



# GORDONS

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WHITE PAPER  
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ANSWERS TO THORNY  
QUESTIONS

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**'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?'**





## DISMISSAL OR NOT?

- **'Irretrievably damaged'** would suggest that continued employment is untenable.
- Last resort not first choice.
- Measures short of dismissal must be seen to be considered.
  - workplace mediation,
  - redeployment to different roles,
  - relocation,
  - review of reporting lines,
  - coaching,
  - warnings.

If dismissal, then what is the difference...

Gross misconduct versus some other substantial reason (SOSR)?



And, if dismissal, what is a fair and effective process?





# SECTION 98 EMPLOYMENT RIGHTS ACT 1996

- 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 reasons

- Conduct
- Capability
- Redundancy
- Illegality



## SOSR

- Breakdown in working relationship
- Personality clashes
- Family companies and family breakdowns
- Third party/customer pressure
- Business reorganisation
- Imprisonment
- Loss of trust and confidence..... or perhaps not



## GROSS MISCONDUCT

- Misconduct so serious as to justify summary dismissal of an employee.
- It is behaviour so bad that the employer cannot be expected to employ them any longer.
- May vary according to the particular circumstances of the workplace.
- Acts of gross misconduct, such as theft, fraud, physical violence, serious negligence or serious breach of health and safety regulations, will result in a serious breach of contractual terms.



## SECTION 98 ERA REASONABLENESS

- a) 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.

Relevant to:

- Process
- Decision



# BURCHELL TEST

## Misconduct Dismissals

- Genuine belief
- Reasonable belief
- Reasonable investigation
- Band of reasonable responses



## ACAS CODE

- Not formally binding on employers.
- Employment Tribunals are required to take it into account where it is relevant.
- Unreasonable failure to follow its recommendations may result in an adjustment of compensation of up to 25%.
- The Code states that it applies to disciplinary issues relating to 'misconduct' and 'poor performance'.
- It does not extend to redundancy dismissals or dismissals on the non-renewal of a limited-term contract.
- However, Code does not expressly exclude SOSR dismissals.



## SOSR PROCESS

- No such prescriptive path as the Burchell Test or ACAS Code.
- So many potential “reasons” = so many potential processes.
- Be led by the facts of the case.



## CASELAW

### **Loss of Trust and Confidence**

- McFarlane v Relate Avon Ltd 2010 EAT
- Leach v Office of Communications 2012 CofA
- Handshake Ltd v Summers 2012 EAT



CASELAW

## **Personality Clashes**

- Perkin v St George's Healthcare NHS Trust 2006 CofA



## CASELAW

### **Breakdown in Working Relationship**

- Ezsias v North Glamorgan NHS Trust 2011 EAT
- McFarlane v Relate Avon Ltd 2010 EAT
- Gallacher v Abellio Scotrail Ltd 2020 EAT



## CASELAW

### **Reasonableness**

- Governing Body of Tubbenden Primary School v Sylvester 2011 EAT
- Marshall v Parkway Entertainment Company 2017 ET
- Pheonix House Ltd v Stockman 2017



## CASELAW

### **Fair procedure**

- Jefferson (Commercial) LLP v Westgate 2012 EAT
- Express Medicals Ltd v O'Donnell 2015 EAT
- Gallacher v Abellio Scotrail Ltd 2020 EAT



## TAKE AWAY POINTS...

- Think carefully about what the reason is for the potential dismissal.
- If more than one reason, say it.
- Be able to explain why it is such a substantial reason that the termination of employment would flow from it.
- Be able to explain the background to the damage to the working relationship.
- Consider all potential alternatives to dismissal.
- The more resource and bigger the organisation you work for, the more justification you will need to show as to why dismissal is needed.
- Make a contemporaneous note of the alternatives considered and why it has been concluded that they would not be successful in avoiding the dismissal.
- Consider what a fair process looks like on the facts before you, not on previous cases.
- Consider before you start, what do you need to show (potentially to a judge in the future) that dismissal is the appropriate decision.
- Phone a friend if in doubt...

# ANY QUESTIONS?



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