The role of trust and confidence in reinstatement and re-engagement

Emma Williamson looks at why it may not be practical to re-employ a dismissed employee even if this is what they want

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This article considers how a breakdown in mutual trust and confidence affects an application for reinstatement or re-engagement in a tribunal case. In the light of recent case law, it also sets out practical tips when dealing with such an application where trust and confidence is an issue.

Background

If a tribunal upholds a complaint of unfair dismissal, it must explain to the claimant what orders it can make to reinstate or re-engage them and ask them whether they wish any such order to be made (s112, Employment Rights Act 1996 (ERA)). This duty applies even if the claimant has not sought such a remedy in their ET1 claim form. The tribunal must first consider reinstatement and only move on to consider re-engagement if it considers that the former is not appropriate (s116 ERA). Under ss116(1) and (3) ERA, the tribunal should consider:

- the employee's wishes;
- whether it is reasonably practicable for the employer to comply with the order; and
- whether the employee contributed to the dismissal.

Tribunal orders for reinstatement or re-engagement are rare, being made in less than 1% of cases. The employment tribunal and Employment Appeal Tribunal (EAT) statistics for 2011/2012 show that only five such orders were made out of 5,100 cases which were upheld (compared with eight out of 4,200 in 2010/2011).

A key issue in relation to the first two considerations listed above is whether there has been a breakdown in mutual trust and confidence between the parties. In terms of the claimant's wishes, although many claimants tick the reinstatement or re-engagement box on the ET1 claim form, after a full hearing their desire to continue working for the employer may well have diminished. If it has not, trust and confidence is often the deciding factor in whether an order is reasonably practicable.

Practicability

Established case law flags the difficulties in balancing whether reinstatement or re-engagement is practicable against the inevitable consequence that there may be strained relations between the parties following a tribunal hearing.

Even if a claimant requests an order, it may not be practicable because they give evidence indicating

Remedies for unfair dismissal

Reinstatement means giving the employee their old job back and treating them in all respects as if they had not been dismissed.

Re-engagement means giving the employee a comparable role to their previous one or other suitable employment. The re-engagement must be on terms that are, so far as is reasonably practicable, as favourable as an order for reinstatement. However, the re-engagement does not necessarily need to be with the same employer and could be with a company in the same group, for example.

Compensation should be awarded if neither reinstatement nor re-engagement is appropriate. This will comprise a basic award to compensate the employee for loss of job security and possibly a compensatory award for financial loss.

that, from their perspective, trust and confidence has broken down. In *Nothman v London Borough of Barnet (no 2)* [1980], the EAT held that reinstating the claimant was 'unthinkable' because she had alleged that other staff members were involved in a conspiracy against her.

Alternatively, an order may be impracticable because trust and confidence has broken down from the respondent's perspective. In *Central and North West London NHS Foundation Trust v Abimbola* [2009], the EAT noted that the relationship of mutual trust and confidence is 'a two-way street'. In *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998], the EAT indicated that, even where the respondent's beliefs about the claimant are unfair, this may make re-engagement impracticable. It stated that:

> We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee.

However, whether a breakdown in trust and confidence makes re-engagement impracticable will still be decided on a case-by-case basis.

In *Johnson Matthey Plc v Watters* [2006], the tribunal stated that the employer will always have to 'swallow its pride' when it takes back an employee who has brought a successful tribunal claim. If that fact could thwart an application for re-engagement, the remedy would be of no practical effect.

Recent developments

Three recent cases set out some developments in this area which are worth noting.

Multi-establishment premises

In *Oasis Community Learning v Wolff* [2013], the parties had made a number of allegations against each other. The respondent asserted that the claimant had accused a number of its staff, including the chair of the board and members of HR, of fabricating evidence and collusion, among other things. A member of the respondent's HR team also gave evidence that the claimant was vindictive and vexatious. The respondent argued that neither reinstatement nor re-engagement were practicable in the circumstances.

The EAT dismissed the respondent's appeal against the tribunal's re-engagement order. It noted that the claimant:

- could work at a different school and so did not need to interact with the individuals with whom he had difficult relationships; and
- was 'willing and able' to commence work at the new school.

This case is important for employers with multi-establishment premises, as it indicates that re-engagement orders may be more practicable in such circumstances.

Breakdown in trust and confidence after the merits hearing

The EAT held in *Rembiszewski v Atkins Ltd* [2012] that the assessment of practicability should be made at the date the order would take effect, not at the date of the hearing. The EAT held:

> The parties made written submissions on whether the claimant's application for costs against the respondent was couched in such terms as to display a lack of trust and confidence in them. This was an issue which arose after the oral remedies hearing. Since a remitted hearing to determine whether an order for re-employment should be made will depend on relevant factors at the time such order would take effect, it would be appropriate for an [employment tribunal] also to consider the argument on absence of trust and confidence which was advanced by the respondent following the claimant's costs application.

The EAT indicated that, even where the respondent's beliefs about the claimant are unfair, this may make re-engagement impracticable.

This case shows that if there is a delay between the remedies hearing and the tribunal making an order, it is worth making further written

submissions if new evidence comes to light about trust and confidence which could affect the decision to make such an order. It builds on the decision in *Abimbola*, in which the EAT held that the tribunal should have taken the claimant's evasive and dishonest conduct during the remedies hearing into account when considering whether to make a reinstatement order.

Objective of vindication

The Inner House of the Scottish Court of Session recently considered an appeal against the EAT's decision that an order to reinstate a fingerprint officer in a high-profile misidentification case was perverse because of the considerable conflict between the parties (*McBride v Scottish Police Services Authority* [2013]). The court summarised the EAT's findings on trust and confidence:

> On the issue of practicability, the EAT noted that this was not simply a matter of possibility, but involved consideration of the extent to which reinstatement was a practical proposition. Matters such as the claimant being determined to vindicate her position or past significant tension between the claimant and employer were relevant, and where such factors existed, they considered that it would only be in the rarest of circumstances that reinstatement would be a practical proposition.

The court upheld the EAT's decision to overturn the tribunal's original reinstatement order. This was on the basis that the tribunal had attached conditions, which is only possible with a re-engagement order, which the claimant did not request. The court, however, found that the EAT had wrongly substituted its own views on trust and confidence on the facts of the case and that the tribunal's decision was not perverse. The case was therefore remitted to the same tribunal to assess compensation.

Practical tips

For claimants seeking an order

- If a claimant's evidence indicates mistrust in the respondent (as per *Nothman*) or that the claimant's objective as vindication (as per *McBride*), an order will be less likely.
- Johnson Matthey highlighted factors which suggested continued trust and confidence and which may assist a claimant in applying for a re-engagement order:
  - the dismissal concerned an isolated incident and there was no breakdown in relationships in the workplace;
  - the claimant gave evidence that he was willing to 'draw a line' under the events;
  - the employee's colleagues gave evidence that they supported him; and
  - the employee did not have to report to either of the managers involved in his dismissal.
- If the employer has a number of premises, the claimant's advisers could consider asking for re-engagement at a different location, as the tribunal may consider this more practicable following *Oasis*.

For respondents resisting an application

- Making an offer to re-engage can be a useful negotiating tool. In *Debique v Ministry of Defence* [2011], the EAT reduced the claimant's compensation for loss of earnings flowing from an upheld discrimination complaint to zero after she had unreasonably refused re-engagement. However, if a respondent offers redeployment (on an open basis), it will 'be impossible' to argue that there has been a breakdown of mutual trust and confidence, as the Court noted in *McBride*.
- If there are no facts supporting a breakdown in trust and confidence before the hearing but the claimant's conduct during the hearing or subsequently supports such a breakdown, it may be worth advancing an argument about practicability at that stage. Evidence may be presented demonstrating that trust has broken down from the claimant's perspective, as per *Rembiszewski*, or from the respondent's perspective, as per *Abimbola*. ■

If there is a delay between the remedies hearing and the tribunal making an order, it is worth making further written submissions if new evidence comes to light about trust and confidence.

Central and North West London NHS Foundation Trust v Abimbola [2009] UKEAT/0542/08/LA

Debique v Ministry of Defence [2011] UKEAT/0075/11/SM

Johnson Matthey plc v Watters [2006] UKEAT/0236/0237/0910

McBride v Scottish Police Services Authority [2013] ScotCS CSIH 4

Nothman v London Borough of Barnet (no 2) [1980] IRLR 65

Oasis Community Learning v Wolff [2013] UKEAT/0364/12 and UK EAT/0365/12

Rembiszewski v Atkins Ltd [2012] UKEAT/0402/11/ZT

Wood Group Heavy Industrial Turbines Ltd v Crossan [1998] IRLR 680