her claim for reinstatement/re-engagement in her cross-examination of Miss Fearon-McCaulsky.

5.2 After careful consideration of its notes of the hearing the Tribunal concluded that even though the Claimant may not have used the word 'trust' explicitly, she had precisely and substantively challenged Miss Fearon-McCaulsky's evidence on the reasons which this witness sought to advance for the Respondent's loss of trust in the Claimant, following the incident leading to her unfair dismissal.

5.3 The Tribunal formed the view that the Respondent's Counsel appeared to be taking an unduly technical point in this regard, against a litigant in person, which was not justified on the substance of the cross-examination which the Claimant had conducted.

6 In coming to these conclusions, the Tribunal has had careful regard to the Over-riding Objective of dealing with cases fairly and justly, including, so far as practicable – ensuring that the parties are on an equal footing and avoiding unnecessary formality and seeking flexibility in the procedure.

The Issues

7 The issues before this Tribunal were:

(i) Should an order be made for re-instatement or reengagement, as the Claimant wishes? The Respondent contends that it would be neither practicable nor just so to order.

(ii) Did the Claimant fail to take reasonable steps to mitigate her loss, as the Respondent contends?

(iii) Are certain of the sums claimed by the Claimant, relating to the cost of some retraining courses, too remote and not to be regarded as caused by the Respondent's dismissal of her, as the Respondent contends?

(iv) If reinstatement/reengagement is not ordered by the Tribunal, to what compensation is the Claimant entitled?

The Facts

8 This Remedy Hearing is premised upon the findings of fact made by the Tribunal at the full merits hearing, together with the evidence presented at today's Hearing and today's submissions regarding the same by both parties.

9 The Claimant was summarily dismissed for gross misconduct on 25 August 2017 by Mr R Swain, a dismissal which the Tribunal found to be unfair. She had worked for the Respondent since 23 March 2007 and this had been her only job since arriving in the UK in 2006.

10 Following her dismissal, the Claimant made various job applications herself online, having no knowledge or experience of the role of Job Centres. In needing urgently to begin earning money, and because of the guidance of family and friends in the immediate aftermath of her dismissal, she began working with agencies as a temporary, casual, health care assistant. Her first earnings are dated 15 September 2017, less than a month after her dismissal. She has worked an average of 30 hours per week since (varying between 70 hours a week and zero) and has earned a total of £17,748.25 to the date of this hearing. This is considerably below what the Claimant's earnings had been with the Respondent; £28,992.00 gross salary plus £4,058.88 antisocial hours allowance plus an average of £150.00 bonus per month. The current salary for the Claimant's previous post with the Respondent is £29,813.00.

11 The Claimant's documents show that she applied for about 6 jobs, for example with KPMG, Total and the NHS, including admin and customer service roles, although she told the Tribunal that she had searched for work throughout the period since her dismissal and that there were other applications of which she had not kept records. The Respondent produced a print out showing 4,870 Customer Service job vacancies in London, typical at any one time. The Claimant stated that many of these vacancies required management or supervisor level experience which she did not have, but that the main reason for her reticence had been the damning nature of the reason for her dismissal by the Respondent – gross misconduct – after over 10 years service, about which she was not prepared or able to lie. She stated that she had put the Respondent's name on such applications as she had made, but had not approached the

Respondent directly for a reference. None of her applications for work outside the health care field were successful.

12 The Claimant stated that she seeks and accepts all of the care work which she is offered from her listings with the agencies, often spread across wide geographical locations, for example into Kent, in order to boost her earnings, and has incurred costs of £100 for DBS checks and £153.60 Carer Mandatory Training Fees in order to do so. She finds the work psychologically and physically demanding and exhausting. She began seeking qualifications and training in order to advance to a better level of earning power in the health care field. She stated that in order to advance her career and earnings prospects she took an access course (since she had been out of education for a long time) and began to plan ahead to qualify as a nurse/midwife, incurring college fees of £888.00 for a course which started on 1 March 2018.

13 The Tribunal's Judgment on the merits was promulgated on 4 July 2018, some ten and a half months after the Claimant's dismissal and nine months after she had begun working as a health care assistant. This vindicated the Claimant to a great extent by a finding of unfair dismissal. She has not applied for customer service roles after this date.

14 The Claimant stated that she had no knowledge of the benefits system until later, approaching the Job Centre for help only in August/September 2018, and was paid £505.19 universal credit on 6 November 2018. She very strongly desires to return to the Respondent's employment.

The Law

15. As to the law, the Tribunal directed itself as follows:

(i) Where the Tribunal finds that a complaint of unfair dismissal is well-founded and a Claimant expresses a wish for reinstatement or reengagement, such of these orders can be made as the Tribunal may decide under **section 113 Employment Rights Act 1996.**

(ii) An order for reengagement is an order, on such terms as the Tribunal may decide, that the complainant be engaged by the employer or by a successor of the employer or by an associated employer in employment comparable to that from which she was dismissed or other suitable employment. On making such an order the Tribunal shall specify the terms on which re-engagement is to take place, including … amounts due in respect of any benefits which the complainant might reasonably be expected to have had but for the dismissal between the date of termination of employment and the date of re-engagement. … taking into account, so as to reduce the employer's liability, sums received by the Complainant in respect of this period from the employer or remuneration from other employment. **(section 115 of the Act**).

(iii) In exercising its discretion under **section 113** the Tribunal shall first consider whether to make an order for reinstatement, taking into account the complainant's wishes, whether it is practicable for the employer to comply and,

where the complainant has contributed to some extent to the dismissal, whether it would be just to order reinstatement **(section 116(1) of the Act).**

(iv) 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. **(section 116(2))**

(v) In doing so 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 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 her re-engagement and (if so) on what terms. **(section 116(3))**

(vi) Except in a case where the Tribunal takes into account contributory fault, 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. **(section 116(4).**

(vii) Where an order for reinstatement or reengagement is made but not complied with, the Tribunal shall make a compensation order in accordance with **section 117 of the Act.**

(viii) The following cases were cited in argument before the Tribunal: Port of London Authority v Payne and ors [1994] ICR 555 CA; Coleman v Magnet Joinery Ltd [1975] ICR 46 CA; Enessy v Minoprio [1978] IRLR 489; United Lincolnshire Hospitals NHS Trust v Farren [2017] ICR 513, EAT; Parker Foundry Ltd v Slack [1992] ICR 302; RSPCA v Cruden [1986] ICR 205; Ministry of Defence v Cannock [1994] IRLR 509; Lifeguard Assurance Ltd v Zadrozny [1977] IRLR 56; Simrad v Scott [1997] IRLR 147; Savage v Saxena [1998] ICR 357; Tamdem Bars v Pilloni EAT0050/12.

Conclusions

16 Causation: The Tribunal concluded that the Claimant was entitled to recover the expenses of obtaining a DBS check (£100) plus mandatory Carers' training fees (£153.60), since this expenditure was necessary in order for her to begin earning money at once, within a month of her dismissal for gross misconduct, in order to mitigate her loss.

17 However, the Tribunal concluded that the Claimant was not entitled to recover the college fees of £888.00 since this expenditure was not essential to her ongoing temporary carer work assignments, and was only one method of trying to increase her earning capacity to that which she would have enjoyed had she not been unfairly dismissed by the Respondent. Therefore it cannot properly be said to have been caused by the Respondent's actions.

18 Mitigation: The duty to mitigate her loss is the duty to take all reasonable steps to restore herself financially to the position in which she would have been, had she not been unfairly dismissed – in all the circumstances in which the

Claimant found herself in the aftermath of 25 August 2017. The Respondent must take the Claimant as it finds her, in the practical reality of her situation after its unlawful act in dismissing her. The Tribunal accepted, on all the evidence before it, that this practical reality included the following:

18.1 The Claimant had worked for the Respondent for over 10 years and had had no experience of any other job or job-seeking or the benefits system, since her arrival in the UK in 2006.

18.2 She was her own sole financial support and very urgently needed to begin earning money after being dismissed.

18.3 She was badly affected and shaken by the loss of her job with the Respondent. She told the Tribunal that she felt 'safe' and happy with the Respondent and was faced with starting again at the age of 45.

18.4 Her friends and family who had experience in that field, suggested temporary care work as a rapid way of starting to earn money. She began to do this and does not dislike the people-contact aspect of the work but finds it physically challenging and often exhausting; working twice as hard for much less money, as she told the Tribunal. This has affected her health.

18.5 The Claimant has made various job applications outside the health care field since her dismissal, but has felt herself seriously impeded and deterred by the fact that she felt unable honestly to explain her departure from the Respondent's employment after over 10 years' service, having been summarily dismissed for gross misconduct.

18.6 She was unclear about the efficacity of approaching the Respondent for a reference, particularly having been summarily dismissed for gross misconduct. The Tribunal accepted that the Respondent only ever gives a brief factual reference. In any event, this would not have assisted the Claimant in completing job application forms, which invariably required her to state the reason for her leaving her prior job.

18.7 By the time the Tribunal's merits judgment was promulgated on 4 July 2018, she had been doing health care work for nearly 10 months and had therefore, to some extent, settled into a new field of endeavour and was trying to plan some future career progress for herself by undertaking training in the field in order to increase her earnings.

18.8 The Respondent contends that, given reasonable efforts and the widespread availability of job vacancies in customer service in the London area, the Claimant would have obtained a job in the sector and would have been earning at her previous salary level within six months of dismissal. Whilst this may be true in normal circumstances, the Tribunal did not accept that it was the case where the Claimant had been summarily dismissed for gross misconduct after over 10 years with one employer, since a prospective employer would certainly have regard to this reason for dismissal and, without more, would simply not pursue the Claimant's application, which would inevitably be one among many others. There was nothing in the Claimant's experience to make her stand out for special consideration to counter the stark fact of her gross misconduct dismissal.

19 In all these circumstances the Tribunal concluded unanimously that the Claimant had not failed to take all reasonable steps to mitigate her loss. She began earning money within a very short period of dismissal in the most immediately available field. Her job history and experience with the Respondent,

notably her summary dismissal for gross misconduct from her long held customer service role, rendered her recruitment into an equivalent role extremely unlikely, at least until the promulgation of the Tribunal's merits Judgment some 10 months later, by which time she had been pursuing a health care path for some 9 months. It cannot be said that it would have been reasonable for her to have lied or obfuscated the reason for her dismissal with any prospective new employer.

20 Reinstatement/reengagement: The Claimant very much wants to return to the Respondent's employ. She does not mind where in terms of location or in which post, whether in her previous post or any other, having in the past worked for the Respondent in gate-line London Underground, lost property, the school travel department, corporate and customer service. 'I would go anywhere', as she told the Tribunal.

21 The Respondent resists the Claimant's wish for reinstatement/re-employment on the grounds that it is not practicable and/or would be unjust because;

a) due to a 3 year long costs-saving exercise by reducing headcount in the back office organisation, there is currently a recruitment freeze in the Visitor Centre area of the organisation, where the Claimant previously worked. The Claimant's previous role has not been filled permanently but is currently filled with non-permanent agency staff.

b) there are no currently available band one roles vacant which are suitable for the Claimant, as per today's vacancy list put before the Tribunal.

c) given the finding of 30% contributory fault relating to the incident of 31 May 2017, for which the Claimant was dismissed, the Respondent does not feel that it can trust the Claimant to maintain a professional working relationship and persona at all times, for example in the environment of Paddington Visitor Centre, where she worked; a small team working environment without direct management supervision.

22 Practicability - general:

22.1 The Tribunal is mindful that 'practicable' means more than merely possible and entails an appraisal, on all the evidence before it, of whether or not the order is realistically capable of being successfully carried into effect.

22.2 The Respondent, together with it's subsidiary company London Underground Ltd, employs some 20,000 people. The 'snapshot' vacancy list provided by the Respondent showed 45 current vacancies at Band One level (the Claimant's previous band), albeit about 50% of them technical. Staff turnover must reasonably be presumed to be high in a workforce of this size, especially at Band One levels, with a variety of Band One vacancies becoming available on a rolling, daily basis over a period of, for example, 4 to 6 weeks.

23 Practicability – reinstatement: The Tribunal concluded that it would not be practicable to order the Claimant's reinstatement into her former role because;

a) Mr Swain, the dismissing officer, remains in overall management of the chain of about 5 Visitors' Centres at the mainline stations and at Piccadilly underground station (including Paddington where the Claimant worked).

b) The Tribunal's merits Judgment, at paragraphs 37 and 38, found Mr Swain to have shown a tendency to excuse Mr Sheldon, the instigator and main protagonist, whilst blaming the Claimant, without any excuse, for her relatively minor part in the incident – a point put to the Respondent by 2 separate Trades Union representatives during the disciplinary process.
c) The Tribunal's merits Judgment, at paragraph 42, noted that the Claimant had become concerned about the potential unfairness of the disciplinary process as soon as she learned that Mr Swain was in charge of it, because she felt that he had previously been unfair to her regarding the granting of leave requests.
d) Whilst the Claimant failed to raise a prima facie case of race discrimination in relation to Mr Swain's treatment of her, the Tribunal unanimously concluded that Mr Swain's dismissal of the Claimant was clearly unreasonable, within the meaning of **section 98(4) of the Employment Rights Act 1996,** particularly in view of the "very great disparity between the behaviour of Mr Sheldon and the Claimant in terms of gravity and blameworthiness." (Paragraph 36 of the Tribunal's merits Judgment).
e) In these circumstances, it would be undesirable to order the Claimant's reinstatement under the management umbrella of Mr Swain, and potentially inimical to the likely success of the Order.

24 Practicability – re-engagement: The Tribunal concluded unanimously that, for the reasons set out in paragraph 22.2 of these Reasons, it would be entirely practicable for the Respondent to re-engage the Claimant into a Band One role, across the entire geographic spectrum of the Respondent and London Underground Ltd, in any vacant role, from gate-line through any department, in accordance with the Claimant's explicit flexibility and willingness to 'go anywhere', as expressed to the Tribunal, within a period of 4 to 6 weeks of the date of undertaking the exercise in good faith.

25 Trust:

25.1 The Tribunal found credible and convincing the Claimant's evidence that she has not lost trust and confidence in the Respondent, despite her unfair dismissal. She said that she had always believed, and continued to trust the Respondent to be a good and fair employer, where she had always felt safe, and wished above all else to be reemployed. She said that it had only ever been an issue with one manager, Mr Swain, and that she felt that the entire salutary experience had only made her an even more grateful, better and loyal employee, should she be re-employed. She greatly regretted her part in responding to the provocation of Mr Sheldon during the incident on 31 May 2017, but she had been sorely provoked and had maintained a professional calm after the event and had immediately tried to re-establish relationships with Mr Sheldon, who had rebuffed her. It was also notable that all of the Claimant's colleagues in the Visitors' centre on that day, as well as the independent contractor present, fully supported the Claimant following Mr Sheldon's outburst, and clearly continued to trust her as a colleague.

26 Miss Fearon-McCaulsky's evidence was that the Respondent had serious concerns about reinstating the Claimant back into the business because she had 'raised her voice and swore at a colleague' during an incident on 31 May 2017.

This raised concerns about the Claimant's ability to control her emotions and display bad temper, giving rise to serious risk to the organisation. Further there was concern about maintaining comfortable working relationships in the very small team environment, working unsupervised in the environment of the Paddington Visitors' Centre, so that the Respondent did not feel that it could trust the Claimant to maintain a professional working relationship in that environment at all times.

27 The Tribunal noted:
27.1 That Miss Fearon-McCaulsky confirmed in evidence before the Tribunal that her concerns leading to loss of trust in the Claimant were confined to the single incident which occurred on 31 May 2017.
27.2 That the Claimant had a clean conduct record over her 10 plus years of employment and had won an award for good performance in 2015.
27.3 That Mr David Flynn, her Line Manager's reference dated 24 April 2017, just one month before the incident in question, stated: "Adi (the Claimant) is an extremely able and well-presented individual. *She is very calm and measured in her approach to customers and colleagues alike."* (Italics supplied). "I have always found her to be honest, reliable and disciplined in all my professional dealings with her and that she takes great pride in her work. Adi shows a great interest in the accounting and sales aspects of her role in the Visitors' Centre and her strengths and flair for numbers is frequently evident. Her attendance and timekeeping at work is consistently good. She is a very organised individual who I feel would be well suited to applying herself to academic study."
27.4 That all of the Claimant's colleagues who witnessed the incident precipitated by Mr Sheldon on 31 May 2017, as well as the independent contractor who was present, unanimously and squarely placed the full blame for the incident upon Mr Sheldon and told the Claimant that she had done nothing wrong.
27.5 That the Claimant did not gratuitously 'raise her voice' during the incident, as alleged by Miss Fearon-McCaulsky, but, as the Tribunal found in paragraph 36 of its merits Judgment, "sufficiently only to assert her responses to Mr Sheldon's loudly voiced criticisms".
27.6 After the distressing incident, and albeit shaken by it, as were all of her colleagues, the Claimant "maintained sufficient composure and professionalism to go to the customer window and begin serving the public after Mr Sheldon had walked out, telling her distressed colleague that she would report the matter to a manager after her shift." (paragraph 36 of the Tribunal's merits Judgment).

28 The Tribunal considered very carefully its finding of 30% contributory conduct to the Claimant's dismissal and its impact on the issue of loss of trust. The Claimant herself at once accepted responsibility for responding in kind to the words used to her by Mr Sheldon, expressed contrition and attempted to heal the relationship with Mr Sheldon immediately after the incident, which he rebuffed. She herself assessed her contribution to her dismissal as 20%. In the event the Tribunal determined a contributory factor as 30%.

29 There is no reason in principle why a Tribunal should not order reengagement, even where there has a considerably larger contributory conduct factor than in this case, provided the circumstances warrant it. The Tribunal

concluded that in all the circumstances of this case, that there had been no dishonesty on the Claimant's part nor failure to accept responsibility for her use of the one offensive word in the incident for which the Tribunal found that she had been unfairly dismissed. It concluded that the circumstances of this case warrant an order for reengagement, despite the finding of contributory conduct, and that it is just so to order.

30 Miss Fearon-McCaulsky stated in evidence that the Respondent's trust issue with the Claimant was confined solely to the incident of 31 May 2017 and seemed to relate to her reinstatement into the small Visitors' Centre team of her previous role.

31 On all the evidence before it, the Tribunal was unanimously satisfied that the Respondent, as employer, cannot reasonably be found to have lost trust in the Claimant as an employee with the Claimant's unblemished conduct record over a 10 year period, including her line manager's character assessment as set out above, on the basis of one incident regarding which the Tribunal found her to have been unfairly dismissed, and relating to which she accepted full responsibility for the single error of responding in kind to extreme, aggressive and offensive provocation by a male employee offered to two female colleagues. This particularly in the context of her re-engagement into an alternative role in a different part of the organisation, away from the manager responsible for her unfair dismissal.

32 Accordingly, the Tribunal's unanimous decision is to Order that the Claimant be re-engaged within the terms of this Judgment.

_____

Employment Judge Stewart

_____

Date 9 January 2019

Reasons sent to the parties on

14 January 2019

……

FOR THE TRIBUNAL OFFICE