

## Re-Engagement may not be suitable if an employer has lost trust in an employee's abilities

The Claimant in this case brought a claim of unfair dismissal and PGA European Tour (PGA) conceded that the dismissal was procedurally unfair. The Employment Tribunal was only left to consider remedy.

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The Claimant was employed by the PGA European Tour (PGA) since 1989 as Marketing Director. By 2015, the Claimant was Group Marketing Director. That same year, following a strategic review, PGA appointed a new Chief Executive Officer (CEO) of the Group. The CEO had concerns over the Claimant's performance, as a result of which he was terminated within 2 months of the CEO's appointment. The Claimant brought a claim of unfair dismissal and PGA conceded that the dismissal was procedurally unfair. The Employment Tribunal (ET) was only left to consider remedy.

The Claimant requested to be reinstated to his role or, alternatively, re-engaged in a comparable role.

PGA argued that this was impracticable and that no such order should be made due to the loss of trust and confidence in the Claimant stemming from the CEO's concerns about his performance and also his integrity (he recorded meetings covertly).

The ET ordered that the Claimant be re-engaged in the role of Commercial Director, China, which was one that he had identified to be of interest. This was on the basis that the Claimant had a proficiency in foreign languages and was keen to learn Mandarin.

Unhappy with the order, PGA appealed to the Employment Appeal Tribunal (EAT). The question for the tribunal was whether it was practicable to order PGA to re-engage Mr Kelly.

The EAT found that the ET had wrongly imposed its own view as to whether the concerns regarding the Claimant's capability and conduct were rational and genuinely held so as to undermine trust and confidence. It had also incorrectly substituted its own view as to whether the ability to speak Mandarin was key for the Claimant's re-engagement. This decision was held to fall on the wrong side of the line between what is practicable and what is possible. The EAT substituted the ET's order accordingly.

The EAT's judgement here in respect of this remedy hearing provides a reminder to employers and employees of the importance of trust and confidence in an employment relationship, which is an implied term of all employment contracts. This case follows earlier decisions. It is a useful reminder that where an employer genuinely and rationally believes that it has lost trust and confidence in an employee, or that it has good reason for considering that an employee is not qualified for a particular alternative role, they will not be required by an employment tribunal to re-engage that employee.

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