

Chapter 17: Procedural fairness and remedies

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1. In your opinion, to what extent is the marginalization of the reinstatement and re-engagement remedies an inevitable or desirable development?

Author's answer: On the one hand, it can be claimed that there is no reason for these two remedies to be relegated to second and third place behind the remedy of compensation. This position is based on the fact that the statutory unfair dismissal regime in terms of sections 111 to 127 of the Employment Rights Act 1996 establishes no hierarchy of remedies for a finding of unfair dismissal. Each of the three remedies of reinstatement, re-engagement and compensation are afforded equal significance. On the other hand, it is suggested that it is unrealistic to expect an employment tribunal or a court to order an employer to reinstate or re-engage an employee where it has been held that the employee was unfairly dismissed. The main justification for this viewpoint is that if an employer has taken the extreme decision of terminating an employee's employment contract, trust and confidence between the employee and employer will inevitably have broken down. This line of argument goes on to the effect that it is misguided to force both parties to co-operate in either of these two ways, since it represents an affront to their liberty and is ultimately impractical as an option. However, the marginalisation of the remedies of reinstatement and re-engagement do mean that employees cannot be understood as having property rights in their jobs. It has been argued that the reluctance of the judiciary to make these orders in cases of unfair dismissal is a hangover from the common law of wrongful dismissal, which is ingrained in the sub-consciousness of the judges. The common law famously eschews orders of specific performance of employment contracts or injunctive relief where it is claimed that the employer or employee is threatening to terminate the contract of employment. These attitudes would appear to have permeated the statutory unfair dismissal regime, where we witness the same level of judicial hesitancy.

2. If such marginalization is not desirable, on what basis would you justify such a response?

Author's answer: The desire to secure 'job property' is the principal argument in favour of carving out a strong role for the reinstatement and reengagement orders in the remedies regime pursuant to statutory unfair dismissal laws: see W. Njoya, *Property in Work: The Employment Relationship in the Anglo-American Firm* (Aldershot, Ashgate Publishing Company, 2007). This is the notion that every worker has a right to property in his/her job and that it should be a difficult process for the worker to be involuntarily severed from that job. It is closely allied to the strong variety of the concept of 'job security' discussed in chapter 16, section 16.1.2. The recognition that an employee has property rights in his job is depicted as a countervailing force to the employer's power to coordinate its own property and resources, including labour inputs and capital: Mummé, 'Property in Labor and the Limits of Contracting' in U. Mattei and J. D. Haskell (eds.), *Research Handbook on Political Economy and Law* (Cheltenham, UK, Edward Elgar, 2015) 413–15. Where it has been held that an employee has been unfairly dismissed, a more committed and active use of reinstatement and reengagement orders by the employment tribunals would serve to vindicate that employee's property in his/her job, as well as enhance his/her job security, wage earning capacity, firm-specific investment in human capital and skills and potentially his/her career prospects.

3. If you believe that side-stepping these two remedies is sensible, why would you prefer to rely on compensation as an effective mechanism?

Author's answer: There are a number of justifications for eschewing the remedies of reinstatement and re-engagement and instead preferring the compensation remedy. First, there is the argument from impracticability, i.e. that it is unrealistic to expect employers and employees to co-operate after an employer has dismissed an employee, since invariably, all trust and confidence between them will have been destroyed. The second justification is the argument from liberty. This is the idea that it is illiberal and illegitimate to foist an ex-employee on an unwilling employer. Such a process is said to interfere in the liberty of employers to exercise their managerial judgment. Thirdly, there is the argument from compensation, which posits that compensation is an adequate remedy for an unfair dismissal insofar as it enables the effect of the dismissal on the employee to be reflected in monetary terms. Moreover, it is consistent with the underlying approach of English Law to prioritise compensation over specific remedies.