

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

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

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

Implied duty of mutual trust and confidence

Every contract of employment is treated as containing an implied (unwritten) term of mutual trust and confidence. This requires employers and employees not to conduct themselves, without reasonable or proper cause, in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. It is a two-way duty, binding on both employer and employee.

Case law is clear that the duty of mutual trust and confidence has two separate strands:

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

A breach of the implied duty of mutual trust is more frequently used by the employee as evidence that the employer has repudiated the contract of employment, entitling the employee to resign and claim constructive unfair dismissal. However it is also possible for the employer to rely on a breach of this term on the basis for dismissing the employee.

Recent judgments considering employer's entitlement to rely on breach of implied term

Martin –v- Devonshires Solicitors UKEAT/086/10

Woodhouse –v- West Northwest Homes Leeds Ltd [2013] IRLR 773

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

Shinwari v Vue Entertainment Limited UKEAT/394/14

Salisbury NHS Foundation –v- Wyeth UKEAT/0061/15

Martin –v- Devonshires Solicitors UKEAT/086/10

Ms Martin was employed as a legal secretary. She presented a written grievance alleging that one of the partners had stated that she was “after the partner’s money” and that another partner had referred to her as a “prostitute.” The matter was investigated by a different partner who concluded that the allegations against the existing partners had been made maliciously and in bad faith. Ms Martin was notified that her grievance was dismissed but that she was subject to disciplinary action. When disciplinary proceedings were commenced, Ms Martin reported absent from work suffering from stress-related symptoms. She remained absent from work for a further five months although proceeded to lodge seven further grievances during this period. As a result of Ms Martin’s absence, her employers obtained a report from an occupational health consultant which confirmed that she had

a history of mental ill health with a recurrent depressive illness with psychotic episodes during which she experienced paranoid delusions. The medical consultant believed that her allegations about the partners were probably hallucinations. Her employers decided that disciplinary action would be abandoned and instead there was a proposal to terminate her employment on the basis of a breakdown of the implied duty of mutual trust and confidence. During this process, Ms Martin maintained that her allegations were true and denied that the medical information which had been obtained was accurate. Her employers dismissed her on the basis of the breakdown in trust and confidence which had commenced with Ms Martin's original allegations which were not corroborated by any witnesses. Whilst the employer accepted that Ms Martin believed these allegations to be true, this gave rise to a serious concern that similar allegations may be made in the future which Ms Martin would believe to be true which were not. Ms Martin's unwillingness to recognise these allegations could have been symptomatic of her condition but was a concern in addition to the nature of her allegations having the potential to ruin careers and lives. Her employers were concerned that additional grievances which would be lodged which would provide difficulties in successfully managing Ms Martin in the future.

Although Ms Martin claimed that her grievances were protected acts and she had been victimised as a result of these, the employment tribunal disagreed. The tribunal found that the reason for her dismissal was nothing to do with the fact that Ms Martin had made complaints of discrimination. Instead the tribunal found that the fact that those complaints involved false allegations of considerable seriousness, that they were repeated, that Ms Martin refused to accept that these were false and that the relevance of those facts being taken together led to the conclusion that Ms Martin had a mental illness which was likely to lead to unacceptably disruptive conduct in future. To put it another way, the tribunal found that the reason for the dismissal was that Ms Martin was mentally ill and the management problems to which that gave rise

The EAT agreed with the tribunal stating:

"The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation: and if not, not. In our view, there will be in principle cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable...

Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable...

An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases...

[The tribunal] identified as the reason [for dismissal] a combination of inter related features – the falseness of the allegations, the fact that the Appellant was unable to accept that they were false, the fact that both those features were the result of mental illness and the risk of further disruptive and unmanageable conduct as a result of that illness. But it seems to us that the underlying principle is the same: the reason asserted and found constitutes a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself”.

Woodhouse –v- West Northwest Homes Leeds Ltd [2013] IRLR 773

Mr Woodhouse was advised by a manager that he had “an attitude problem.” Mr Woodhouse, who was of black ethnicity, regarded this as “a racist remark.” He subsequently lodged a grievance alleging race discrimination. The three-stage grievance procedure was not upheld. During the three stages of the first grievance, Mr Woodhouse believed there had been further discrimination and therefore lodged a second grievance. After the same three stage procedure, the second grievance was not upheld. Mr Woodhouse’s health was adversely affected by the process and, as a result, he went off work with stress. Whilst off work with stress, he lodged a tribunal claim and, on his return to work six months later, lodged his third grievance followed by seven more grievances (and eight more tribunal claims).

During the hearing, the tribunal considered over 4,000 pages of documentary material and evidence from twenty five witnesses. When determining his claim of victimisation, the tribunal stated that this case was “on all fours” with the earlier Martin case. The tribunal dismissed the claims of victimisation.

The EAT overturned this decision stating:

“In our judgment, Martin cannot be regarded as some sort of template into which the facts of cases of alleged victimisation can be fitted. There are no doubt exceptional cases where protected acts have not caused the dismissal or whatever other detriment is at issue. Martin is an example of such an exceptional case but we emphasise the word exceptional: very few cases will have grievances based on paranoid delusions about events that never happened. It seems to us the process of measuring cases against such a yardstick is a dangerous one...

On any objective basis, this case is not “on all fours” with Martin. This is not only illustrated by the clear factual differences between this case and Martin but also by the difficulty, as we perceive it to be, of the employment tribunal being able to articulate what the “genuine separable features” are...

Indeed, we think that employment tribunals would do well to start from the proposition that very few cases will be like Martin.”

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

Mr Panayiotou made protected disclosures to senior officers concerning the attitude of certain officers in respect of the treatment of race and the treatment of victims of rape, child abuse and domestic violence. Although there was an investigation, Mr Panayiotou was not happy with the outcome. The difficulty for his employer came, not because of the public interest disclosures, but from Mr

Panayiotou's desire to right the wrongs that he believed had occurred. Therefore, he did not just make protected disclosures but he began to campaign for the Police Force to take the actions that he believed were appropriate.

In response to this, the Police Force revoked, refused or would not consider applications for permission which he made to be involved in his wife's businesses. The Force also arrested him at his home when he was on sick leave, the alleged offence being that he was receiving sick pay whilst working without authorisation in his wife's business. Six officers attended his home for the arrest. Thereafter, the Force approved surveillance to establish whether he was working in his wife's business. Surveillance was carried out on the market stall run by his wife and from the roof of a nearby supermarket. Ultimately, Mr Panayiotou was dismissed on the basis that he had an incompatible business interest with the Force.

An employment tribunal did not accept that the reason, or principal reason, for his dismissal was the protected disclosures. Instead the tribunal concluded that the employer dismissed the claimant because of his long term absence on sickness grounds together with the manner in which Mr Panayiotou had sought to pursue his complaints. The employer was resigned to the fact that it had to devote a great deal of management time to responding to his correspondence and complaints and the employer formed the view that Mr Panayiotou was completely unmanageable.

The EAT agreed with this decision, stating:

"The EAT in Woodhouse suggested that, in such cases, it would only be exceptionally that the detriment or dismissal would not be found to be done by reason of the protected act. In my judgment, there is no additional requirement that the case be exceptional ...

It was a combination of long absence through sickness, from which Mr Panayiotou would never return, coupled with the sheer effort of dealing with the correspondence and complaints and the exasperation that Mr Panayiotou would never accept any answer save that which he sought. It was the combination of his long term absence and the way in which he pursued his views which was the reason for the employer's actions. As the tribunal put it in what it describes as its key finding, Mr Panayiotou had become completely unmanageable...

The tribunal did not conclude that the fact that Mr Panayiotou had made a number of repeated disclosures in the past meant that subsequent disclosures of information were not protected. Rather the tribunal considered that the reasons for the actions of the respondents were the combination of the period of time that Mr Panayiotou had been absent from work, coupled with the way in which he pursued his complaints."

Shinwari v Vue Entertainment Limited UKEAT/394/14

Mr Shinwari was employed as a customer assistant by The Vue. The Vue had a policy of providing complimentary tickets to staff for films at its cinemas but with a prohibition against resale to members of the public or at all. Mr Shinwari witnessed a colleague acting in contravention of that rule. When

that colleague became aware that Mr Shinwari had witnessed this, he offered him a £5 bribe to gain Mr Shinwari's silence. The colleague's misconduct was disclosed by Mr Shinwari and the colleague was subsequently dismissed. A dispute arose between Mr Shinwari and the employer as to the use of Mr Shinwari's witness statement in disciplinary proceedings. Mr Shinwari alleged that he had not permitted the employer to use this. Mr Shinwari was subsequently approached by the colleague and told that he would pay for his disclosure and that Mr Shinwari would be begging for his life. Although Mr Shinwari was moved to a different cinema, he alleged that his new colleagues were calling him a snitch and trying to get him in trouble. Mr Shinwari lodged a formal grievance (although it was not actually addressed to anyone in particular). The letter did not receive immediate attention and so Mr Shinwari lodged a second formal grievance asserting that he had no option but to resign and claim constructive unfair dismissal.

The employment tribunal determined that, although Mr Shinwari had made a protected disclosure, the answer as to whether he was dismissed or suffered detriment because of this protected disclosure was "unhesitatingly no".

The EAT agreed with this finding, stating:

"There is nothing in the Woodhouse case that prohibits the drawing of a distinction between the making of a protected disclosure and conduct, by the respondent that follows, which although related to those disclosures is separable from them..."

Both the Martin case and the Woodhouse case support the conclusion that it is permissible in appropriate circumstances for a tribunal to separate out factors or consequences following from the making of a protected disclosure itself, provided that the tribunal is astute to ensure that the factors relied on are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did..."

It seems to me that there is no additional requirement that the case be exceptional...

[The tribunal] can, as a matter of common sense and common justice say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable."

Salisbury NHS Foundation –v- Wyeth UKEAT/0061/15

Mr Wyeth was employed as a nursing assistant and had concerns about one of his colleagues who had been found asleep on a number of occasions and had been difficult to rouse. Mr Wyeth had seen him inhaling a substance from a bottle in the operating theatre. He reported this to his line manager who took no action. The following year, Mr Wyeth again had cause to raise concerns regarding his colleague, on this occasion crawling on the floor and, at times, comatose. One of this colleague's friends then sought to carry out his own investigation seeking to exonerate the colleague. This friend had also acted aggressively towards Mr Wyeth. Mr Wyeth lodged another complaint and, in response to this, was moved to the day shift. After raising concerns about his treatment which he felt to be humiliating and embarrassing, Mr Wyeth went off sick with depression. An investigation took place

however Mr Wyeth was not interviewed. Attempts were made to facilitate a phased return for Mr Wyeth, all of which failed. After the investigation concluded that there was no evidence to support a finding of gross misconduct, Mr Wyeth and other staff members were written to with a letter from the employer stating, "I will not tolerate unfounded gossip undermining this individual's return to work". Mr Wyeth resigned from employment.

The employment tribunal concluded that Mr Wyeth's second attempt at raising concerns amounted to a protected disclosure and that this was the reason (or principal reason) for his dismissal. The EAT disagreed with this reasoning, finding that the tribunal had applied the wrong test. The tribunal appeared to accept that the reasons for Mr Wyeth's treatment were not the protected disclosure but instead a "face-saving exercise" on the part of the employer. However the tribunal did not make clear findings as to the reason for the dismissal.

The EAT remitted the matter back to a fresh tribunal, stating:

"Given the importance of this [face-saving] factor, it was fundamental that the tribunal engaged with the respondents explanation for why it had acted as it had and made clear findings as to whether that explanation was accepted or rejected and, if rejected, why..."

If that was indeed the reason – whilst hardly laudable – I can see how that might be said to be other than the protected disclosure itself (albeit the protected disclosure would certainly have provided the context). I cannot however be certain that is what the tribunal ultimately found or as to how that would then impact on its assessment of the reason or principal reason for the dismissal."

Set of Principles for Breakdown of Trust and Confidence Dismissals

- Dismissal on the basis of a breakdown in trust and confidence can be fair.
- The reason for dismissal should be "separable" from the employee complaint.
- If the reason is the "manner" of the complaint, "ordinary" unreasonable behaviour is not sufficient. If the reason is a combination of inter-related factors, a decision-maker should list them all in decision letter.
- Cases are highly fact-specific: take advice

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