SUMMARY

2015/35 Court orders reinstatement of employee dismissed in 2009, with six years of back pay (IR)

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Facts

Mr Reilly was a sales manager with the Bank of Ireland ('BOI') with eight years' service and an exemplary work record. In 2009, it came to BOI's attention that inappropriate emails, described as "*pornographic, obscene or offensive*" were being circulated internally and externally by its employees, including Mr Reilly. Mr Reilly was placed on paid suspension pending an investigation and subsequently dismissed for gross misconduct for breach of BOI's email policy.

Mr Reilly initially brought proceedings before the Employment Appeals Tribunal for unfair dismissal under the Unfair Dismissals Acts, 1977- 2014 (the 'UD Acts'). The Tribunal found that Mr Reilly was unfairly dismissed and directed that he be reinstated to his old job. BOI appealed the decision to the Circuit Court where it found the dismissal to be unfair but awarded Mr Reilly compensation in the amount of one year's salary. The Circuit Court overturned the EAT's judgment, awarding Mr Reilly compensation instead of reinstatement. Mr Reilly appealed to the High Court.

Judgment

The High Court strongly criticised what it characterised as an attempt by BOI to "*make an example*" out of Mr Reilly. Mr Reilly gave evidence that the practice of circulating such emails was "*widespread*", that it was simply "*banter*" between colleagues and that senior employees (one of which was subsequently promoted within BOI) were also involved in circulating them.

BOI had been aware that there was an existing problem with employees circulating inappropriate emails but, prior to Mr Reilly's dismissal no employees had been disciplined for such conduct. The High Court noted that if a zero tolerance policy was going to be adopted by BOI, it should have notified its employees by way of circular notices, team briefings etc. of the policy shift. The High Court overturned the Circuit Court's judgment and ordered BOI to reinstate Mr Reilly to the position he held at the time of his dismissal and to pay him salary for the intervening period.

Commentary

A significant element of the High Court's decision focused on what was held to be the unjustified suspension of Mr Reilly. BOI investigated five employees in relation to the inappropriate emails, but only suspended three of these employees, including Mr Reilly. Mr Reilly was informed verbally that he was being put on paid suspension as "*an issue had arisen in relation to emails*", but he received no further information at the time of his suspension.

Mr Justice Noonan noted that suspension is an extremely serious measure which can cause irreparable damage to an employee's reputation, and stated that a holding suspension should only be imposed after "*full consideration of the necessity for it pending a full investigation*" of matters. Helpfully, he identified the following four instances where suspension will normally be justified, if it is necessary:

To prevent repetition of the conduct complained of;
To prevent interference with evidence;
To protect individuals at risk from such conduct; or
To protect the employer's business and reputation.

On the evidence before him, Mr Justice Noonan did not believe that Mr Reilly's suspension was necessary as BOI had preserved the evidence in relation to the emails, and it was extremely unlikely that Mr Reilly would continue to circulate such emails during the investigation.

Under the Unfair Dismissals Acts, an order may be made in favour of an employee for compensation, re-engagement or reinstatement. In the vast majority of cases where an employee's claim is successful, an award of compensation is made. Traditionally, the Courts have been reluctant to make an award of reinstatement or re-engagement due to the view that following a dismissal, even if the dismissal has been deemed unfair, the relationship between the parties has been damaged to such an extent that returning to the workplace is not a viable option for either the employee or the employer.

Significantly however in this case, the High Court ordered that Mr Reilly be reinstated to the position in BOI that he held at the time of his dismissal in 2009.

As a consequence, BOI will be obliged to put Mr Reilly back in the position he held prior to his dismissal, on the same terms and conditions, without a break in his continuity of service. Mr Reilly will be entitled to back pay from the date of his dismissal in 2009 and all other benefits must be brought up to date.

This is an exceptional remedy and one which is rarely ordered in Ireland. As such the Court went to great length to explain why reinstatement was awarded in this case. In making the award of reinstatement, the High Court in this case was highly critical of the manner in which BOI handled the disciplinary proceedings. The Court described BOI's conduct as "*disproportionate and unreasonable*" and paid particular attention to the way in which BOI "*predetermined and manipulated the entire process*". Due to the nature of BOI's conduct in this case and the degree to which the dismissal had affected Mr Reilly's reputation and standing, the court was of the view that "*an award of compensation would fall far short of providing adequate redress in this case*".

Further, the High Court was careful to make clear that the mere fact that an employee may have contributed to his or her own dismissal will not preclude the court from considering whether the remedies of reinstatement or re-engagement are appropriate.

Only time will tell if the Irish Courts and Tribunals will become more at ease with awarding exceptional remedies such as reinstatement or re-engagement. However, what can be said is that this case will act as a strong authoritative basis for employers when implementing disciplinary processes and indeed for employees seeking the appropriate remedy.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The author of this case report makes the following observation: "*Traditionally, the Courts have been reluctant to make an award of reinstatement or re-engagement due to the view that following a dismissal, even if the dismissal has been deemed to*

have been unfair, the relationship between the parties has been damaged to such an extent that returning to the workplace is not a viable option for either the employee or the employer". This view seems obvious, yet the Dutch legislator has never accepted it wholeheartedly. In fact, Parliament recently adopted a law that seems to negate this view.

Since 1940 (not coincidentally, during wartime it has been unlawful and more or less impossible to dismiss an employee (other than for serious cause and barring some exceptions) in the absence of either a governmental permit or a court order. Until 1 July 2015, if a working relationship had broken down, most courts accepted that there was no point in continuing the employment relationship. Applications to terminate the relationship were routinely granted, almost always with an order for the employer to pay the employee severance compensation (the amount of which depended, *inter alia*, on the extent to which each party was to blame for the breakdown of the relationship).

A new law came into effect on 1 July 2015. Since that date, the courts may only terminate an employment relationship if a number of requirements have been satisfied. One is that "reassignment of the employee to another position within a reasonable period, where appropriate with the aid of training, is not possible or cannot reasonably be required of the employer". Another requirement is that one of the situations listed exhaustively in Article 7:669 (3) c to h of the Civil Code exists. In a situation such as that of Mr Reilly, the relevant situations are:

d. "where the employee is unfit for the performance of his contractual duties for reasons other than sickness or medical disability, provided the employer has informed him of this fact in good time and has given him sufficient opportunity to improve his performance and the underperformance was not caused by the employer's failure to provide adequate training or adequate working conditions".

e. "where the employee behaves reprehensibly to such a degree that the employer cannot reasonably be expected to continue the employment relationship".

g. "where the working relationship has broken down to such an extent that the employer cannot

reasonably be expected to continue the employment contract".

It remains to be seen how broadly the courts will interpret these provisions. Based on the Parliamentary debate on the Bill that eventually became law, during which the government stressed that the intention of the new rules is for the courts to interpret the provisions narrowly, it is widely anticipated that it will be harder than it was before 1 July 2015 for employers to obtain termination of their relationship with employees on the basis that the relationship has broken down. This will in some cases lead to a continuation of broken down relationships. More often, however, it will simply mean that the employee in such a situation has a stronger bargaining position in respect of the amount of severance compensation he is to be paid in consideration of 'voluntary' separation.

Creator: European Court of Justice (ECJ)
Verdict at: 2015-04-17
Case number: [2015] IEHC 241