Neutral Citation Number: [2021] EWCA Civ 559

Case No: A2/2020/1559

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HHJ AUERBACH

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2021

Before :

LORD JUSTICE UNDERHILL
(VICE-PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION))
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

- -

Between :

SCOTT KELLY	**Appellant**
- and -	
PGA EUROPEAN TOUR	**Respondent**

- -
- -

David Mitchell and Philippe Kuhn (instructed by **M Law LLP**) for the **Appellant**
Paul Nicholls Q.C. (instructed by **Fox Williams LLP**) for the **Respondent**

Hearing date: 30 March 2021

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 19th April 2021 at 10:30am.

Lord Justice Lewis:

Introduction

1. This appeal concerns the proper approach to the making of orders for the re-engagement of employees who have been unfairly dismissed. I will refer to the appellant and the respondent as the claimant and respondent as they were referred to in the tribunals below.

2. In brief, the claimant, Scott Kelly, was unfairly dismissed from his post as Group Marketing Director for the PGA European Tour. The employment tribunal held, however, that he had not been dismissed by reason of his age. The tribunal ordered that he be re-engaged in the vacant role of Commercial Director, China. The claimant sought a reconsideration of the decision contending, amongst other things, that the respondent should also have disclosed the existence of other comparable or suitable positions which had been already been filled prior to the remedies hearing. That request was refused by the employment tribunal.

3. The Employment Appeal Tribunal ("EAT") allowed an appeal by the respondent against the order for re-engagement. The EAT held, so far as material to this appeal, that re-engagement would not be practicable if the employer genuinely and rationally believed that the employee would not be capable of fulfilling the role the employer wished him to perform or that the employee's conduct had led to a breakdown in trust and confidence. The EAT held that it was not open to the employment tribunal to order re-engagement as that was inconsistent with the facts found at the liability hearing in deciding that the reason for dismissal was not the claimant's age. The employment tribunal had found as a fact that the respondent had genuinely believed that the claimant was not capable of fulfilling the role it wished him to perform and that that was a rational view. The EAT also concluded that the employment tribunal had erred in ordering re-engagement to the role of Commercial Director, China as it had found as a fact that an essential requirement of the post was that the holder be able to speak, write and read Mandarin and the claimant could not do that. The EAT set aside the order for re-engagement. It did not consider it necessary to remit the matter to the employment tribunal as the only legally correct outcome given the findings of fact was that re-engagement should not have been ordered.

4. The EAT also held that the employment tribunal had wrongly failed to consider whether there was a chance that the claimant would have been fairly dismissed in any event and remitted that matter to the employment tribunal to consider that issue when assessing compensation. Finally, the EAT held that the respondent was only required to disclose vacancies existing at the time of the remedies hearing and it was not required to disclose other comparable or suitable posts that had already been filled by that date. It therefore dismissed the claimant's appeal against the employment tribunal's refusal to reconsider its decision. The claimant appeals against all those rulings. We had written and oral submissions from Mr Mitchell for the claimant. We had written submissions from Mr Nicholls Q.C. for the respondent but it was not necessary to call on him for oral submissions.

The Legal Framework

5. A complaint that a person has been unfairly dismissed may be brought in an employment tribunal which may, if the complaint is upheld, award one or more of the remedies provided for in Chapter II of Part X of the Employment Rights Act 1996 ("the Act"). The remedies include an order for re-instatement or re-engagement: see section 113 of the Act. An order for reinstatement is an order that "the employer shall treat the complainant in all respects as if he had not been dismissed": see section 114 of the Act.

6. An order for re-engagement is dealt with by section 115 of the Act which provides, so far as material, that:

> "(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.
>
> "(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—
>
> (a) the identity of the employer,
>
> (b) the nature of the employment,
>
> (c) the remuneration for the employment,
>
> (d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,
>
> (e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and
>
> (f) the date by which the order must be complied with."

7. Section 116 of the Act deals with the order in which reinstatement and re-engagement should be considered and provides that certain material considerations should be taken into account when deciding whether to make such an order. It provides that:

> "(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—
>
> (a) whether the complainant wishes to be reinstated,
>
> (b) whether it is practicable for the employer to comply with an order for reinstatement, and
>
> (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.
>
> (2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

> (3) In so doing the tribunal shall take into account—
>
> > (a) any wish expressed by the complainant as to the nature of the order to be made,
> >
> > (b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and
> >
> > (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.
>
> (4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.
>
> (5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.
>
> (6) Subsection (5) does not apply where the employer shows—
>
> > (a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or
> >
> > (b) that—
> >
> > (i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and
> >
> > (ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement."

8. "Practicable" in this context means that reinstatement or re-engagement is not merely possible but capable of being carried into effect with success: see *Coleman and Stephenson v Magnet Joinery Ltd* [1975] I.C.R. 46 at 52B-C, dealing with the predecessor legislation to the Act.

9. In the event that an employer fails to comply with an order for re-instatement or re-engagement, the employment tribunal will then calculate the amount of compensation payable in respect of the unfair dismissal and the employer must pay an additional award of compensation (calculated in accordance with section 117 of the Act) unless "the employer satisfies the tribunal that it was not practicable to comply with the order": see section 117(4) of the Act. In that way, an employer has a second opportunity to persuade the employment tribunal that an order of re-instatement or engagement is not practicable.

The Factual Background

10. The claimant was employed by the respondent as the Marketing Director of the PGA European Tour in 1989. His remit was to expand its marketing department and commercial partnerships. He performed that role successfully and was employed by the respondent for 26 years. He became Group Marketing Director in 2015 and had overall responsibility for the PGA European Tour's commercial operations.

11. A new chairman was appointed in May 2014 and a strategic review of the respondent was carried out by business consultants. In April 2015, the appointment of Mr Keith Pelley as the new chief executive officer was announced. Mr Pelley met the respondent's senior leadership team prior to taking up the appointment in August 2015. In October 2015 Mr Pelley had two meetings with the claimant. He told the claimant that he would like him to consider retiring at the end of the year but to continue his relationship with the respondent by becoming a consultant on a tournament in Morocco. The claimant secretly recorded the two meetings although this fact did not emerge until after he had been dismissed.

12. By letter dated 27 October 2015, the respondent dismissed the claimant with effect from 30 October 2015. The claimant brought a complaint in the employment tribunal alleging that he had been unfairly dismissed and discriminated against on grounds of his age. He sought re-instatement or re-engagement. By letter dated 24 June 2016, the respondent accepted that it had unfairly dismissed the claimant as it had not conducted a fair procedure prior to dismissal.

13. The claimant continued with his claim for age discrimination. That was the subject of a four-day hearing before an employment tribunal comprised of Employment Judge Gumbiti-Zimuto and two lay members, Mrs Brown and Ms Edwards. The tribunal received written evidence and heard evidence from, amongst others, the claimant and Mr Pelley. It recorded that the complaint of unfair dismissal had been admitted. It decided that the complaint of age discrimination was not well founded and dismissed that claim. Its decision was the subject of an unsuccessful appeal to the EAT. The EAT (the President, Choudhury J sitting alone) analysed the decision carefully, identifying the findings of fact that the employment tribunal had made, and concluded that the employment tribunal had not erred in finding that the reason for the claimant's dismissal was not his age and it had given adequate reasons for its decision.

The Employment Tribunal's Decision on Liability

14. For present purposes, the following are the key issues, findings of fact and conclusions reached by the employment tribunal. First, it noted that the respondent had conceded that it had unfairly dismissed the claimant and the only matter that the employment tribunal had to decide at that stage was whether he was discriminated against on the grounds of age. As it noted, the "sole issue for us to determine is whether the claimant's age was a reason for his dismissal" (see paragraph 1 of the liability decision). It concluded that the claimant had proved facts from which it could conclude that there was discrimination on grounds of age and therefore looked to the respondent for a reason for dismissal that was not age (see paragraph 46 of the decision).

15. Secondly, in considering that issue, the employment tribunal made certain findings of fact. These included that:

(1) Mr Pelley had formed the opinion that the claimant was lacking confidence, wasted time on fruitless projects or ventures, had no vision, no current marketing knowledge and his team did not back him; Mr Pelley formed that opinion from his own observations of the claimant's work, and from negative comments from employees about the work of the commercial team in that it lacked direction, there was a lack of commercial initiative and the team was leaderless, and from board members and members of the senior leadership team about the claimant (see paragraph 17 of the liability decision and paragraph 27(b) of the decision of Choudhury P in the EAT);

(2) Mr Pelley believed that the claimant's approach to commercial operations did not involve any proper analysis of data or any sophisticated analysis of categories (see liability decision at paragraph 15, and paragraph 27(b) of the decision of Choudhury P in the EAT).

16. The employment tribunal's conclusion on whether age was the reason for dismissal are set out at paragraphs 53 to 56 of the liability decision in the following terms:-

> "53. The positive reason given by Mr Pelley is that the claimant was not suitable for the role of commercial director. The evidence before us exposed numerous references to the claimant's ability being an issue for Mr Pelley. The claimant asks us to conclude that this is an after the fact rationalisation because there was no fair reason for the dismissal. We do not accept that. Mr Pelley carried out his own due diligence before he joined the respondent and formed a view of concern about the respondent's commercial performance. On meeting the Claimant Mr Pelley was concerned about the claimant's attitude to sponsorship revenues which was 100% reactive. Mr Pelley received negative feedback on the claimant from the claimant's team. Mr Pelley formed his own unfavourable view of the claimant's performance. The claimant himself refers to incidents with Mr Pelley in which Mr Pelley makes critical observations to the claimant about matters related to his performance, which on at least one occasion was expressed in writing (p119).
>
> "54. Mr Pelley considered the claimant had not bought into his ideas and this was a matter he considered. The Respondent argues that an email exchange between the Claimant and Mr O'Grady supports that view. We do not accept that the email we were referred does make that position clear, however, we accept the evidence given by Mr Pelley, that the Claimant had not bought into his ideas, was a genuine expression of his view that the Claimant had been unable to embrace a change of CEO.
>
> "55. We have also considered the fact that the respondent has failed to carry out any fair procedure to deal with a capability dismissal. The fact that the respondent's conduct was unfair does not support a view that there was discrimination on the grounds of a protected characteristic. Mr Pelley had approval of the board to decide his team having formed his view of the claimant he

> decided to follow it through quickly. The failure to follow a reasonable procedure is not necessarily indicative of discrimination. It may indicate a closed mind but it does not assist in concluding why the decision to dismiss was taken.
>
> "56. The conclusion of the Tribunal is that having heard the evidence of the respondent and in particular Mr Pelley whose evidence we have accepted we are satisfied that the respondent has proved that there was no contravention of the Equality Act 2010".

17. The matter is pithily expressed by Choudhury P in his judgment in the EAT. He concluded that the claimant lost his case:

> "because the Tribunal accepted that Mr Pelley's reasons for dismissal was his concern that the Claimant was not capable of fulfilling the role that Mr Pelley wished him to perform."

The Remedies Hearing

18. There was then a remedies hearing, over two days, in January 2018. The claimant sought to be re-instated in his job as Group Marketing Director or to be re-engaged in another role. There was evidence of a number of posts which were vacant at the date of the remedies hearing, including the post of Commercial Director, China.

19. The employment tribunal found that the claimant's role of Group Marketing Director had ceased to exist and the role had been substantially replaced by the role of Chief Commercial Marketing Officer (see paragraph 37 of the remedies decision). The employment tribunal unanimously decided that it was not practicable to reinstate the claimant as the structure of the Tour had evolved, the way of working had changed, and the claimant's precise job no longer existed (paragraph 57 of the remedies decision).

20. In terms of re-engagement, the remedies decision records at paragraph 52 that:

> "The Tribunal has gone on to consider if there are any roles in which the claimant could be re-engaged. The Tribunal concludes that the only role in respect of which there is a realistic possibility of successful re-engagement is the Commercial Director, China, role."

21. There were, effectively, three reasons why the respondent contended that it should not be ordered to re-engage the claimant in that role. First, Mr Pelley did not believe that the claimant would be able to perform a role in the respondent's senior leadership team in the way he, Mr Pelley, would require. Secondly, Mr Pelley had lost trust in the integrity of the claimant by reason of the fact that the claimant had secretly recorded their discussions and Mr Pelley did not believe that he could work with him in future. Thirdly, in relation to the Commercial Director, China, role in particular, the role required a person who could speak, write and read Mandarin and the claimant could not. The claimant had said in evidence that he would be willing to relocate to Beijing in order to perform the role. He did not speak Mandarin but had what he described as a "modest navigation of Japanese" and his facility with languages might assist him in

being able to learn Mandarin. In practical terms, the claimant gave evidence that he would have to work with an interpreter or translator whilst he was learning the language.

22. The majority of the employment tribunal decided that it was practicable to order re-engagement of the claimant in the role of Commercial Director, China. The minority disagreed. The reasoning of the employment tribunal on the three reasons put forward by the respondent for not ordering re-engagement were as follows:

> "57. The view of the majority is that issue of trust and confidence arising from doubts about the claimant's capability and his integrity arising from the covert recordings are not so significant as to make it impracticable for the claimant to be re-engaged. The majority consider that when tested those matters are not so serious as to prevent the claimant's reemployment in a suitable role.
>
> "58. The view of the majority is that there is no reasonable basis for concluding that the claimant did not have the ability to perform the role required by the Tour in his old role (Group Marketing Director). Mr Pelley did not give the claimant the opportunity to prove himself capable or incapable of working in the new regime that Mr Pelley instituted. He formed a view that the claimant was not capable and dismissed without more.
>
> "59. The majority consider that concerns alleged about the claimant's ability are necessarily emphasised by the respondent due to the nature of this litigation. The majority do not consider that they necessarily reflect reality. The claimant had 26 years of successful service with the Tour and at the point of his dismissal was considered of sufficient competence to be offered a role as a consultant on the Morocco tournament, a prestigious and important event, for a period of three years. The majority do not consider that the Tour was likely to agree to this merely to effect an elegant exit for the claimant. While there may have been concerns about the claimant's style, the majority do not consider that it has been established that there was concern about the claimant's ability to do the job that withstands scrutiny.
>
> "60. The question of trust arising from the covert recordings and any other residual issues from the litigation could be overcome by all if reasonable professional behaviour is maintained. The covert recordings were merely a covert recording. There was no underhand attempt to exploit the fact that the recording was made. There was no attempt to unfairly exploit the circumstances. The majority echo the sentiments of Mr Schofield on this issue.
>
> "61. While there has undoubtedly been tension created by the dismissal and the employment tribunal process, and there may have been historic issues relating to the claimant's performance,

> but it is the view of the majority that it has not been established by the respondent that there has been such a fracturing of relationships that the claimant could not return to work with the respondent.
>
> …..
>
> "64. The China PGA role is a role which the Tribunal considers the claimant could fulfil. Considering the nature of the role and the claimant's personal attributes, the Tribunal is satisfied that it is a role that the claimant could potentially perform. The area of reservation in relation to this role arises from the fact that the role is based in China and it is expressed by the respondent as being a role for which a Chinese speaker is required.
>
> "65. In respect of this part of the case, the majority view is that the Claimant's expressed willingness to learn added to his proficiency in languages mean that is practicable for the claimant to be re-engaged in the role of China PGA role."

23. The minority view was that it was not practicable to order re-engagement of the claimant for the following reasons:

> "54. Mr Pelley does not have confidence in the claimant to perform the role as he requires it. He does not trust the claimant's ability. While the claimant can correctly state that he was not put through a capability procedure which would have highlighted shortcomings and given him an opportunity to improve, the views held by Mr Pelley were genuine and formed as a result of his observation of the claimant's work.
>
> "55. Further, the covert recordings of the meetings have resulted in a loss of trust in the claimant on the part of Mr Pelley.
>
> "56. The absence of trust in the claimant's ability and integrity, in the view of the minority, means it is not reasonably practicable to reinstate the claimant. Reinstating the claimant would require him to work closely with Mr Pelley."

and on the role of Commercial Director, China,

> "66. The view of the minority is that while in general terms, the claimant is the possessor of the skill set required for the role, he is deficient in one significant respect relating to the person specification. The job profile states that "bilingual essential (spoken, written, listening), Mandarin and English (Cantonese is preferred but not essential). The person profile makes clear that the person filling this job has to have those language skills. The

> minority notes that the outgoing holder of the equivalent position was a Chinese speaker. The minority also takes into account the evidence which was given by Mr Pelley as to what the expectations were in relation to this role - "a person with cultural knowledge of China to be able to identify benefit to the Tour."
>
> "67. The view of the minority is that whilst the claimant in broad terms has the skills required for this job, the absence of the language skills is such that in reality it would not be practicable for the claimant to be engaged in this role. For that reason, the minority view is that the claimant cannot be re-engaged in this role."

24. The employment tribunal also considered whether there were factors which would enable it to form the view that the claimant would have been dismissed in any event either at or shortly after the date of dismissal had a fair procedure been followed. That would have affected the calculation of any compensation payable to the claimant pursuant to the decision in *Polkey v AE Dayton Services Ltd* [1988] A.C. 344 ("the *Polkey* reduction"). It concluded that:

> "75. We accept the submission put forward by the claimant that the respondent in the way that it chose to deal with him deprived him of the opportunity of being able to demonstrate that he was capable of performing a role going forward in the way that Mr Pelley would have wished. We accept his position that he did not have the opportunity that Mr Hills and Mr Walters were given to prove themselves.
>
> "76. We are unable to form conclusions that support of a *Polkey* reduction. The issues presented to us at the liability hearing turned principally on the question of whether the claimant was dismissed in a discriminatory manner. While the Tribunal made a number of findings in respect of the reasons for the claimant's dismissal. We were not considering whether those reasons would have resulted in a fair dismissal."

The Request for Re-consideration

25. The claimant applied to the employment tribunal to reconsider its decision on two grounds. First, he contended that the respondent should have disclosed details of all the positions that had been filled by the respondent between the date of the presentation of the complaint to the employment tribunal and the remedies hearing so that the tribunal could consider if it were practicable to order re-engagement in one of those posts. Secondly, he asked the tribunal to clarify its order for re-engagement so that he was to be re-engaged on terms that "he had the assistance of an interpreter and/or language lessons" as that was the basis on which the claimant had said that he could perform the Commercial Director, China role. The employment tribunal refused the request for reconsideration.

The Appeal to the EAT

26. The respondent appealed against the order that it re-engage the claimant. The claimant appealed against the refusal to reconsider the remedies decision. In a clear, thorough and impressive judgment, HHJ Auerbach, sitting alone in the EAT, concluded in summary as follows.

27. First, the EAT held that it may not be practicable to order re-engagement of an employee if the employer genuinely and rationally believes that the employee lacks the ability to perform the role and/or has lost trust in the employee. Secondly, the employment tribunal was required to have regard to findings of fact made by it at the liability hearing in considering whether re-engagement was practicable. Thirdly, in the present case, the tribunal had erred in deciding that it would be practicable for the claimant to work with the respondent in future, by substituting its view for the respondent's as to the capability of the claimant, and as to whether they had lost trust in him because of the secret recordings of meetings, in deciding that it would be practicable for the claimant to work with the respondent in future. It had not had regard to relevant findings of fact made at the liability hearing. Further, the employment tribunal had found that an ability to speak, read and write Mandarin was an essential requirement for the role of Commercial Director China. In those circumstances, the tribunal erred in concluding that it was practicable to order the respondent to re-engage the claimant in that role when he did not meet an essential requirement for the post.

28. The EAT accordingly allowed the appeal against the order for re-engagement and, as the only possible conclusion was that it was not open to the employment tribunal on the facts as found by it to order re-engagement, it declined to remit the question of re-engagement to the employment tribunal. It also found that the employment tribunal erred in failing to consider whether on the evidence the claimant would at some stage have been dismissed fairly in deciding whether any deduction should be made to the compensation to be paid to the claimant in respect of the unfair dismissal.

29. The EAT dismissed the claimant's appeal. It held that it would not in general be practicable to order re-engagement to positions that had already been filled at the time of the remedies hearing. On a proper interpretation of section 116(5) of the Act, an employment tribunal was only required to disregard the fact that a respondent had appointed a replacement for the claimant and would not be required to disregard the fact that other posts had become vacant but had been filled by the time of the remedies hearing.

The Appeal

30. The claimant appealed against the decision of the EAT on five grounds. They are:

    (1) The EAT misapplied section 116(5) of the Act;

    (2) The EAT erred by (a) wrongly treating the employment tribunal's findings at the liability stage as creating an issue estoppel binding on its remedy decision (b) misapplying the decision in *United Lincolnshire NHS Foundation Trust v Farren* [2017] I.C.R. 513 and (c) otherwise substituting the EAT in the role of the employment tribunal as the fact-finding tribunal;

(3) The EAT impermissibly applied the perversity test;

(4) The EAT erred in its application of the decision in *Polkey v AE Dayton Services Ltd.* [1988] A.C. 344;

(5) The EAT erred procedurally in that the issue of whether re-engagement was practicable should have been remitted to the employment tribunal for reconsideration rather than having the EAT substitute its own decision.

31. The respondent sought to uphold the decision of the EAT on an additional ground, namely that by requiring it to re-engage the claimant as Commercial Director, China, it required the respondent to create a job for the claimant, there being no job for a commercial director who did not speak Mandarin.

The First Ground – The Proper Interpretation of Section 116 of the Act.

Submissions

32. Mr Mitchell, for the claimant, submitted that the practicability of an employer complying with an order for re-engagement under section 116(3)(b) of the Act is not affected by the fact that an employer has appointed replacements to fill staff vacancies occurring during the period following an unfair dismissal. He submitted that section 116(5) permitted the employment tribunal to disregard the fact that the employer has engaged a permanent replacement for a dismissed employee. That applies to orders for re-instatement and re-engagement. An order for re-engagement is an order for the engagement of the dismissed employee in comparable or suitable alternative employment. Consequently, he submitted, an employer must disclose, and an employment tribunal must consider, re-engagement in any comparable or suitable alternative employment arising after the date of dismissal and prior to the remedies hearing even if the post had been filled by the time of the remedies hearing. In response to questions during argument, Mr Mitchell indicated that at the very least, where there had been a re-structuring and parts of the claimant's job were carried out by different employees, a respondent must disclose, and an employment tribunal consider, posts which involved the holder carrying out at least some of the tasks previously carried out by the dismissed claimant. Mr Nicholls Q.C. for the respondent submitted in his written skeleton argument that the EAT had correctly interpreted section 116 of the Act. In particular, he submitted from sections 116(5) and (6) read as a whole that section 116(5) is concerned with persons who have been appointed to replace the dismissed employee, that is, the claimant, not persons who have been appointed to fill other posts which might, if available, have offered been comparable or alternative employment.

Discussion

33. An order for re-engagement is an order that an employer engage a dismissed employee in employment comparable to that from which the employee was dismissed or other suitable employment (see section 115(1) of the Act). The employment tribunal must specify the terms upon which re-engagement is to take place including the nature of the employment and the date by which the employer must comply with the order (see section 115(2)(b) and (f) of the Act). Section 116(3)(b) of the Act requires an employment tribunal to take account, amongst other things, of whether it is practicable for an employer to comply with an order for re-engagement.

34. In general terms, when considering whether to make an order for re-engagement, an employment tribunal will be considering the position as at the date of the remedies hearing. It will be considering whether it will be practicable for an employer to re-engage a person by the time stipulated in the order. If comparable or suitable alternative posts had become vacant, but had been filled before the remedies hearing, then it would not be practicable to order the employer to engage the dismissed employee in one of those posts. The employer could not realistically employ someone to perform a role if someone else was already employed in that role.

35. Mr Mitchell submitted that section 116(5) of the Act refers to re-instatement and re-engagement. That, he submitted, must mean that it includes comparable or suitable alternative employment done by other employees who have been permanently replaced. It is correct that section 116 deals with re-engagement in comparable or suitable alternative employment. But that does not mean that Parliament intended that an employment tribunal must look at all potential comparable or alternative roles previously carried out by other employees whether or not those roles were available at the time of the remedies hearing. There is nothing unusual, or surprising, in legislation requiring employment tribunals to consider if there were any comparable or suitable alternative employment vacancies available at the time of the remedies hearing whilst not requiring tribunals to consider comparable or suitable posts previously held by other employees who had been permanently replaced by the time of the remedies hearing.

36. Furthermore, section 116 of the Act must be considered as a whole. The interpretation put forward by the claimant is inconsistent with section 116(5) and (6) of the Act. Section 116(5) provides that where the employer "has engaged a permanent replacement for a dismissed employee", the employment tribunal shall not take account of that fact. It is clear from section 116(6)(b)(i) of the Act that the reference to "a dismissed employee" is a reference to the dismissed employee who is claiming that he has been unfairly dismissed. That subsection refers to the employer not having heard "from the dismissed employee that he wished to be reinstated or re-engaged". That must be a reference to the claimant for unfair dismissal for it is that person who may express a wish to be reinstated or re-engaged. If the employer has employed a replacement for the claimant, then the legislation specifically provides that that fact must be disregarded unless one of the qualifications in section 116(6) of the Act applies, e.g. it was not practicable for the dismissed employee's (i.e. the claimant's) work to be done without engaging a permanent replacement. That, however, indicates that the legislation did not require an employment tribunal to have regard to comparable or suitable posts held by *other* employees where any vacancies had been filled by the time of the remedies hearing. In particular, the legislation does not require employment tribunals to ignore the fact that the employer had already replaced those other employees in deciding whether it was practicable to order re-engagement.

37. Mr Mitchell, in oral argument, indicated that there may be cases where there has been a restructuring so that the work of the dismissed employee is carried out by more than one employee. I recognise that there may be an argument that section 116(5) of the Act would require an employment tribunal to disregard the fact that the employer has appointed more than one permanent replacement for the claimant. That, it could be said, would be consistent with section 116(6) of the Act which refers to whether it was practicable for the "work of the dismissed employee" to be done without engaging a permanent replacement. However, it is not necessary to reach a decision on that issue

as it is clear that that was not the case the claimant was advancing for the following reasons.

38. First, the basis for the request for reconsideration was that the respondent was required to disclose all the vacancies that had been filled between the presentation of the complaint for unfair dismissal and the remedies hearing. It was not limited to any posts which might involve doing work previously carried out by the claimant prior to his dismissal. The aim of the request was to see if there were any comparable or suitable alternative posts which had been filled prior to the remedies hearing. Secondly, it is clear from paragraph 37 of the remedies decision that the role of Group Marketing Director previously performed by the claimant had been substantially replaced by the role of Chief Commercial Marketing Officer. There was no order that the claimant be re-engaged in that role (and no appeal against any failure to make such an order). Further, we were told that counsel for the claimant did not cross-examine Mr Pelley during the remedies hearing as to where any other elements of the claimant's work had gone. Thirdly, it is clear that the appeal to the EAT was, and was understood by the EAT to be, a claim that section 116 of the Act required the employment tribunal to consider suitable vacancies arising in respect of other employees prior to the remedies hearing albeit that those vacancies had been filled by the time of the remedies hearing. See, for example, paragraphs 22 and 118 of the judgment of the EAT. Fourthly, it is clear from the grounds of appeal and the claimant's written skeleton argument, that the issue before this Court was whether the employment tribunal had to have regard to a vacancy in other comparable or suitable employment which had become available prior to the remedies hearing and to disregard the fact that such a vacancy had been filled (unless the employer could show that the qualifications in section 116(6) applied to the replacement for that other employee). For the reasons given, an employment tribunal considering whether to order re-engagement is required to consider, amongst other matters, whether there is other comparable or suitable employment available at the date of the remedies hearing date; it is not required to consider vacancies which had arisen but had been filled prior to the remedies hearing.

The Second Ground – The Correct Approach to Re-Engagement

Submissions

39. Mr Mitchell submitted that the EAT was wrong to find that the employment tribunal erred in its approach to ordering re-engagement in this case. First, Mr Mitchell submitted the EAT was wrong to apply the decision in *Farren* to this case. There, the EAT had held that it would not be practicable to order an employer to re-engage an employee where the employer had a genuine and rational belief that the employee had engaged in conduct which had led to a breakdown in trust and confidence. He submitted that those principles did not apply to a situation such as the present where it was said that the fact that the respondent had doubts about the capability of an employee justified a conclusion that re-engagement was not practicable. Furthermore, in relation to conduct, such as the secret recording by the claimant of meetings, that could only justify a conclusion that it was not practicable to order re-engagement in extreme cases where the misconduct was capable of amounting to a breach of trust and confidence.

40. Secondly, Mr Mitchell submitted that the EAT erred by treating the employment tribunal's decision at the liability stage as giving rise to an issue estoppel which was binding on the tribunal when it came to give its decision on remedies. This was not a

case where the claimant had been dismissed for misconduct. Nor had the employment tribunal found that he had been dismissed for a reason related to his capability as that matter had not been the subject of adjudication by the tribunal because the respondent had conceded that the dismissal was unfair for procedural reasons. The tribunal had only dealt with, and decided, the issue of whether the dismissal was by reason of the claimant's age. That did not bind the employment tribunal when it came to consider whether re-engagement was practicable. Finally, he submitted that the EAT had subjected the factual findings of the employment tribunal to an overly-critical analysis and, in effect, impermissibly substituted its own view of the facts for that of the employment tribunal contrary to the guidance given in cases such as *Fuller v London Borough of Brent* [2011] I.C.R. 806 and *Volcafe Ltd and others v Compania Sud Americana de Vapores SA* [2019] A.C. 358.

41. Mr Nicholls submitted in his written skeleton argument that the EAT was correct to hold that the principles in *Farren* did apply in the circumstances of this case. Further, the EAT was correct to hold that the employment tribunal had erred in its application of those principles and acted contrary to the findings of fact it had made at the liability stage.

Discussion

42. One of the matters that an employment tribunal must take into account when considering whether to order re-engagement is whether it is practicable for the employer to comply with the order and re-engage the employee (see section 116(3)(b) of the Act). In *Wood Group Heavy Industrial Turbines Ltd. v Crossan* [1998] I.R.L.R. 689, the employer genuinely believed that an employee had used and dealt in drugs at the workplace (although it had not carried out a fair investigation into that allegation). The EAT held at paragraph 10 of its judgment that:

> "it is not practical to order re-engagement against the background of the finding that the employer genuinely believed in the substance of the allegations. It may seem somewhat incongruous that where a tribunal goes on to categorise the investigations into the belief as unfair or unreasonable, nevertheless, the original belief can found a decision as to remedy and the practicality of re-engagement, but it is inevitable to our way of thinking that when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist between an employer and employee, inevitably broken by such investigations and allegations can be satisfactorily repaired by re-engagement or upon re-engagement. 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. Even if the way the matter is handled results in a finding of unfair dismissal, the remedy, in that context, invariably to our minds will be compensation."

43. The way in which employment tribunals should approach the issue of practicability in this context was considered by the EAT in *Farren*. There, the employer, an NHS Trust,

believed that a nurse had administered medication to patients without prior prescription, contrary to the trust's policy. The employment tribunal had accepted that the employee had administered drugs in breach of the trust's policy but considered that the employee had long service, had undertaken training and understood the importance of the policy on administration of medication and, in the view of the tribunal, the employee could be trusted to act properly in an environment other than an accident and emergency unit, given her experience, record and professional commitment. On appeal against that conclusion, the EAT held:

> "40. That, however, was not the correct question for the tribunal. As the case makes clear (see *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680, para 10, cited at para 24 above), it had to ask whether this employer genuinely believed that the claimant had been dishonest, and—per the Employment Appeal Tribunal in, 27 April 2000 , para 14 (see para 25 above)—whether that belief had a rational basis. It was, after all, *this* employer—not some other and certainly not the employment tribunal—that was to re-engage the claimant. The issue of trust and confidence 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, whether it was capable of being carried into effect with success, whether it could work. The trust might have reached a conclusion as to the claimant's honesty by an impermissible route in its dismissal decision and might also have drawn the wrong inference at the rehearing, but the tribunal still needed to ask, as at the date it was considering whether to order re-engagement, whether it was practicable or just to order *this* employer to re-engage the claimant. It thus was the trust's view of trust and confidence—appropriately tested by the employment tribunal as to whether it was genuine and founded on a rational basis—that mattered, not the tribunal's.

> "41. We make clear that we are not saying that we find that a re-engagement order was not a permissible remedy in this case. The answer did not have to be in the negative simply because the tribunal had found that a fundamental part of the substantive charge against the claimant had been made good or because it had concluded that her compensation should be reduced by a third, given her contributory conduct, or because it had refused to order reinstatement. These were all relevant considerations but were not necessarily determinative and we would not have allowed the appeal simply on those bases. In particular, we observe that stating the bare facts of a case can seem to suggest a particular answer, but the assessment of practicability for the purpose of a re-engagement order requires a far more nuanced consideration of the position; something that an employment tribunal is very much best placed to undertake. In this case the

> assessment undoubtedly included the claimant's long experience, her past good record and professional commitment; all matters that permissibly weighed with the tribunal. We equally do not say that the tribunal was wrong to have regard to evidence of references from other employees: we can see why an employment tribunal might not consider such evidence to be relevant, and we do not consider these were given great weight in the present case, but it is all a matter of assessment for the tribunal.
>
> "42. What we consider the tribunal did have to do was to consider, as at that point in time, whether the trust had made good that which it said made it impracticable or unjust to order re-engagement; that it could no longer have trust and confidence in the claimant. Given the tribunal had found that the claimant had committed the act of misconduct in question, that might not seem to have been an obviously irrational position, but, as Mr Bourne accepted in oral argument, it was not the only question. The tribunal also needed to consider whether the trust 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 tribunal was thus entitled to scrutinise whether the trust's stated belief was genuinely and rationally held, tested against the other factors the tribunal considered relevant. It was, however, still a question to be tested from the perspective of the trust, not that of another employer, still less that of the tribunal: was it practicable to order *this* employer to re-engage *this* claimant? And, unfortunately, we do not feel able to conclude this was the approach adopted by the tribunal. We consider that paras 48–49, in particular, set out the conclusions reached by the tribunal itself, standing in the shoes of the employer, testing the question of practicability from the tribunal's perspective rather than asking what was practicable as between these parties, the parties to the re-engagement order it was considering making. That being so, we consider we are bound to allow this appeal and set aside the order."

44. I consider that that approach is the one that employment tribunals should adopt in considering whether it is practicable to order re-engagement in cases where an employer asserts that the conduct of an employee was such as to have led to a breakdown in trust and confidence between the employer and employee. The question is whether the employer had a genuine, and rational, belief that the employee had engaged in conduct which had broken the relationship of trust and confidence between the employer and the employee.

45. Dealing with the facts of this case, first, I consider that similar principles apply to the consideration of whether it is practicable to order re-engagement in cases where an employer has a genuine and rational belief that the employee lacks the ability to perform the required role if re-engaged. The employer will need to establish that it genuinely

believes that, if re-engaged, the employee would not be able to perform the role to the requisite standards and that that belief is based on rational grounds. Mere assertion by an employer that it does not believe that the employee would, if re-engaged, be able to meet the demands of the role will be insufficient. But if the employer is able to establish that it genuinely and rationally had such a belief, that will be relevant to, and probably determinative of, the question of whether it is practicable for an employer to comply with an order for re-engagement.

46. Similarly, an employee may have engaged in conduct which did not, of itself, cause or contribute to dismissal, but which an employer may genuinely and rationally believe means that it can no longer rely upon the integrity of the employee and is unable to have trust or confidence in the employee in future if he were to be re-engaged. The present facts are an example of such a claim. The claimant here secretly recorded meetings between him and Mr Pelley. That did not contribute to the dismissal because the respondent was not aware of the recordings at the time of the dismissal (if the conduct had caused or contributed to the dismissal, section 116(3)(c) of the Act requires the employment tribunal to consider whether it would be just to order re-engagement). Again, the tribunal will have to test whether the employer genuinely believes that the employee cannot be trusted to work for the employer in future and whether there is a rational foundation for that belief. It would not be appropriate to seek to restrict the type of conduct capable of leading to such a conclusion to a category defined, or described, as extreme cases. Rather, the nature of the conduct may well be a factor that is relevant to the assessment of whether the belief is genuinely held, or whether there is a rational basis for the belief. If, for example, the conduct was insignificant or involved minor misconduct, or occurred a long time ago, that may be a factor pointing to a conclusion that the belief that the employer cannot trust the employee to work for him is either not a genuine reason for objecting to re-engagement or is a belief that has no rational basis.

47. Secondly, the EAT in the present case was correct to conclude both that the employment tribunal had erred in its application of the decision in *Farren* to this case and that the decision on practicability was inconsistent with its findings of fact at the liability stage. On the first point, the employment tribunal did not consider whether there was a genuine and rationally based belief on the part of the respondent (in substance Mr Pelley) that the claimant would not be capable of performing a senior leadership role. Rather, the employment tribunal substituted its own view as to whether that was the case. That appears, for example, from paragraph 57 of the remedies decision where the decision records the "view of the majority is that the issue of trust and confidence arising from doubts about the claimant's capability and his integrity are not so significant as to make it impracticable for the claimant to be re-engaged". Again, the decision records that "the majority consider that when tested those matters are not so serious as to prevent the claimant's re-employment in a suitable role". That language is redolent of the employment tribunal forming its own view as to whether it thinks that the claimant could be re-engaged to work with the respondent. It was not asking whether the employer had a genuine and rationally based belief that the claimant either lacked the ability to perform a senior management role or that his integrity could no longer be trusted given the secret recording of meetings with the chief executive officer.

48. Furthermore, the findings in relation to capability are inconsistent with the findings of fact made by the employment tribunal at the liability stage. It is correct that the issue to be decided at that stage was different. The employment tribunal was deciding whether

the claimant had been discriminated against on grounds of age. The employment tribunal was not deciding if he had been dismissed for a reason related to capability. Nor was it deciding the issue relevant at the remedies stage, that is whether it was practicable to order re-engagement given the respondent's doubts about the claimant's ability to perform a senior role in the management and marketing structure that had been put in place. The tribunal did, however, make findings of fact relevant to those issues in deciding whether the reason for dismissal was age. As the EAT noted, these were findings of fact, made by the employment tribunal in this litigation and involving the same parties. They were "positive findings of fact about the views and beliefs that Mr Pelley had in fact formed". They were made by the employment tribunal which had found that the burden had passed to the respondent to explain, and demonstrate, the reason or reasons for dismissal. The employment tribunal would be bound to consider any relevant finding of fact in deciding whether it was practicable to order re-engagement.

49. That this is the position is well established. The point was made by the Employment Appeal Tribunal in *Great Ormond Street Hospital v Patel* [2007] UKEAT 0085/07/LA where it observed that:

> "21. As to (ii), the extent to which findings made by a Tribunal at the liability hearing will be relevant to the question whether it is practicable for an unfairly dismissed employee to be reinstated will depend on the nature of the issues in the particular case. Sometimes there will be very little overlap; sometimes, as the Claimant would say was the case here, the issues will be very close (though they will never be identical — even if they were identical in every other respect, the Tribunal will, as discussed above, be concerned with different dates). Where such previous findings are indeed relevant, we have no doubt that the Tribunal at the remedy hearing is obliged to take them into account. Indeed in principle we cannot see why the ordinary principles of issue estoppel should not apply, so that the parties on the remedy hearing cannot go behind a relevant finding of fact made in the liability decision. However, the rules about issue estoppel allow for a degree of flexibility, and there will be circumstances where the way in which a particular decision was reached at the first hearing renders it unjust for a party to be definitively bound by it…."

50. In the present case, the employment tribunal had made relevant findings of fact at the liability stage. As summarised at paragraph 14 to 17 above, the employment tribunal decided as a fact that Mr Pelley had formed the view that the claimant would not be able to perform the role of commercial director in the structure that he was putting in place. Furthermore, the tribunal found that that was not an after the fact rationalisation of the position. It found as a fact that Mr Pelley formed that view on the basis of his own observations of the claimant, and from the negative feedback received from other employees and board members. The employment tribunal was obliged to take those facts into account in deciding whether the respondent genuinely believed that the claimant did not have the capability to perform at a senior level if re-engaged and whether that belief was rationally based. The employment tribunal would be obliged to

reach decisions consistent with the facts as found by it unless there were good and cogent reasons for departing from its findings of fact. The EAT did not err in its approach to this matter.

51. Finally, I do not accept that the EAT in the present case subjected the decision of the employment tribunal to an undue or overly-critical factual analysis. Nor do I consider that the EAT substituted its view of the facts for that of the tribunal. Rather, the EAT correctly applied the principles set out in *Farren* to the facts of this case as found by the employment tribunal itself. For all those reasons, I do not consider that the claimant has established any of the errors alleged as part of ground 3 of the appeal.

The Third Ground – The Perversity Issue

Submissions

52. Mr Mitchell submitted that the EAT was wrong to find that the employment tribunal erred in ordering the respondent to re-engage the claimant in the role of Commercial Director, China. Whilst accepting that the employment tribunal had found that it was essential for the holder of that role to speak, write and read Mandarin, the context in which the employment tribunal reached that conclusion was one where the claimant had good linguistic skills, and was willing, and expected to be able, to learn sufficient Mandarin to enable him to do the job and, in the interim, could perform the role with the assistance of a translator or interpreter. Furthermore, the assessment of practicability at the stage of making an order for re-engagement was a provisional one as explained in *McBride v Scottish Police Authority* [2016] I.C.R. 788. The respondent would have the opportunity to argue at a subsequent stage that it had not been practicable to comply with the order.

53. Mr Nicholls submitted in his written skeleton argument that the EAT had been correct in its analysis that it was impracticable to order re-engagement in this role given that the claimant did not speak Mandarin. The respondent had also filed a respondent's notice seeking to uphold this aspect of the decision on an additional ground, namely, that the employment tribunal order had effectively required it to create a job for the claimant, there being no job for a commercial director who did not speak Mandarin, contrary to the principles established in *Port of London Authority v Payne* [1994] ICR 555, and *Lincolnshire County Council v Lupton* [2016] I.R.L.R 576.

Discussion

54. It is possible to deal with this ground of appeal relatively shortly. The employment tribunal found that an essential requirement of the role of Commercial Director, China was that the person employed in that role spoke, wrote and read Mandarin. The claimant did not speak, write or read Mandarin. It was impracticable for the respondent to comply with the order for re-engagement and appoint the claimant to that role as he did not meet one of the essential requirements of the job.

55. Indeed, that simple fact is further confirmed, if confirmation is necessary, by the fact that the claimant himself sought reconsideration of the employment tribunal's decision so that the order would provide for the respondent to employ additional staff to act as an interpreter or translator. That amounts to recognition that the respondent could not realistically comply with the order as it stood and the order for re-engagement was not

capable of being carried into effect with success as the claimant did not possess the required linguistic skills necessary to perform the role.

56. Furthermore, the fact that the case law refers to the assessment of practicability at the stage of making the order as being provisional ought not to be mis-interpreted. The role of the employment tribunal is to determine whether to exercise its discretion to order re-engagement under section 116(2) of the Act. In doing so, it must take account of whether it is practicable for the employer to comply with an order for re-engagement. That assessment will not necessarily be a final, conclusive determination of practicability as an employment tribunal considering the award of compensation under section 117(3)(a) of the Act, if the order was not complied with, may also consider whether it was practicable to order re-engagement. In that sense, the initial assessment of practicability at the time of making an order for re-engagement may be described as "provisional" as the assessment may be subsequently revisited. That is recognised in *McBride* itself at paragraph 37 where Lord Hodge refers to it as provisional and as a "prospective assessment of the practicability of compliance and not a conclusive determination". But it still involves an assessment, on the facts as at the date of making the order for re-engagement, whether it would be practicable for the employer to comply with the order and re-engage the claimant by the time specified in the order.

57. I agree, therefore, with the observations of the EAT at paragraph 103 of its judgment that:

> "where it is accepted, or found, that a particular requirement was genuinely designated as essential to a particular job, and accepted, or found, that the employee plainly did not meet it, it would usually be wrong for the Tribunal, based on its own view, to hold that, despite this, re-engagement to that role was nevertheless practicable."

58. Furthermore, I agree with the EAT that, on the facts, this was a case where the job of Commercial Director, China, involved an essential requirement that the holder of the post speak, write and read Mandarin. What the employment tribunal did was order the respondent to re-engage the claimant in a role where he did not meet an essential requirement. I would not regard this as a case where the order of the employment tribunal required the respondent to create a job, that is a non-Mandarin speaking Commercial Director, China. I would therefore reject the additional ground for upholding the decision of the EAT put forward in the respondent's notice.

The Fifth Ground – The Decision of the EAT not to remit the matter

Submissions

59. For convenience, it is appropriate to consider ground 5 of the notice of appeal before considering ground 4. Mr Mitchell submitted that it was wrong as a matter of procedure for the EAT not to remit the matter to the employment tribunal for it to consider the issues concerning the practicability of the respondent complying with an order for re-engagement. The employment tribunal would then have considered whether the respondent had a genuine and rationally based belief as to the capability and conduct of the claimant or as to the ability of the claimant to perform the role of Commercial Director, China. He submitted that this was not a case where the EAT could conclude

that the only decision that could have been made was not to order re-engagement, applying the test set out in *Jafri v Lincoln College* [2015] Q.B. 781.

Discussion

60. First, the employment tribunal found that the only role in respect of which re-engagement was possible was the Commercial Director, China role: see paragraph 62 of the remedies decision. However, on the facts as found by the employment tribunal, it was not practicable for the respondent to comply with an order for re-engagement as the claimant did not meet an essential requirement for performing the role as he did not speak, write or read Mandarin. On those facts, it is inevitable, as the EAT held, that the employment tribunal could not properly order that the claimant be re-engaged in the role of Commercial Director, China. In those circumstances, the EAT was right to allow the appeal and to decline to remit the matter to the employment tribunal. There was no other role that the claimant could have been re-engaged in and it was not practicable for the respondent to re-engage him in the Commercial Director, China role.

61. Secondly, on the facts as found by the employment tribunal at the liability stage, the only conclusion it could have reached was that the respondent had established a genuine and rationally based belief that the claimant was not capable of performing a senior role in the structure that had been put in place. The employment tribunal had found that Mr Pelley had genuinely formed the view that the claimant lacked the skills that he considered necessary to perform a senior role in the commercial team going forward. Further, it found that that belief was based on his own observations of the claimant's work, and on information provided by other employees and board members. On those facts, it was inevitable that the employment tribunal would have found that it was not practicable for the respondent to comply with an order for re-engagement in this case. Finally, in relation to the question of the conduct of the claimant in secretly recording meetings, if that had stood alone, it may well be that that issue would have had to be remitted to the employment tribunal for it to consider that issue. The employment tribunal at the liability hearing had been focussing on the issue of the reason for dismissal and the secret recordings played no part in the dismissal as the respondent was unaware of them at that stage. The employment tribunal had made some findings about the secret recordings but had not properly addressed the question of whether the respondent had a genuine and rational belief that it could no longer rely on the integrity of the claimant. In the circumstances, however, it is not necessary for that matter to be remitted as the employment tribunal would inevitably have had to decline to make an order for re-engagement for the other reasons given above.

The Fourth Ground – The Possibility of a *Polkey* Reduction

Submissions

62. Mr Mitchell submitted that the EAT erred in remitting the question of whether any compensation should be reduced as the claimant might have been fairly dismissed in any event. He submitted that the employment tribunal was entitled to conclude that no sensible prediction could be made based on the evidence available, relying on the decision in *Software 2000 Ltd. v Andrews* [2007] I.C.R. 825

Discussion

63. In determining an award of compensation, an employment tribunal must award that amount which is just and equitable having regard to the loss that has been sustained by the claimant (see section 123 of the Act). It may be necessary for an employment tribunal to assess the chances that an employee would have been dismissed fairly at some stage. The principles for making that assessment are conveniently summarised by the EAT in the *Software* case at paragraph 54 in the following terms:

> "54. The following principles emerge from these cases. (1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.) (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. (5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role. (6) The section 98A(2) and *Polkey* exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued

> indefinitely. (7) Having considered the evidence, the tribunal may determine: (a) that if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did In any event: the dismissal is then fair by virtue of section 98A(2); (b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly; (c) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in *O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615 ; (d) that employment would have continued indefinitely. However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

64. It is clear that the employment tribunal must consider the evidence available to determine amongst other things the chance that a fair dismissal would have taken place. Unless the evidence is so scant that it can be ignored, the employment tribunal will need to consider what evidence there is and assess whether, on that evidence, it is possible to assess the chance of there being a fair dismissal at some stage. The importance of an employment tribunal following that approach was emphasised by the EAT in *Eversheds Legal Services v De Belin* [2011] I.C.R. 1137 at paragraph 45 of its judgment.

65. In the present case, the EAT was correct in its conclusion that the employment tribunal had not done that task. The employment tribunal had heard, over four days, considerable evidence about why the claimant had been dismissed. There was evidence before it which may have enabled it to assess the chances that the claimant would have been fairly dismissed at some stage. It did not do so because it said at paragraph 76 of the remedies decision that it was unable to form conclusions on that issue. The reason it gave was that the issues presented at the liability hearing turned principally on the question of whether the claimant was dismissed by reason of discrimination on grounds of age. That is, of course, correct. But the employment tribunal made findings of fact about what the beliefs of Mr Pelley, for the respondent, were about the claimant's capabilities and what steps he had taken to obtain information and why he believed what he did. It was incumbent on the employment tribunal to consider that evidence to determine if it could assess the chances of a fair dismissal being undertaken at some stage in order to establish the loss that the claimant had suffered. The EAT was correct, therefore, to remit this issue to the employment tribunal for it to consider.

66. The question of the appropriate award of compensation will now be a matter for the employment tribunal to assess. I would, however, urge the parties to consider whether they can now agree a compromise. Now that it is clear that there is no prospect of a re-engagement order being made, the only issue is the quantum of the ordinary basic and (more important) compensatory awards. The fact that the tribunal will now have to consider a "*Polkey* reduction" does not mean that it will necessarily make one or, if it does, that it will be substantial (or indeed – though we have no knowledge of the relevant figures – such as to bring the award below the statutory cap). A further hearing on the issue of quantum will only increase costs still further. I would like to think that

the parties will see the sense of putting behind them past differences, exacerbated no doubt by the litigation, and agreeing a fair settlement.

Conclusion

67. I would dismiss the claimant's appeal. In the present case, the EAT correctly held that the employment tribunal had erred by ordering the respondent to re-engage the claimant in the role of Commercial Director, China when the claimant did not meet one of the essential requirements of the role, namely to speak, write and read Mandarin, and where, on the facts as found by the employment tribunal at the liability stage, the respondent had a genuine and rational belief that the claimant would not be capable of fulfilling the role the respondent would wish him to perform. Furthermore, the employment tribunal was not required to consider vacancies in potentially comparable or suitable employment which had arisen but had been filled prior to the remedies hearing. The EAT also correctly held that the employment tribunal had failed to consider whether, on the evidence, it could have assessed the chances that the claimant would have been fairly dismissed at some stage.

Lady Justice Elisabeth Laing

68. I agree.

Lord Justice Underhill

69. I agree that the appeal should be dismissed for the reasons given by Lewis LJ. Like him, I would pay tribute to Judge Auerbach's clear and careful judgment in the EAT and would endorse the reasoning in it. I add a few words on one point. Although I agree with paras. 44-46 of Lewis LJ's judgment I would be sorry if the question of the "practicability" of reinstatement or re-engagement became subject to too many glosses. In particular, I am wary of tribunals becoming too focused on the language of "trust and confidence", which may carry unhelpful echoes from its use in other contexts. In this context it simply connotes the common sense observation that it may not be practicable for a dismissed employee to return to work for an employer which does not have confidence in him or her, whether because of their previous conduct or because of the view that it has formed about their ability to do the job to the required standard. Of course any such lack of confidence must have a reasonable basis. The important point made by the EAT in *United Lincolnshire NHS Foundation Trust v Farren* is that while that is an objective question it must be judged from the perspective of the particular employer: that reflects a proper recognition that an employment relationship has got to work in human terms. However, each situation must be judged on its particular facts. An example of a case where an order for re-engagement was made notwithstanding that the dismissed employee had behaved in a way which would have made it very difficult for him to work with his former colleagues is *Oasis Community Learning v Wolff* [2013] UKEAT 0364/12, where the essential point was that he was re-engaged in a different part of the institution (and a senior manager with whom he had fallen out had left).