Case Number: 2302043/2014

JB

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondents**
Mr J Akinwunmi		**(1) Brighton and Sussex University Hospitals NHS Trust** **(2) Mr John Morris** **(3) Mr Carl Hardwidge** **(4) Mr Lal Gunasekera** **(5) Mr Giles Critchley** **(6) Mr Sorin Bucur**
Held at London South		**On 18, 19 and 20 April 2018**

BEFORE: Employment Judge C Hyde

Members: Ms B C Leverton
Miss B Brown

Representation

For the Claimant: Mr B Frew, Counsel
For the Respondents: Ms E Melville, Counsel

JUDGMENT

The unanimous Judgment of the Employment Tribunal is that:-

1. The Second to Sixth Respondents were discharged from the proceedings forthwith.

2. It was ordered that the deposit of £1000 paid in by the Claimant pursuant to the order made by Employment Judge Spencer on 6 March 2015 be paid out to the First Respondent forthwith.

3. The applications for reinstatement and/or reengagement were refused.

4. The (First) Respondent was ordered to pay to the Claimant forthwith the grand total of **£76,190.98** as compensation for the unfair dismissal, as follows:

    a. A basic award in the sum of £7,424.00.
    b. In respect of the compensatory award, the sum of £68,766.98 for financial loss.

    The Recoupment Regulations did not apply to this award.

REASONS

1. The Tribunal reviewed its deliberations on liability in this case before determining remedy. A decision was sent out in September 2016 in which various other claims which the Claimant had brought were dismissed but the complaint of unfair dismissal under section 98(4) of the Employment Rights Act 1996 was upheld. The determination of remedy had been somewhat delayed because an appeal to the Employment Appeal Tribunal against our liability judgment was dealt with first. It was now agreed that remedy had to be considered.

2. The other outstanding issue concerned the deposit order which had been made by Employment Judge Spencer on 6 March 2015 in relation to a discrimination allegation under the Equality Act 2010 and as a result of that the Claimant had paid in the sum of £1,000. It was not disputed that as that claim was not upheld by us, it was appropriate for the Tribunal to order that that money be paid out. Accordingly, we ordered the sum of £1000 to be paid out forthwith to the First Respondent.

3. As the Second to Sixth Respondents were discharged from the proceedings forthwith, the First Respondent is hereafter the only Respondent, but is referred to as the First Respondent in these Reasons for the sake of clarity.

4. At the commencement of this hearing it was clarified that the Claimant wanted the Tribunal to consider reinstatement and in the alternative, reengagement. The parties committed the issues to writing in an agreed list of issues which was eventually set out in a document which we marked [RC3]. There were other documents produced for the remedy hearing. There was a bundle of new documents for the remedy hearing and also a further bundle of documents extracted from the previous liability bundles which were considered to be relevant to remedy. There was a further bundle which we marked [R1A] which contained some supplementary documents and then during the course of the hearing we admitted further documents predominantly by agreement.

5. Both Counsel, very helpfully, set out statements of the law in their written submissions, including summaries of the relevant case law. The Tribunal acknowledged this assistance and indicated that these statements were likely

to be incorporated into the written reasons in due course, where the Tribunal agreed with the statements of the law.

6. It is convenient to refer to the orders for reinstatement and reengagement sought by the Claimant as "reemployment Orders" hereafter, unless it is relevant or necessary to specify which type of Order is being considered. The Tribunal was clear however that we had to consider a reinstatement Order first. The central issue to be determined in that context was practicability, the other issues under section 116(1) not being in dispute (section 116(1)(a), or relevant (section 116(1)(c)) - the consent of the Claimant and whether there was contributory conduct. Sections 116(2)(a) and (c) were to the same effect in relation to the consideration of the reengagement Order.

7. Under section 116(5) and (6), we had to decide in the context of practicability, whether we should take into account or disregard the fact that the First Respondent had engaged a permanent replacement for Mr Akinwunmi.

8. As far as the section 116(5) and (6) point was concerned, we were not satisfied that the threshold had been met. The Claimant had confirmed in a document the desire for reinstatement, in the agreed list of issues on 8 April 2015, prior to the liability hearing. It was not in dispute that the replacement was employed permanently only in September 2017, after the Claimant had been absent for a number of years, and a good year and a half after his dismissal. The only evidence that we heard about a pressing need for a permanent recruitment, were the understandable desire on the part of the locum consultant to achieve certainty as to his position; and the First Respondent's wish to comply with the Fixed Term Workers' Regulations which discouraged repeatedly giving locum employees fixed term contracts. It was however also not in dispute that the First Respondent had not complied with that objective on many occasions in any event. Indeed, the permanent replacement had been employed by them on successive fixed term contracts since 2012. Also by the time the appointment was made, the remedy hearing at which reinstatement was being sought was due to take place within a reasonably imminent time frame.

9. When, as here, a dismissed employee has brought an unfair dismissal claim and has stated that they intend to seek reinstatement if successful, and then a permanent recruitment took place shortly before the remedy hearing, a degree of suspicion about the bona fides of the employer's actions inevitably arises. We did not question Ms Denyer (HR) about the practicalities of this, but it appeared to us that it would be sensible where there is an unfair dismissal case outstanding, that the position should somehow be flagged up within Human Resources within the former employer's systems to alert anyone dealing with consideration of filling that post of the fact that there is an outstanding unfair dismissal claim. Even if an employee has not expressly asked for reinstatement in the claim, that remedy can always be sought subsequently if the complaint is successful. Further, where as in this case, the Claimant has been successful in claiming unfair dismissal, that position should most certainly be flagged up internally in the Human Resources Department so that consideration can be given to that state of affairs when any request for a permanent recruit for the former employee's post comes up.

10. We concluded in the circumstances however that there was really no cogent evidence before us to support a finding that the First Respondent had established that it was not reasonably practicable for it to arrange for Dr Akinwunmi's work to be done without engaging a permanent replacement. We were therefore satisfied that we should disregard that fact in assessing the question of the practicability of the reemployment Orders.

11. The consideration which weighed very heavily with us in making our decision as to practicability was the issue of the relationships between the Claimant and the First Respondent on the one hand and, separately, with the Second to Sixth Respondents.

12. The applicable legal principles, which were not disputed and were set out in counsel's submissions are referred to briefly here. Counsel for the Respondents set out in her written submission at paragraph 11 quoting the case of *Timex Corporation v Thomson* [1981] IRLR 522 that practicability was to be decided in this hearing on a first stage basis. Moreover, it was agreed that we should not make an order for reinstatement if we thought that it was unlikely to be effective. The second relevant principle came from the Judgment of Lord Justice Ormrod in the case of *Northman*, at paragraph 15 (b) (i) of Ms Melville's submission. Finally, we refer in these reasons to the principle derived from the case of *NW London NHS Foundation Trust v Abimbola* [UKEAT/0542, 3 April 2009] in particular at paragraph 15(c)(i) of Ms Melville's submission. We were also assisted by the reference in Mr Frew's submissions to the relevant principle in the case of *McBride v Scottish Police Authority* [2016] UKSC 27 at paragraph 23 of his submission. These are all cases which we are bound by and we made our decisions in accordance with the statutory provisions and the case law.

13. Some of our findings on the issue of the relationships were helpfully listed in Ms Melville's written submissions and so are not going to be repeated in these reasons. She also relied on evidence which the Claimant and others had given in the liability hearing. We accepted her submissions that the evidence and our findings at the liability stage painted a picture of severely fractured relationships between the Claimant and his former employer on the one hand, and quite separately, between the Claimant and his former colleagues, most of the other Respondents. One of the named Respondents had left the employment of the First Respondent, but the others were still employed. It was clearly relevant for us to take those findings and that evidence into account.

14. For the avoidance of doubt, the Tribunal adopted the points made in paragraphs 34 to 36 of Ms Melville's written submission.

15. The Claimant explained that he believed he could now effectively draw a line under the past, but we did not consider that that was consistent with his actions certainly after the Employment Tribunal Judgment on liability had been received by the parties. We wanted to make it quite clear that we did not criticise him for his actions. There was nothing unlawful about what he had done especially in terms of the way he had continued to press professional bodies about his concerns about the performance of some of his former colleagues. However,

his actions were nonetheless inconsistent with his statement that he was quite happy now to move on. An example of this was the referral of his former colleagues to the GMC despite our adverse findings against the colleagues in our very detailed judgment. Further examples were the statements in his witness statement for this remedy hearing to which his attention was drawn in cross examination and the way certain issues were put on his behalf, for example challenging the credibility of Mr Lane in the course of an application for disclosure and in other respects. This was particularly striking because Mr Lane is a new character on this stage, with no previous involvement in this case. He would be the manager who would represent the Claimant's first point of contact with the administrative side of the Trust if he were to return to work at the First Respondent. Neither Mr Lane nor the Claimant had any previous involvement with each other.

16. We considered that this evidence indicated the probable difficulties which would be encountered if a reemployment order were made, due to the depth of the Claimant's lack of trust.

17. As to the other general issues about practicability, we did not think that it helped that as things stood on the day of the remedy hearing, the Claimant was not ready to go in terms of resuming his medical practice. He did not have his licence to practice, having voluntarily suspended it a couple of years ago and there were also potential issues about revalidation. We accepted that he understood that he would have a period of up to 18 months to seek revalidation. However, we also heard some apparently inconsistent evidence about this time frame and the process from Ms Denyer, the Respondent's Human Resources witness, when she recounted what she had been told by the GMC. Neither the Claimant nor the Respondent had written confirmation from the GMC of what they were telling us. We therefore asked for some sort of clarification about the position, by reference to a document or documents. As a result, the parties provided a written extract from the GMC guidance document in such situations. However, it was then agreed that it was not clear from that document how long it would take for the Claimant to regain his licence and/or revalidation, and that the regaining of the licence and revalidation were not certainties. Further, the process involved was not clear and it was certainly consistent with both the positions that were put forward by Ms Denyer and the Claimant. We considered that as at the date of the remedy hearing, there was little certainty or clarity about what would actually happen. These could potentially be long processes in any event.

18. We also took into account the Claimant's evidence that he had practised at a much lower level in terms of volume in the intervening period since he last worked in the NHS in November 2012. This had occurred due to the lack of opportunity in the Cayman Islands which had a much smaller population. This was simply a matter of fact, not a criticism of the Claimant, but it was a relevant consideration in assessing the practicability of a reemployment order. The Claimant was unlikely for this reason also, to be able to 'hit the ground running'. He also accepted that the number of operations he had undertaken and the opportunities to work were much lower than when he was working at the First Respondent. This had taken a dip because of the arrival on the Islands of

other less experienced surgeons offering their services. However, he said that work had subsequently picked up again with an increased demand for his services. We had no reason to doubt that evidence but we had no detail about the overall picture in the terms of the volume of work that he had done over the whole period, except that he acknowledged that there had been a significant reduction initially.

19. We also found, as set out in our liability judgment, that if the Claimant were to resume working for the First Respondent there would need to be what was described as a complex mediation process between the Claimant, the First Respondent and the Claimant and the three of the original four named Respondents, one of the named Respondents, Mr Gunasekera having retired in December 2015. Of the remaining three former colleagues, Mr Morris is a senior longstanding member of the department, and Mr Hardwidge has overall responsibility on the medical side as Clinical Director. These were the two people with whom there had been a long and difficult history as chronicled in our judgment on liability. Mr G Critchley is now Lead Consultant, and his involvement in the case was also criticised by us in our previous Judgment.

20. There was nothing that the Tribunal saw from those Respondents in the liability hearing or indeed as I have set out above from the Claimant either then or in this hearing which would give us grounds for believing a mediation process was likely to be successful. When this was suggested earlier, just before the Claimant went on a career break in 2012, we noted that although the Claimant and Mr Morris were the only parties who were meant to get involved in that mediation, and that they had each indicated in advance that they were prepared to see it through, in fact it was not taken up by them.

21. It was put to the Human Resources witness Ms Denyer, on behalf of the Claimant, that the various concerns that were outstanding on either the Claimant's side or those on the Respondent's side could be raised or dealt with in mediation. However, mediation on a much less complex scale had been on the table before the Claimant's career break but was not in the event pursued. We did not think that the evidence provided us with a realistic basis for finding that mediation of the sort that would be needed now, was likely to be successful.

22. We were also mindful, (although it was not a point that either party made), that this employer was in the business of providing a service which needed to be provided to the general public whilst the Claimant was being reintroduced into the workplace. We also took into account the nature of the service.

23. We also took into account that the Claimant's role and those of his colleagues were not generic posts. They are highly skilled medical professionals. Further, within neurosurgery, there are yet further areas of expertise. These findings were relevant in terms of the point that was made that the Claimant could effectively be slotted in to the work of the department by taking up PAs previously allocated to other surgeons.

24. On the evidence before us, there was little basis for us to find that there were likely to be any available PAs anyway in what was now a reorganised department, to provide a reasonable working schedule for the Claimant if he were to return to work. We considered it likely that the late formulation of the Claimant's case on reengagement perhaps was also consistent with this finding.

25. There was no dispute that since the Claimant last worked within the Trust, certain of the areas that he specialised in were no longer part of the Service. The Respondent has maintained that they believe that the Claimant was fairly dismissed, the Claimant made it appeared to us a valid point that this position must be on the basis that the First Respondent must consider that it was reasonable and safe for the Claimant to have returned when he was dismissed and to return now. The Tribunal agrees with the logic but considers that the First Respondents opposition to the reinstatement application belies the truth of that position and indeed reinforces our findings about the ruptured relationships and that it was not in fact the case that it was reasonable for the Claimant to have returned to work.

26. In all those circumstances, and primarily because of the relationships on both sides, we considered that it was not appropriate to make an order for reinstatement. We also considered the further application for reengagement and reached the same conclusions given the similarity of the considerations that we had to take into account. So, we also rejected the application for reengagement.

27. The Tribunal then moved on to determine compensation. The Claimant did not dispute the Respondent's figures as set out in the Counter-Schedule of Loss.

28. The Tribunal therefore ordered that the Claimant was entitled to the sum of £7,424.00 as a basic award. In respect of the compensatory award, he was entitled to the sum of £68,766.98 for financial loss. This gave a grand total of £76,190.98 (pp196 A – 196 C). There was no reduction for contributory fault given our liability judgment and further the Claimant had not claimed statutory benefits therefore the Recoupment Regulations did not apply to this award.

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Employment Judge Hyde
Date: 07 JUNE 2018