

Redundancy & Dismissal:
Hints, Tips & Solution-Focused Answers
for Employers

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***How do you identify when enough is enough and the relationship of trust and confidence is broken?**

**** How much evidence do you need – how many grievances or complaints, allegations of bullying, instances of just not doing the job etc.?**

- Implied duty and associated risks
- Recent judgments
- Set of principles

Implied duty and associated risks

The implied duty of mutual trust and confidence has two different strands:

- treating each other with respect and civility
- not treating each other in a wholly unreasonable manner

Employer can use a breach of implied right of mutual trust and confidence as a reason for dismissal.

Don't mask misconduct with SOSR

Implied duty and associated risks

Risks to employer when dealing with grievances, complaints, allegations etc.

- constructive unfair dismissal
- protected disclosures
- victimisation/detriment
- discrimination

Recent judgments

Martin v Devonshires solicitors UKEAT/086/10

- Legal secretary lodges written grievance with serious (false) allegations against partners
- Grievance not upheld, disciplinary proceedings commenced and secretary goes off sick
- Secretary lodges a further seven grievancees
- Medical report discloses history of severe mental health issues

Recent judgments

Martin v Devonshires solicitors UKEAT/086/10

- Disciplinary proceedings on the basis of false allegations abandoned
- Proposal to terminate employment on the basis of a breakdown of trust and confidence
- Ms M maintained false allegations, denied medical findings and was dismissed on the basis of SOSR
- ET held dismissal fair: reason for dismissal was repeated false allegations, refusal to accept falsity and likelihood of disruptive behaviour in the future

Recent judgments

Martin v Devonshires solicitors UKEAT/086/10

- EAT upheld fairness of dismissal: reason for dismissal was not the complaint but some feature of it which can be properly treated as “separable”.

EAT held:

- an employer who objected to “ordinary” unreasonable behaviour should be treated as objecting to the complaint itself;
- reason for dismissal was the falseness of allegations, the fact that employee would not accept that they were false & the employee’s mental illness.

Recent judgments

Martin v Devonshires solicitors UKEAT/086/10

- Tribunals should be clear to recognise a distinction between the complaint and the way it is made save in “clear cases”

Cases are highly fact-sensitive

Recent judgments

Woodhouse v West North West Homes Leeds Ltd [2013] ***IRLR 773***

- Mr W alleges that management concern about his “attitude problem” was a racist remark and lodges formal grievance: formal grievance not upheld
- Mr W alleges further race discrimination and lodges second grievance: second grievance not upheld
- Mr W goes off sick, lodges third grievance and first employment tribunal claim
- Mr W lodges seven more grievances and eight more tribunal claims
- Dismissal on the basis of SOSR: ET holds that case “on all fours” with Martin case and dismissal fair

Recent judgments

Woodhouse v West North West Homes Leeds Ltd [2013] *IRLR 773*

- EAT overturned decision, stating Martin case cannot be regarded as template and that the Martin case was “an exceptional case”.
- EAT held that measuring cases against a yardstick is dangerous and that ET had failed to articulate the genuinely “separable” features of the grievances and the context of the comments made by Mr W.
- EAT suggested that ETs would do well to start from proposition that very few cases will be like Martin case.

Recent judgments

Woodhouse v West North West Homes Leeds Ltd [2013]
IRLR 773

- Employers who hide behind employee methods are on dangerous ground.

Proceed with caution

Recent judgments

Panayiotou v Chief Constable Kernaghan & others ***UKEAT/436/13***

- Mr P raised a number of public interest disclosures and campaigned for the police force to take actions he believed appropriate
- The force:
 - refused to consider Mr P's work-related applications
 - arrested him for receiving sick pay whilst working for wife's business
 - carried out surveillance from roof of nearby supermarket, then dismissed on the basis of an incompatible business interest
- ET found Mr P to have become completely unmanageable because of mental difficulties and this was the reason for dismissal – not disclosures

Recent judgments

Panayiotou v Chief Constable Kernaghan & others ***UKEAT/436/13***

- EAT agreed with ET, disagreed with Woodhouse case – no need for case to be exceptional, whilst still a need to safeguard against spurious defences
- There is in principle a distinction between the disclosure of information and the manner/steps taken re disclosure

Recent judgments

Panayiotou v Chief Constable Kernaghan & others
UKEAT/436/13

- It is important that any decision makers are distinct and independent from the content of the complaint

Don't allow decision-makers to follow the crowd

Recent judgments

Shinwari v Vue Entertainment UKEAT/394/14

- Mr S witnesses a colleague abusing the complimentary tickets for staff policy, resulting in that colleague being dismissed.
- Mr S lodges two separate grievances alleging intimidation by ex-colleague, bullying in the form of malicious rumours, name-calling by his colleagues and his ultimate ostracism, then resigns.
- ET finds “dismissal” not because of protected disclosure.

Recent judgments

Shinwari v Vue Entertainment UKEAT/394/14

- EAT finds distinction between the making of a protected disclosure and the conduct which follows.
- EAT disagrees with “exceptional” reasoning in Woodhouse case.
- EAT finds that an employer can “as a matter of common sense and common justice” state that the reason for dismissal was not the complaint itself but some feature of it which can properly be treated as “separable”.

Recent judgments

Shinwari v Vue Entertainment UKEAT/394/14

- There must be separable features which justify dismissal

Document all forms of monkey business in correspondence

Recent judgments

Salisbury NHS Foundation v Wyeth UKEAT/061/15

- Mr W raises concerns with a colleague's misuse of drugs, no action taken
- Mr W again raises concerns about colleague's misuse of drugs finding him crawling on the floor and, at times, comatose.
- Mr W suffers intimidation and is moved to day shift.
- Mr S goes off sick, is not involved in the investigation, then all staff receive a letter stating, "I will not tolerate unfounded gossip undermining colleague's return to work."
- Mr S resigns: ET finds "but for" protected disclosure, Mr S would not have suffered detriment

Recent judgments

Salisbury NHS Foundation v Wyeth UKEAT/061/15

- EAT overturns decision, on the basis that the wrong test has been applied
- EAT found that the ET failed to make clear findings as to what were the reasons in the employer's mind – the reason (or principal reason) was management face-saving. The protected disclosure provided the context but was not itself the reason.

Set of principles

- Dismissal on basis of breach of trust and confidence can be fair
- Reason for dismissal should be “separable” from complaint
- If reason is manner of complaint, “ordinary” unreasonable behaviour is not sufficient
- If reason is a combination of inter-related features, list them all
- Cases are highly fact-specific; take advice

When dealing with an employee

DO NOT tell them

or worse still

Instead if you

You won't be

or

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