

Gross misconduct

Although you don't have enough to dismiss for gross misconduct, you feel the working relationship is irretrievably damaged - what actions can you take to resolve the situation fairly and effectively?

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- Gross misconduct- what is this?
- “irretrievably damaged” – in whose opinion? How is this measured?
- Some other substantial reason of a kind to justify dismissal (SOSR)
- SOSR versus Gross misconduct

Legal Framework for dismissal

Where two or more year's service S98 Employment rights Act

2 stage test

Stage 1- it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

Subsection 2 potentially fair reasons-
Capability/qualifications
Conduct
Redundancy
illegality

And some other substantial reason of a kind to justify dismissal

The reported cases show conduct and SOSR are the main reasons used

Stage 2

the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Some of the dismissals which have made their way to tribunal have resulted from little procedure with the tribunal attaching greater weight to inevitability of dismissal.

Although you don't have enough to dismiss for gross misconduct, you feel the working relationship is irretrievably damaged - what actions can you take to resolve the situation fairly and effectively?

- Think about measures short of dismissal- workplace mediation, redeployment to different roles etc
- But if dismissal looms large as a desirable outcome let's see what the tribunals have said.....

Case law-

Ezsias v North Glamorgan NHS Trust 2011

- Dr Ezsias was an oral and maxillofacial surgeon. He repeatedly expressed concerns about clinical standards often criticising colleagues
- Internal inquiry found his complaints “excessively frequent, unacceptably detailed and unrelenting to an extreme degree”.
- The claimant continued to make complaints about his colleagues.
- Nine senior members of the department signed a petition registering their grave concerns about the lack of progress made in resolving issues around the claimant. Expressed no confidence in him.

- Employer suspended Dr E.
- External investigator appointed. He reported concerns of irretrievable breakdown in working relationships
- He recommended disciplinary action then changed his report to recommend the employer decides between disciplinary action and termination on basis of irretrievable breakdown

Employer decided against disciplinary action and opted for termination.

- Unfair dismissal and “whistle blowing” claims then began
- Thrown out at tribunal, decision reversed by EAT, EAT decision upheld by Court of Appeal, then back to the tribunal but on unfair dismissal only. The tribunal dismissed the claim (again). Dr E appealed to EAT
- EAT dismissed the appeal

It was not necessary to classify whether the claimant's conduct was personal or professional. The relevant question was whether the action which the respondent had taken against the claimant should have been regarded as action taken against him because of his conduct. Only if it was concluded that the action taken against him *was* because of his conduct, should the question then be asked whether the conduct was personal or professional

If the claimant's behaviour which had caused the breakdown of working relationships with his colleagues had been the reason for his dismissal, the respondent's dismissal *could* have been classified as action taken against him because of his conduct, but it does not necessarily follow that it *should* have been classified in that way

Perkin v St Georges Healthcare NHS Trust 2005

- Conduct dismissal
- Court of Appeal

- Mr P claimed unfair dismissal

- He was employed as a director of finance. Senior management position. He was required to manage relationships below and above. Considered to be good technically but many people found his management style to be difficult to cope with.

- Mr P was called to a meeting without notice and was asked to resign.

- He refused. A disciplinary hearing was convened and chaired by the Chair of the Board. Evidence was led that he was stubborn and intimidating and that he did not contribute constructively. During the hearing he accuse some witnesses of lying and attacked one witnesses' integrity.

- Mr P was dismissed with notice. The reason given was that he had a “disabling and negative approach” which led to a breakdown in relationships with his team. He was criticised for making criticism of the various witnesses.
- The tribunal following the approach set out in BHS v Burchell decided that the employer had a belief that Mr P’s style has serious adverse impact and that that belief was formed after reasonable investigation. However it decided the dismissal was unfair because it was known that the Chair had already determined to exit him and had spoken of an “exit strategy”.
- It also decided that Mr P contributed 100% to his dismissal.

- On appeal to the Court of Appeal there was discussion about whether this was really a SOSR or conduct dismissal.
- It was held that the employer was not wrong to label this as conduct.
- Although personality cannot be a ground for dismissal the manifestation of that personality may bring the employee's actions within the scope of S98.
- Whether the dismissal is conduct or SOSR is not the true issue. The issue is whether the employer has established facts which justify the dismissal. The Court of Appeal was satisfied that the facts justifying dismissal had been established.

- It was not wrong to treat the process as if this were a conduct dismissal and not wrong to apply Burchell even though Burchell was a conduct case.

Adeshina v St George's University Hospitals NHS Foundation Trust 2017

- This was a conduct dismissal.
- Decision of Court of Appeal
- Mrs A claimed unfair dismissal and race discrimination
- Employed as a pharmacist by the NHS but to work in a prison. She was asked to participate in a reorganisation. She strongly disapproved of an aspect of the proposed changes. The Governor and Deputy Governor complained of her lack of leadership in the reorganisation. She was suspended and a disciplinary process began.

- She was accused through her negative attitude of bringing the employer into “disrepute” and of “serious insubordination”, “negligence” **and** “verbal abuse”. It was said she lacked insight into her actions and sought to criticise others.
- The tribunal found that the disciplinary process was flawed but that the defects were cured on appeal. For the tribunal the real issue in the case did not turn on the details of the particular incidents but on whether the Appellant’s attitude was indeed one of ‘deliberate resistance’.

- There was a clear picture of ‘deliberate disengagement’ in the meeting and a ‘mutinous attitude’ in her telephone conversation with her boss during the break.
- The Court of Appeal dismissed the appeal.

Case Law- Gallacher v Abellio Scotrail Ltd 2020

- Senior manager- Head of Customer Delivery and Standards
- Needed to be able to form and maintain good working relationships with her line manager
- Mrs G became disenchanted-
 - Unhappy with salary although an increase was granted
 - Unhappy about being required to participate on an on call rota
 - Mrs G made clear she was looking for a different role
 - Off sick- unhappy with her manager's (Mrs Taggart) recording of a back to work meeting

- G's unhappiness- continued

- Unhappy about the preferred candidate for a new post
- Came across in discussions with her boss as being unhappy with her boss. Seemed to blame her boss for the deteriorating relationship
- Mrs Taggart concluded that the relationship was not sustainable, the breakdown was irretrievable, that standing considerable pressure to deliver better returns to the business Mrs G could not remain in post. No alternative jobs available. Mrs T informed Mrs G of the decision to dismiss Mrs G at her appraisal.

- Mrs T felt she could not “work with someone who is okay one minute and not the next”
 - “irretrievable breakdown in relationship”
 - No proper procedure
 - Not conduct or performance
-
- Mrs G complained of unfair dismissal and disability discrimination
-
- Tribunal found that there was a breakdown in trust and that the dismissal was for some other substantial reason of a kind to justify dismissal.

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- It further found that despite the summary procedure the dismissal was substantially and procedurally fair.
- Mrs G appealed to the EAT on a number of grounds including lack of fairness/natural justice
- The EAT held that as the tribunal had found that proper procedure would have made any difference the tribunal had not erred.

- **Conclusion**

Although you don't have enough to dismiss for gross misconduct, you feel the working relationship is irretrievably damaged - what actions can you take to resolve the situation fairly and effectively?

Mediation/redeployment/dismissal

- Mrs G- boss could not “work with someone who is okay one minute and not the next” and “irretrievable breakdown in relationship”
- Mrs A “deliberate resistance”, “deliberate disengagement’ and a “mutinous attitude”.
- Mr P “disabling and negative approach” leading to breakdown in relationships
- Dr E complaints “excessively frequent, unacceptably detailed and unrelenting to an extreme degree”.