

Court of Appeal clarifies the correct test to apply when a tribunal is considering whether or not to make an order for re-engagement when the employer argues that the trust and confidence has broken down

By [Sarah Clarke](#)

3PB Barristers

Kelly v PGA European Tour [2021] EWCA Civ 559

Factual background

1. Following his dismissal, the claimant brought claims of unfair dismissal and age discrimination. The respondent conceded that the dismissal was unfair and the tribunal dismissed the discrimination claim. The reason for the dismissal was a concern that the claimant was not considered capable of performing the role required of him going forward, following the appointment of a new CEO. At the remedy hearing, the tribunal ordered that the claimant be re-engaged in the role of Commercial Director (China), within 56 days.
2. The respondent opposed an order for re-engagement, relying on the fact that the relationship of trust and confidence had broken down. In particular, they relied on the fact that it was considered that the claimant was not capable of performing his role and also that he had covertly recorded various meetings he had with the CEO, Mr Pelley. Such recordings had been discovered post-dismissal and thus were not causative of the decision to dismiss.
3. In reaching their conclusion, the tribunal held that “*The employment tribunal has to reach its own conclusions as to trust and confidence rather than testing the employer’s view to see whether it was genuine and founded on a rational basis.*” It was the claimant’s position that the relationship had not broken down, and that the situation was one which could be retrieved with sensible, level-headed adults focusing on the good of the company. The tribunal concluded that the issues over the claimant’s capability and the covert recordings were ‘*not so significant as to make it impracticable for the claimant to be re-engaged*’.

4. The respondent appealed the decision on the basis that the question for the tribunal ought to have been whether the respondent had a genuine and rationally held belief that its trust and confidence in the claimant had been damaged. Instead, erroneously, they acted on their own view, that it was not damaged. They also wrongly took the approach that, for these purposes, there were grades of seriousness of loss of trust and confidence.

EAT judgment

5. In a situation in which an employer argued that the trust and confidence had been damaged such that re-engagement was not practicable, the EAT relied on the case of United Lincolnshire Hospitals NHS Foundation Trust v Farren [2017] ICR 513. The NHS Trust had believed that a nurse had administered medication to patients without prior prescription, and thus had lost their trust in her. In that case, the tribunal had formed its own view as to whether the claimant was dishonest and concluded that she could be trusted if she returned to working for the same employer in a different working environment. However, the EAT disagreed with this approach [paragraphs 40 to 42]:

*As the case law makes clear (see Crossan at paragraph 10, cited above), [the tribunal] had to ask whether this employer genuinely believed that the Claimant had been dishonest, and - per the EAT at paragraph 14 of United Distillers v Brown, see above - whether that belief had a rational basis. It was, after all, this employer - not some other and certainly not the ET - 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 Respondent 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 re-hearing, but the ET 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 Respondent's view of trust and confidence - appropriately tested by the ET as to whether it was genuine and founded on a rational basis - that mattered, not the ET's.***

*...The ET was thus entitled to scrutinise whether the Respondent's stated belief was genuinely and rationally held, tested against the other factors the ET considered relevant. It was, however, still a question to be tested from the perspective of the Respondent, not that of another employer, still less that of the ET: was it practicable to order **this** employer to re-engage **this** Claimant?*

6. The EAT held that it was not sufficient for an employer merely to assert that the trust and confidence had been broken, and that the tribunal should test and evaluate the evidence to form a view as to whether such a belief was both genuinely and rationally held. However, the test is not one of reasonableness. A belief may have a rational foundation in evidence or information known to the person who forms it, though it has not been reasonably reached.
7. Drawing together these principles, the EAT concluded that the tribunal had erred in law and had not applied the Farren test. In relation to the covert recordings, the evidence from the respondent was that this was considered to be *'extremely underhand, a gross breach of trust'*. The CEO stated that he would *'really struggle to be able to work again with somebody who had breached trust in this way'*. In relation to the capability issue, whilst the tribunal were not required to make any findings as to this (as it was conceded that the dismissal was unfair), the tribunal did accept that the CEO had formed the view that the claimant was not capable of fulfilling the role that he wished him to perform going forward. It was also found that the CEO had concluded that that claimant had not bought into his ideas and had been unable to embrace a change of CEO.
8. In these circumstances, the correct approach for the tribunal was to consider whether the CEO genuinely and rationally concluded that the capability issue, and/or the covert recordings issue, separately or together, undermined trust and confidence so as to render re-engagement impracticable.
9. However, it was clear from the judgment that the tribunal had in fact concluded that, *in their view*, the matters relied upon, when tested, were not so serious as to prevent re-employment. They also stated that, in their view, there was *'no reasonable basis'* for concluding that the claimant did not have the requisite ability. As regards the covert recordings, the tribunal did not actually address how far they accepted the CEO's evidence as to the view he took of such conduct. The tribunal set out their views that this was *'merely'* a covert recording, it was not *'underhand'* and that there had been no attempt to exploit the recording. Thus, they were making findings as to their views of the conduct, rather than evaluating the genuineness and rationality of the CEO's views.
10. The claimant appealed, arguing that (inter alia) the EAT was wrong to apply the decision in Farren in this case on the basis that those principles did not apply to a situation such as this in which there were doubts about capability (as opposed to a misconduct case). In relation to the covert recordings, it was argued that this type of act 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.

Court of Appeal decision

11. The Court of Appeal upheld the approach taken by the EAT, confirming that the principles laid down in Farren should be followed. It was reiterated that the correct question was 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. In cases in which capability was in issue, the employer could not merely assert that they did not believe that the employee would not be able to meet the demands of the role- they would need to evidence that such a belief was in fact held and was rational.
12. Furthermore, in circumstances in which the conduct relied upon to support an assertion that the trust had broken down did not cause or contribute to the dismissal, it was reiterated that an employer is entitled to rely on such conduct in respect of an application for a re-engagement order. It was not considered appropriate to restrict the type of conduct which was capable of leading to such a conclusion to a category of 'extreme cases'. Rather, the nature of the conduct may well be a factor that is relevant to the assessment of whether the belief is reasonably held.
13. The Court of Appeal found that the EAT had correctly applied Farren as the language used in the ET judgment indicated that the tribunal had formed its own view as to whether the claimant could be re-engaged when they ought to have considered whether the employer's belief was genuinely and rationally held.

Commentary

14. Helpful confirmation that, when considering the issue of re-engagement/reinstatement where the employer argues that there has been a breakdown in trust and confidence, the issue of practicability is not to be determined on the basis of the tribunal's own views. Rather, the correct approach is to evaluate the employer's reasons for concluding that the relationship had broken down, and to consider whether such a view was genuine and founded on a rational basis. The test is not to be equated with the reasonableness test as set out in section 98(4) ERA. However, that is not to say that it is sufficient for an employer to simply assert that the trust and confidence had been broken; such an assertion must be tested by the tribunal. Further, an employer is entitled to rely upon conduct which did not cause or contribute to the dismissal and information obtained post-dismissal can be considered. Thus, there may be cases in which the manner in which the claimant

conducted the litigation (such as allegations made in oral evidence) can be relied upon by an employer to argue that the trust and confidence has been broken, such conduct clearly not being relevant to the reason for dismissal.

This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you seek further information, please contact the [3PB clerking team](#).

30 April 2021



Sarah Clarke

Barrister

3PB

Telephone: 01179 281520

sarah.clarke@3pb.co.uk

3pb.co.uk