



EMPLOYMENT TRIBUNALS

Claimant: Mr Lewis Smith

Respondent: Network Rail Infrastructure Ltd

Before: Employment Judge Craft

By: CVP On: 30 June 2021

Representation:

Claimant: Mrs K Loraine, Counsel

Respondent: Mr T Welch, Counsel

Reserved Judgment on Remedy

1. The Respondent is ordered to reinstate the Claimant in the job of Team Leader Track Inspections at its Havant Maintenance Depot, from which he was dismissed on 15 October 2019.
2. The Remedy Hearing will, if it is necessary to do so, now be reconvened on a date to be confirmed to confirm the date by which the Respondent should

comply with the Order for Reinstatement; to determine the amount payable in respect of any benefit the Claimant might reasonably have expected to have received between the Effective Date of Termination and his reinstatement, including back pay; and to establish rights and privileges (if any) to be restored to the Claimant.

Reasons

Background

1. At the conclusion of the liability hearing held on 15 and 16 October 2020, the Tribunal concluded that the Claimant had been unfairly dismissed by the Respondent (NR) and gave detailed oral reasons to explain its Judgment. The Claimant confirmed that he wanted to apply for reinstatement and the proceedings were adjourned to enable the Tribunal Office to fix a date for a Remedy Hearing.
2. The parties did not request written Reasons from the Tribunal. The notes taken by Counsel who represented the parties at the liability hearing have been included in the bundle of documents for the Remedy Hearing. Therefore, the Tribunal considers it is helpful to provide a brief summary of its findings on liability to give context to matters that it has had to consider in the Remedy Hearing so far.
3. The Tribunal found that the decision to dismiss the Claimant for gross misconduct, made after a brief disciplinary hearing, was a flawed and ill-considered decision. It was based on an unsustainable finding that the Claimant had refused to provide a urine sample when there was no evidence of such culpable and blameworthy conduct by the Claimant, who had been unable to provide a urine sample because of an undiagnosed medical condition.
4. This unfair decision was upheld on appeal notwithstanding that Mr Malcolm, the Appeal Officer, recognized the failings of the disciplinary hearing. However, he concluded that NR's published procedures for drug and alcohol testing prohibited his consideration of the relevant, and compelling, mitigation which the Claimant had provided to NR to explain why he had failed to provide a urine sample. The Tribunal found that its investigation and disciplinary procedures had not provided evidence to support the finding that the Claimant had been responsible for the misconduct alleged against him and that the decision to dismiss him fell outside the range of reasonable responses available to a reasonable employer in the circumstances of his case.

The Remedy Hearings

5. At the Remedy Hearing held on 18 March 2021 NR confirmed that it opposed either reinstating or re-engaging the Claimant. However, it intended to rely on a new ground that had not previously been disclosed to the Claimant's solicitors. This was that the Sentinel Scheme Rules which applied to NR's employees in the rail industry would prevent NR from reinstating, or re-engaging, the Claimant even if NR was ordered to do so by the Tribunal. It was necessary to postpone the Remedy Hearing to ensure that full disclosure was provided by NR as to the status and position of Sentinel and the operation of its Scheme Rules. The Tribunal's directions for that disclosure are set out in the Case Management Order made on postponement of the Remedy Hearing.
6. The Claimant is seeking reinstatement under **s.113 and s.114 Employment Rights Act 1996 ("the Act")**. This would be an Order that NR shall treat the Claimant in all respects as if he had not been dismissed. In the alternative the Claimant will seek re-engagement under **s.115** of the Act. NR resists these applications. The Tribunal must first consider the application for reinstatement. The matters which the Tribunal must consider are set out in **s.116** of the Act. These are the Claimant's wishes; the practicability of compliance by NR and, if the Claimant had caused, or contributed to, his dismissal whether it is just and equitable to order either reinstatement or re-engagement.
7. The Tribunal was provided with an agreed Bundle of documents (Exhibit R1). The Tribunal received evidence from the Claimant and Mrs A Carder, NR's Head of HR, who each gave evidence in chief by written statement (Exhibits C1 and R2). Mrs Loraine and Mr Welch submitted written skeleton arguments. The pressures of time restricted the Tribunal to consideration of the application for reinstatement on which it reserved its Judgment to consider the evidence submitted to it at the Hearing and the extensive submissions submitted by Counsel.
8. The Claimant commenced employment with NR as an apprentice on 9 August 2010. He enjoyed a successful career with NR and by the date of his dismissal he had been promoted to the job of Team Leader in which he had been managing a team of 12 colleagues in a safety critical role. He had acquired over 50 competences during his training which included a substantial number of engineering competences. He wants to continue his career as a railwayman and will be effectively locked out of such a career unless he is reinstated, or re-engaged, by NR. The Tribunal had found that he had not been responsible for any culpable, or blameworthy, conduct, when his medical condition prevented him providing a urine sample when he was subject to drug and alcohol testing on 29 July 2019. The Tribunal had explained in its oral reasons for its Judgment that the Claimant's

conduct had not contributed to his dismissal.

9. The Claimant secured temporary work in a factory in February 2020. This employment came to an end due to the Covid lockdown. He has searched for work across many industries, including warehouses and supermarkets since his dismissal by NR. He signed up with three agencies to assist him. He had made over 20 unsuccessful applications for employment before he commenced employment with Amazon as an Operations Supervisor on 21 September 2020.
10. At the commencement of the Remedy Hearing Mr Welch confirmed that the Claimant's job at NR's Havant Maintenance Depot remains vacant. NR's Wessex Region extends over a wide area in the south and southwest of England. NR operates many depots in that area. The Claimant has previously worked in the Guildford and Havant Depots. The Claimant has identified eleven other positions in the vacancy lists NR has provided to him for which he has the required qualifications and experience.
11. The Claimant's Team Leader, Mr Bergin, had given evidence to the Tribunal at the liability hearing that he had a good working relationship with the Claimant. The Claimant had confirmed that was the case. Mr Bergin had been interviewed during the investigation of the incident. During the interview he had been asked to provide an explanation as to why the Claimant had failed to provide a urine sample. He informed the investigator that he thought there were three potential reasons why the Claimant had not given a urine sample, one of which was that the Claimant had a medical condition that prevented him from doing so. The Tribunal found that Mr Bergin's request that the Claimant, and four of his colleagues, should be referred to testing was based on a hunch in each case, and no more than that.
12. Mrs Carder joined NR in 2017. She is currently Head of HR for Wessex Route which has a workforce of around 2,000 employees. Her evidence to the Tribunal indicated that she was either ignorant, or had been misinformed, of the evidence before the Tribunal at the liability hearing and the findings of fact which the Tribunal had made at that hearing.
13. It was incorrect of her to state that witness evidence at the liability hearing confirmed that the Claimant had not been open with Mr Bergin or the Testing Officer when he attended the alcohol and drug test which Mr Bergin had requested should be taken by him. Mr Bergin was not present when the testing was undertaken. The Claimant had informed the Testing Officer that he sometimes had difficulty with providing urine and had offered to undertake other tests, including a blood test, in place of providing a urine sample. The Claimant had not sought to evade providing a urine sample. He was unable to do so because of an undiagnosed medical condition.

14. Mrs Carder did accept that the Tribunal had found that it was understandable, and reasonable, that the Claimant had not disclosed his undiagnosed medical condition to NR. He had been inconvenienced on a few social occasions over a number of years, but had been able to provide a urine sample in a screening test that he had undertaken some years before. He had no reason to believe that this would impact on the safe performance of his job. His GP's diagnosis confirmed that he was suffering from paruresis (shy bladder syndrome) and that this had prevented him from providing a sample to the Testing Officer. Mr Malcolm, accepted this diagnosis. He accepted that the Claimant had not refused to provide a urine sample and had not attempted to evade doing so. Mr Malcolm was satisfied that he had failed to provide a urine sample because of this medical condition.
15. Mrs Carder said that a clear lack of trust had existed before the Claimant was dismissed. She provided no evidence to support such a serious allegation. Furthermore, she did not particularise what she was referring to, and NR had made no such claim in the liability hearing, and the Tribunal had made no such finding of fact. Mr Bergin and the Claimant had a good working relationship. Mr Bergin had referred four other colleagues for testing at the same time as the Claimant. They all returned to work under his management after attending their tests. Mrs Carder made a further assertion for which she provided no evidence which was that the Claimant had demonstrated a nervousness about sharing details of his medical condition with his managers. Once again, there was no evidence placed before the Tribunal at the liability hearing to support this assertion.
16. Mrs Carder accepted that NR had provided no evidence to the Tribunal that Mr Bergin would not be able to work with the Claimant if he returned to his job at the Havant Maintenance Depot. She thinks there will be a problem because the Claimant will know that Mr Bergin had referred him for alcohol and drug testing which had resulted in his dismissal and this would undermine trust and confidence between them. However, she accepted that the four other employees he had referred for testing at the same time had resumed their work under his management with no difficulty.
17. Mrs Carder maintains that reinstatement, or re-engagement, will lead other employees to conclude that the Claimant had found a loophole in NR's Alcohol and Drug Policy which they will then exploit for their own benefit. This will mean that other employees will be able to evade "for cause" testing as the Claimant had done. Mrs Carder's explanation caused the Tribunal substantial concern because she is continuing to make an unjustified allegation that the Claimant had deliberately evaded the urine test when Mr Malcolm, the Appeal Officer, had accepted that this was not the case.

18. Mrs Carder was able to set out a helpful and clear explanation of the Sentinel Scheme. NR had developed the Sentinel Scheme which provides a voluntary passport scheme for employers working in the railway industry. It is not, contrary to previous explanations received by the Tribunal, a statutory or regulatory body independent of NR. It is part of NR's business which operates independently within it. NR and the other employers, who are members of the Sentinel Scheme, make their own decisions as to who to employ, and the criteria they will require for the jobs they require within their business.
19. The Claimant will need to be issued with a Sentinel Scheme card if he is to work in a safety critical job for NR. He can only receive such a card if NR sponsor him for it. NR has withdrawn its sponsorship of the Claimant's Sentinel card because of his dismissal. Mrs Carder confirmed that NR is not prepared to act as the Claimant's primary sponsor in the Sentinel Scheme and that if it does not do so he will not be able to undertake safety critical work for NR. This is because NR's Drugs and Alcohol Policy states that if an employee fails an alcohol and drugs test then that employee's certification to carry out safety critical work will be revoked and that the employer will not be able to carry out such work for five years.
20. NR concluded, as a result of the Claimant's unfair dismissal, he did not possess the necessary fitness to operate in a safety critical role. Mrs Carder maintains that if NR reinstates, or re-engages, the Claimant in such a role then it will be acting contrary to the spirit and purpose of NR's own policies and the Sentinel Rules. This is unacceptable for NR because it is the key stakeholder of the Sentinel Scheme.
21. When asked to explain how NR reached this decision Mrs Carder informed the Tribunal that it considers that the Claimant acted in breach of trust for failing to disclose his medical condition in advance of the screening test. She considers that the fact that the Tribunal's Judgment that the Claimant was unfairly dismissed is a matter of public record makes it far more dangerous for NR to reinstate, or re-engage, him because of the message this will send to other employees as to how they can evade testing procedures.

Submissions

22. Mr Welch submitted that NR's Drugs and Alcohol Policy ("the Policy") created what he termed a strict liability for employees who went to undertake "for cause" testing. The effect of this strict liability was that it did not allow NR to take into account any potential mitigation where an employee had failed to provide the required urine sample regardless of the circumstances in which that failure had arisen. He explained that such an approach was necessary to support NR's zero tolerance of misuse of drugs and alcohol, and underpinned the paramount importance of health and

safety requirements in the rail industry.

23. He accepts that NR would be able to secure a Sentinel Card for the Claimant, which would allow him to resume his employment as a Team Leader, if it renewed his sponsorship. It is not prepared to renew his sponsorship because of the strict liability it has imposed in respect of "for cause" testing which prevents it from taking such a step. Mr Welch submits this will always be the case even in circumstances where the implementation of the Policy has been found to be unfair by an employment tribunal.
24. He asked the Tribunal to accept Mrs Carder's evidence. She has lost trust and confidence in the Claimant's ability to undertake his job. She holds a genuine belief that he was guilty of misconduct and that his reinstatement would create a "loophole" which would enable other employees to evade "for cause" testing. He then asked the Tribunal to reconsider the factors which at the time had indicated that the Claimant was unfit to work by reason of drugs and alcohol. The Claimant had also failed to disclose his medical condition. Furthermore it is Mrs Carder's view that his relationship with work colleagues has been damaged significantly by his conduct and because he has pursued employment tribunal proceedings against NR. Mr Welch also submits that the Claimant contributed to his dismissal by his conduct.
25. Finally, Mr Welch referred the Tribunal to what he considers to be the larger issue which is that the Claimant's reinstatement would, in the circumstances of his case, substantially undermine the integrity of the Policy and public confidence in NR's and Sentinel's health and safety procedures.
26. Mrs Loraine submits the Claimant has expressed a clear preference for reinstatement for compelling reasons. He has pursued a successful career as a railway man, and without reinstatement, or re-engagement, he will be locked out of his chosen career in circumstances where he was unfairly dismissed and had not been responsible for any blameworthy, or culpable, conduct. Furthermore, there are no grounds for NR to argue that the Claimant contributed to his dismissal. The only issue before the Tribunal is whether it is practicable for NR to reinstate the Claimant.
27. Mrs Loraine asked the Tribunal to note that the Claimant's job remains vacant. It is possible for him to be reinstated to that job without displacing another person. The Claimant has not been banned by Sentinel from working in his job for five years. He will need to be sponsored by NR to obtain an active Sentinel Card (which was deactivated by NR when he was dismissed) because this is required for him to return to work in his job. It has been agreed that NR will be able to do this without any difficulty if it was willing (which it is not) to allow the Claimant to return to his job. The reality is that Sentinel has not been involved in the matter and would not need to

be involved, except to the extent of administering the issue of the Sentinel Card sponsored by NR.

28. Mrs Loraine referred the Tribunal to Mrs Carder's witness statement in which she had stated that she is not comfortable with having the Claimant back in the business when he did not take a test when requested to do so. However, it is not disputed that for random, rather than "for cause", screening (both of which are undertaken without prior notice to an employee) if someone is unable to provide a urine sample on demand then alternative test arrangements can be made.
29. Mrs Loraine submits that Mrs Carder's discomfort is irrational, as is the criticism that the Claimant failed to be open about his medical circumstances. His medical condition had not been disclosed at the time because it had not been something he had needed to think about prior to the incident, after which he immediately offered a blood sample as an alternative way of completing the screening.
30. Finally, Mrs Loraine submitted that the Claimant had taken every possible step open to him at the earliest opportunity to prove he had not used drugs. There has been no evidence provided to the Tribunal to suggest that he had done so. There is also no evidence before the Tribunal to support an allegation that his relationship with his manager, or any other colleagues, had broken down as a result of his actions and in particular issuing employment tribunal proceedings against NR. Mrs Loraine also asked the Tribunal to note that it is NR's stated intention to utilise the Sentinel Scheme to have the Claimant banned from railway work at large for five years which is an intention demonstrating staggering unfairness towards him.
31. Mr Welch and Mrs Loraine referred to, and commented upon, the EAT case of **United Lincolnshire Hospitals NHS Foundation Trust v Mrs J Farren UKEAT/0198/16/LA**. In this case HHJ Eady explained that practicability was something more than what might simply be possible. An order for reinstatement had to be capable of being carried into effect with success. The correct question which the Tribunal had to ask, in the **Farren** case, was whether the employer genuinely believed that the Claimant had been dishonest, and whether that belief had a rational basis. This was because it was this employer – not some other, and certainly not the ET - that was to engage the Claimant. Therefore, the issue of trust and confidence raised by the employer had to be tested as between the parties in order to determine, even on a provisional basis, whether an order for re-engagement was practicable, that is, whether it was capable of being carried into effect with success and it could work.
32. At paragraph 42 of the Judgment HHJ Eady states as follows:

"What we consider the ET did have to do was to consider, as at that

*point in time, whether the Respondent had made good that which it said made it impracticable, or unjust, to order, re-engagement; that it can longer have trust and confidence in the Claimant . . . The ET also needed to consider whether the Respondent had made good its case that trust and confidence could not be repaired, whether its belief in her dishonesty was such that a re-engagement order was unlikely to be carried into effect with success. The ET was thus entitled to scrutinize whether the Respondent's stated belief was genuinely and rationally held, tested against other factors the ET considered relevant. It was, however, still a question to be tested from the perspective of the Respondent, not that of another employer, still less that of the ET; was it practicable to order **this** employer to re-engage **this** Claimant?"*

Conclusions

33. The Tribunal had been extensively referred to the Policy during the liability hearing. The crux of Counsel's submissions on behalf of NR at that hearing had been the paramount importance of health and safety, particularly in safety critical work, in the rail industry and the need to ensure that employees did not work under the influence of either alcohol or drugs. However, a submission that the Policy was one of strict liability that could result in the dismissal of an employee regardless of the principles of natural justice and fairness (which Mr Welch appears to pursue) was not advanced to the Tribunal at the liability hearing.
34. The Tribunal considers this submission to be misconceived. The Policy states that a failure to submit to testing will be regarded as a refusal to do so, and will lead to a positive result being received. However, the Policy also confirms that blood and hair samples can be taken if breath and urine samples cannot be provided due to medical reasons. The Claimant's contract of employment required him to provide a specimen of breath and / or urine for the purpose of screening for alcohol and prohibited drugs in NR's random or "for cause" screening processes. His contract states: **"Any failure to comply will be a disciplinary offence, which will normally result in dismissal"**.
35. His contract of employment does not state that he will be dismissed in such circumstances. NR's contractual arrangements recognise that, after completing sufficient continuity of service and, in certain circumstances that can arise before that, its employees will have the right not to be unfairly dismissed. NR has a published disciplinary procedure in which it can investigate allegations of misconduct which can then be referred to a disciplinary hearing if it is necessary to do so. The Tribunal is stating the obvious but such arrangements ensure that an employee of NR will be informed of the issues he has to deal with at any disciplinary hearing and

will have the opportunity of explaining his position and, if necessary, submitting mitigation for his involvement in what occurred, to which any reasonable employer acting reasonably will give due consideration before reaching a decision as to whether or not any disciplinary sanction should be imposed. A concept of strict liability which prevents NR from taking account of potential mitigation fully and properly advanced by an employee in such proceedings is an unsustainable position for NR. Furthermore, the Claimant faced a charge of failing to provide a urine sample, he did not face a charge of failing to advise NR of his medical condition. Mrs Carder has also accepted the findings which the Tribunal made as to why he had not informed NR of that condition.

36. Mrs Carder has never worked with the Claimant. She will not be required to do so if he returns to work as a Team Leader. Furthermore, she had no direct involvement with the disciplinary procedure that resulted in his dismissal. Mrs Carder is adamant that the Claimant will not be reinstated or re-engaged by NR. The reasons she has provided for reaching this decision have been examined by the Tribunal.
37. Mrs Carder wrongly asserts that the Claimant evaded completing the screening by his failure to provide a urine sample. This was not the finding of Mr Malcolm at the appeal hearing. At the liability hearing the Tribunal concluded that there had been no evasion by the Claimant. He had been unable to provide a urine sample because of an existing undiagnosed medical condition. It was also incorrect of Mrs Carder to assert that the Claimant was not open about his position with either Mr Bergin or the collecting officer.
38. There has also been no evidence provided to the Tribunal either at the liability hearing or at this hearing that there was "a clear breach of trust" before this incident, or that the Claimant had displayed nervousness about sharing details of his medical condition with his managers. Mrs Carder is also apparently unaware that Mr Bergin and the Claimant agreed that they had a good working relationship before the incident. This, together with the fact that four other employees who Mr Bergin had sent for testing at the same time as the Claimant returned to work with him with no difficulty, make Mrs Carder's view that the Claimant would be unable to return to work with Mr Bergin illogical. This is further supported by the fact that Mr Bergin was aware of, and accepted that, the Claimant may have had a medical condition that prevented him from providing the urine sample.
39. There had been no issues with the Claimant's performance as his successful career with NR to the date of the incident demonstrated. He had faced no previous disciplinary proceedings. Mrs Carder has accepted the Tribunal's finding as to why the Claimant had not disclosed his medical condition. He provided a full explanation for this during the disciplinary

procedures. There is no basis for Mrs Carder to assert that his failure to disclose the undiagnosed medical condition was a breach of trust by him.

40. The Sentinel Scheme presents no barrier to the Claimant's return to work. NR would be able to sponsor the Claimant, if it was prepared to do so to enable him to obtain the necessary Sentinel card. Furthermore, the Claimant's circumstances, on any objective consideration, do not provide a "loophole" which will enable other employees to evade testing. The reasons why he could not provide a urine sample at that time were obviously unique to him and were found by NR to be genuine. Furthermore, he had been able to demonstrate with independent medical evidence the nature of his medical problem and how it impacted on him in those particular circumstances.
41. The Tribunal now refers to HHJ Eady's helpful guidance in the **Farren** case. The submission that the Claimant's conduct contributed to his dismissal is unsustainable. The Tribunal's findings of fact confirmed that he was not responsible for any culpable or blameworthy conduct. The remaining issue is practicability.
42. NR has not made good its case that the Claimant has lost the trust and confidence of his colleagues or that any difficulties in relationships that might arise could not be repaired. NR's own procedures confirmed that the Claimant had not attempted to evade providing a urine sample. The reasons why the Claimant had not advised NR of what was then an undiagnosed medical condition had been accepted by Mrs Carder.
43. The Tribunal were grateful to Mrs Carder for her frank evidence and for setting out her position so clearly. However, her beliefs are based on incorrect information which has caused her to make unsustainable assumptions about a number of matters which are relevant to consideration of the Claimant's pursuit of reinstatement. These assumptions are not supported by Mr Welch's submissions as to strict liability for the reasons which the Tribunal has explained above. Therefore, the Tribunal has concluded that although Mrs Carder's views may be genuinely, and robustly, held they are irrational because they are not supported by the evidence provided to the Tribunal and its previous findings of fact.
44. The question for the Tribunal as helpfully explained by HHJ Eady is: Is it practicable to order NR to reinstate the Claimant? The Tribunal has concluded for the reasons set out above that it is practicable for NR to reinstate the Claimant. It has concluded that, taking account of all the resources available to NR this is an order that is capable of being carried into effect with success. This is a Judgment that has been reached after the Tribunal's extensive consideration of all the matters which were referred to it and fully testing those matters where it has been necessary to do so.

45. The Tribunal is satisfied that the determination that the Claimant was unfairly dismissed by NR was taken after careful consideration of paramount importance of health and safety in the railway industry and did not substantially undermine either the integrity of the policy or public confidence in NR's and Sentinel's health and safety procedures and that any order of reinstatement made in these proceedings after due and appropriate consideration of the relevant issues would not do so.
46. When the parties agreed to adjourn the hearing to enable the Tribunal to consider its reserved judgment in respect of the Claimant's application for reinstatement there was an indication, in no way binding on the parties, that the Tribunal's provisional determination of the application for reinstatement could provide the parties with the basis for reaching agreement on outstanding issues without further reference to the Tribunal. The Tribunal is mindful of the unforeseen delay in promulgating this Judgment and it is proposed that the parties should notify the Tribunal office by no later than 15 December as to whether or not a further hearing will be required in these proceedings. If a hearing is required then the Tribunal has directed that this hearing will continue to be heard remotely by either CVP / VHS and the parties are directed to provide a list of available dates for a further one day hearing in the period up to 28 February 2022 by no later than 15 December 2021.

Employment Judge Craft
Date: 19 November 2021

Judgment sent to the parties: 24 November 2021

FOR THE TRIBUNAL OFFICE