Employee could not claim unfair dismissal after she had been reinstated following successful appeal

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The EAT has held that the dismissal of an employee “vanished” as a consequence of her successful internal appeal of a dismissal decision. To avoid this outcome, the employee should have withdrawn her appeal in no uncertain terms. Merely stating that she did not wish to return to work was not enough to constitute the retraction of an appeal.

What happened in this case?

The Claimant was a Sales Assistant who worked in an Iceland store. She was dismissed in January 2019 for alleged gross misconduct. She appealed the decision and asked to be reinstated. An appeal hearing took place but was adjourned so that further investigations could take place. In the meantime, the Claimant emailed Iceland to say she had lost trust and confidence in them and no longer wished to return to work. During the reconvened appeal hearing, the Claimant said that she did not wish to be reinstated but wanted an apology and compensation.

Iceland upheld the appeal against the dismissal. The Claimant was told that she would be reinstated with continuity of service restored, backpay and a final written warning. However, she refused to return to work. Three months later, in July 2019, Iceland dismissed the Claimant for her failure to attend work. The Claimant brought a claim of unfair dismissal in respect of the January dismissal. She did not bring a claim about the July dismissal.

Iceland said that the claim was not well-founded because the January dismissal had “vanished” when the appeal was upheld and the Claimant had been reinstated. The Employment Tribunal

agreed, holding that the fact that the Claimant had said she did not want to be reinstated was not enough. She should have gone further and withdrawn her appeal altogether. She did not, which meant that she could not escape the consequences of a successful appeal. The underlying motives, intentions or desires of the Claimant were not relevant. The Claimant appealed to the EAT.

What was decided?

The Claimant argued that her statements that she did not wish to work for Iceland, and that she only wanted an apology and compensation, were tantamount to a withdrawal of her appeal.

The EAT held that it was well-established that when a contractual right of appeal is exercised, the agreement between the parties is that should the appeal succeed, the employee will be treated as never having been dismissed and will be reinstated with backpay. This is the objective position, and it does not turn on the employee's personal motives for appealing, however legitimate (e.g. a desire to "clear their name" or a concern not to risk a deduction to a compensation award for failing to comply with the provisions of the Acas Code of Practice on Disciplinary and Grievance Procedures).

Turning to the question of whether the Claimant's words were clear enough to amount to a withdrawal, the EAT said they were not. Although excessive formality was not required, at the very least she could have said "I wish to withdraw my appeal". Moreover, the Claimant had accepted before the Tribunal that she had not withdrawn her appeal.

The EAT also noted that the Claimant's wish not to return to work for Iceland and the pursuit of the appeal were not mutually exclusive. An employee may pursue an appeal in order to clear their name and/or receive back pay and then resign once they have been reinstated (and potentially claim

constructive dismissal).

The outcome was that the Claimant was not dismissed in January 2019 and her claim of unfair dismissal could not proceed.

What are the learning points for employers?

This decision is a useful reminder to employers that if an appeal against a dismissal decision is upheld, the original dismissal will be erased, and the employee will not be able to pursue a claim for unfair dismissal in relation to it. It would remain open to the employee to resign and claim that they have been constructively dismissed, but this is a riskier claim for the employee as they will first need to show that there had been a fundamental breach of contract by the employer.

Importantly, the decision also tells us that appeal processes should be continued even where an employee says that they have lost trust and confidence and/or that the only remedy they want is compensation and an apology. Clear words are needed for an appeal to be deemed to have been withdrawn. Stopping an appeal process withouta clear withdrawal has two negative consequences for employers. First, it would remove the opportunity to erase a flawed dismissal decision, leaving the door open for an unfair dismissal claim. Second, it could potentially mean the employer has breached the Acas Code of Practice, which could lead to compensation being increased.

Marangakis v Iceland Food Ltd

Brahams Dutt Badrick French LLP are a leading specialist employment law firm based at Bank in the City. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

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