



Fitness and propriety: Financial services employee dismissed for lacking credibility as a witness

By **Philip Cameron** - 30 May 2019

A recent Employment Appeal Tribunal (EAT) case considered whether an employer was entitled to dismiss an employee for not being fit and proper because the Employment Tribunal (ET) had found that he lacked credibility as a witness.

What is the importance of fitness and propriety?

Employees who carry out 'controlled functions' for UK financial services firms must be approved - this is called the approved persons regime. Approval is only given by the regulator where such persons are 'fit and proper'. Fitness and propriety includes not only competence and capability but also honesty, integrity, reputation and financial soundness.

Although the approved persons regime is to be phased out at the end of this year, the same rules relating to fitness and propriety exist under the extended SM&CR. The Claimant was employed as a Managing Director in a solo-regulated firm. He was subject to the approved persons regime.

ET findings on credibility

The Claimant brought a claim for disability discrimination whilst employed. In dismissing that claim, the ET made adverse findings about his credibility, variously describing his evidence as "not credible in many respects", "on lots of occasions evasive", "clearly an untruth", "misleading", "untrue", "considerable exaggeration" and "could not have been true". The ET concluded that his conduct as an approved person would be a matter of "grave concern" although it did not specifically find that he was deliberately dishonest. The Claimant did not appeal this judgment.

Specifically, the FCA test for fitness and propriety states that when assessing fitness and propriety all relevant matters should be taken into account, including whether a person has been criticised by a court or tribunal.



Dismissal for not being fit and proper

Upon receipt of the ET judgment, the Claimant was suspended pending a disciplinary investigation. The disciplinary investigation was to investigate whether the employee has “materially and fundamentally breached” his employment contract by “acting dishonestly” in his evidence to the ET.

The employer in this case decided not to do an investigation. It decided to rely on the ET findings and therefore no investigation was necessary. However, the Claimant was given the opportunity to comment on the ET findings in a disciplinary hearing. He also produced written submissions.

The Claimant was dismissed. The employer concluded that his evidence at the ET had not been credible and he either lied to or misled the ET. In light of his dishonesty, the employer did not consider that the Claimant’s conduct was consistent with the FCA rules on fitness and propriety.

In line with accepted practice, the Claimant was offered the opportunity to appeal this decision. The Claimant expressed his wish to appeal, but no actual appeal hearing took place. His dismissal stood.

The Claimant brought further claims in the ET including a claim for unfair dismissal. All claims were dismissed.

The Claimant appealed to the EAT. It considered whether (i) the elision of the investigation and disciplinary hearing, and (ii) the failure to hold an appeal hearing with the Claimant rendered his dismissal unfair.

The EAT found that the employer acted reasonably in treating the ET judgment as its starting point without further investigation. The ET findings spoke for themselves; there was no further investigation that could have been carried out.

On the small point of the appeal, the EAT allowed the Claimant’s appeal on the employer’s failure to hold an appeal hearing.

Professional pointer

This is an interesting and important case. First, it gives comfort to those employers who do not wish to carry out an investigation because there is nothing to investigate. However, those situations will be rare. Second, it underlines the importance of conducting appeal hearings, no matter how futile these may appear.

Most interestingly, it serves as a reminder that employers must look at all the circumstances when considering whether a person is fit and proper. The fact that the employee in this case had misled the ET, rather than being deliberately dishonest, was enough to call into question his honesty and integrity and justify his dismissal.