Unfair dismissal: employer’s loss of trust and confidence relevant to whether the Tribunal should order re-engagement

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Unfair dismissal: employer’s loss of trust and confidence relevant to whether the Tribunal should order re-engagement

In a recent case, the EAT considered whether a Tribunal was right to order an employer to re-engage a former employee in whom they had lost trust and confidence and place them into a role for which they lacked the essential skills.

What does the law say?

Where an employee has been unfairly dismissed, the usual remedy is to award compensation designed to compensate for lost earnings. However, employees can ask the Employment Tribunal to order that they are reinstated or re-engaged by their former employer.

"Reinstatement" means that the employee is placed back in his or her original job and treated as if they had not been dismissed. "Re-engagement" means that the employee is re-engaged in a job that is comparable to their previous role. A Tribunal's decision to order reinstatement or re-engagement is based on various factors including: the employee's wishes; whether the employee contributed to the dismissal; and whether it is practicable for the employer to comply with the order.

What happened in this case?

The Claimant began working for the PGA European Tour (**PGA**) in 1989 as its Marketing Director. By 2015, he had been promoted to Group Marketing Director. Around the same time, PGA appointed a new Chief Executive who decided to dismiss the Claimant on performance grounds. The Claimant brought a claim of unfair dismissal and PGA conceded that the dismissal was procedurally unfair. Therefore, the Employment Tribunal proceeded to consider remedy.

The Claimant asked to be reinstated to his role or, alternatively, re-engaged in a comparable role. PGA argued that such an order should not be made because the Chief Executive had lost trust and confidence in the Claimant, stemming from his concerns about his performance and also his integrity (it had been discovered after the dismissal that the

Claimant had covertly recorded meetings with him).

The Tribunal declined to order reinstatement but concluded that PGA's concerns were not a barrier to re-engagement. In its view, the Claimant has 26 years' service and had not been given enough time to prove himself to the new Chief Executive. Further, the concerns about integrity could be overcome. It ordered that the Claimant be re-engaged in the role of "Commercial Director, China PGA European Tour", despite the fact that the Claimant could not speak Mandarin, which was required for the role. The fact that the Claimant was good at languages and was willing to learn Mandarin meant that it was still practicable to engage him in the role. PGA appealed the re-engagement order.

What was decided?

The EAT allowed PGA's appeal and overturned the re-engagement order.

The EAT rejected the argument that trust and confidence is only relevant to practicability where the dismissal was for conduct reasons – it could also be relevant to capability dismissals. A genuine loss of trust and confidence may mean re-engagement is not practicable. The relevant question was whether PGA had a genuine and rational basis for believing that trust and confidence had been lost. The Tribunal had gone wrong by considering for itself whether trust and confidence had been damaged; its role was to test whether PGA had the necessary genuine and rationally held belief.

The EAT also held that the Tribunal had gone wrong by substituting its own view on whether the ability to speak Mandarin was essential for the role. The Tribunal had failed to give weight to the employer's cogent commercial judgement in this respect. Where an employee does not meet an essential requirement of the role this will usually mean that re-engagement is not practicable.

The case will now be sent back to the Tribunal to decide what compensatory award should be made to the Claimant.

What are the learning points for employers?

Although orders for reinstatement or re-engagement are rare (they are made in less than 1% of cases), if ordered, they have serious consequences. Firstly, the employer will usually be ordered to make up all the employee's lost salary and benefits for the period between the date of dismissal and the date of the reinstatement or re-engagement. Secondly, the employer is faced with either taking back the dismissed (and probably unwanted) employee or refusing to comply with the order and paying an additional award of between 26 and 52 weeks' pay (on top of other compensation). The amount of a "week's pay" is capped for this purpose. Currently, the minimum award is £13,988 and the maximum award is £27,976.

Where there is a risk that an unfair dismissal complaint will be upheld, employers should turn their mind to how they would respond to an order of reinstatement or re-engagement. Employers who wish to argue that such an order is not practicable because trust and confidence has been irreparably damaged must be ready to demonstrate that: (i) they genuinely believe that to be the case; and (ii) that belief is not irrational. Helpfully, employers are able to rely on relevant events occurring after the dismissal if they have contributed to the loss of trust and confidence.

Kelly v PGA European Tour

If you would like to discuss any of the issues raised in this article or how BDBF can help your business navigate a dismissal process, then please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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