

Burger King

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

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Other substantial reason

Is it possible to dismiss an employee because of persistently poor behaviour, e.g. bad manners, undermining, not speaking to people?

What evidence is going to persuade a tribunal?

Chris Thompson of Gateley PLC

- Persistent 'misconduct'
- Employer's disciplinary procedures apply
- Warnings – what stage are we at?
- Exceptionally if the conduct sufficiently persistent it may not matter
 - Stratford v Auto Trail VR Ltd
 - Airbus Ltd v Webb

- ‘Poor behaviour’ rather than misconduct
- Impact of the behaviour
- “Breakdown in trust and confidence”
- Section 98 (1) (b) of the Employment Rights Act 1996
*‘some other **substantial reason** of a kind such as to justify the dismissal of an employee holding the **position which the employee held**’*
- **Substantial** – not whimsical or capricious
- Justify dismissal from **the position which the employee held** – the more senior the role then the more may be expected in relation to their conduct

Mutual trust and confidence

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- Breakdown in the working relationship
- Implied term of trust and confidence
- Term used for constructive dismissal
- Better to describe the behaviour or impact
 - McFarlane v Relate Avon Ltd

Avoiding the disciplinary process

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- Should this be dealt under the disciplinary procedure?
- Is it misconduct?
- SOSR should not be used as a short-cut
 - Bown v Bristol City Council
 - Lund v St Edmunds School
- Conduct or relationship break down?
- Difficult distinction to make
 - Ezsias v North Glamorgan NHS Trust

Personality clashes

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- Personality dismissal?
- Conduct or SOSR?
 - Perkin v St Georges Healthcare NHS Trust
- Deterioration in relationship and poor health but refused to give details
 - Huggins v Micrel Semiconductor (UK) Ltd
- Upsetting colleagues with frank disclosures about sex life
 - Treganowan v Robert Knee and Co Ltd



What evidence is going to persuade a tribunal?

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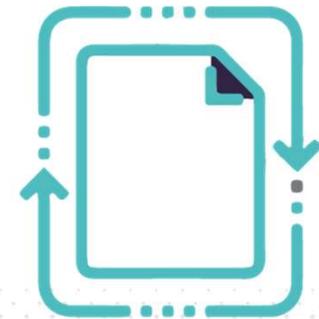
- Reasonableness
- Section 98(4) of the ERA states
- *'the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) — (a) depends on whether in the circumstances (including the **size and administrative resources** of the employer's undertaking) 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**'*

- SOSR outside scope of ACAS Code of Practice
- What steps would be reasonable?
 - Inviting them to a formal meeting
 - Stating the purpose of the meeting in advance
 - Allowing the employee an opportunity to respond in a formal meeting
 - Offer the right to be accompanied
 - Formally notifying the employee in writing of the decision
 - Giving right to appeal

Problem areas

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- Reason for the poor behaviour
- Evidence that employer has caused behaviour?
 - Mock v Glamorgan Aluminium Co Ltd
- Reasonable steps taken to avoid the conflict
- Moving the employee?
 - SA Brain and Co Ltd v Philippart
- Limiting contact
 - Rowe v West Sussex County Council
- Mediation



- Has the relationship broken down?
- Presumption that it has not
 - Phoenix House Ltd v Stockman
- Has there been a substantial disruption to the business?
- Not all disagreements will breach mutual trust and confidence
 - Handshake Ltd v Summers

Summary

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- If misconduct use the disciplinary process
- Always look for any alternative to a dismissal
- Addressing attitude problems at an early stage may resolve issues
- Reorganising may be appropriate at some point – depending on size and resources
- Always consider mediation