

Dismissal: Iron-Clad, Court-Proven Strategies for Scottish Employers

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How do you handle an employee who deflects blame, always has an answer and initiates complaints or grievances when confronted, perpetuating a recurring cycle of difficulties?

5 questions all HR Practitioners should ask when dealing with this type of individual:

1. Is there a possible medical issue?
2. Is there a recurring cycle of grievances?
3. Is this a conduct issue?
4. Can you dismiss on the basis of SOSR?
5. If all else fails, it is time for a protected conversation?

But before all that,

Are you taking notes?

- Diarise incidents of negative behaviour.
- Note down the effect on others
- Prepare a paper trail of evidence.

Is there a possible medical issue?

- Is the employee disabled?
- Is the employer subjecting the employee to unfavourable treatment (disciplinary sanction, dismissal) and that treatment is because of something (difficult behaviour) which arises in consequence of disability?

Is there a possible medical issue?

McQueen v General Optical Council [2023] EAT 36

- McQ had dyslexia, Asperger's Syndrome, left-sided hearing loss & neurodiversity
- OH suggested modifications to the way his employer gave him instructions
- Disciplinary action was taken against McQ.

Is there a possible medical issue?

McQueen v General Optical Council [2023] EAT 36

- McQ claimed he was subjected to unfavourable treatment because of something arising in consequence of his disability
- ET found that McQ had a short temper and resented being told what to do.

Is there a possible medical issue?

Questions to ask OH should include:

- Is Jack medically fit for work at present?
- Is there a medical reason for Jack's behaviour/performance difficulties?
- If so, does Jack need treatment to optimise his health?
- What is the prospect for significant improvement?
- Are there any potential adjustments we can consider?

Is there a possible medical issue?

- Seek a medical opinion on the matter.
- Consider whether there is a less intrusive means of resolving the issue.

Is there a recurring cycle of grievances?

An employee who is confronted in the workplace is, within reason, entitled to lodge a grievance.

But an employee may be fairly dismissed for raising repeated complaints or grievances.

Is there a recurring cycle of grievances?

Panayioutou v Chief Constable Kernaghan UKEAT/0436/13/RN

- Mr P made various protected disclosures which, after investigation, were largely upheld.
- Mr P was unhappy with the action taken by his employer, pursued matters through various other approaches.
- Mr P was later dismissed.
- ET found that Mr P became completely unmanageable & his actions were sufficient to exhaust the patience of the organisation.

Is there a recurring cycle of grievances?

Hope v British Medical Association EA-2021-00187-JOJ

- Mr H brought numerous grievances against senior managers.
- He refused to discuss these grievances with anyone other than his line manager (who had no authority to resolve the issues)
- Mr H refused to attend his grievance meetings and was dismissed.
- EAT held that the BMA acted reasonably in treating conduct as sufficient reason to dismiss.

Is this a conduct issue?

- Is the employee deflecting blame?
- Can't Work, Won't Work?
- (Capability – can't work: Conduct – won't work)

Is this a conduct issue?

Adeshina v St George's University Hospitals [2017] EWCA Civ 257

- Ms A was asked to lead a project to which she was opposed.
- Colleagues complained that Ms A behaved unprofessionally during a meeting and failed to co-operate, support and lead the project.
- SGUH summarily dismissed Ms A on the basis of gross misconduct.
- CoA held that poor attitude to change could be gross misconduct.

Is this a conduct issue?

Points to consider when deciding whether gross misconduct include:

- How serious is the behaviour?
- What impact is it having on the organisation/employees?
- If applicable, the seniority of the employee?
- Has the employee accrued unfair dismissal protection?
- Is there a discrimination/automatic unfair dismissal risk?
- Is it personal or professional misconduct?

Can you dismiss on the basis of SOSR?

Remember that an employer can fairly dismiss an employee for “some other substantial reason” where there are personality clashes or where a difficult personality leads to an irretrievable breakdown of relationship at work.

If all else fails, it is time to have a protected conversation?

- Explain the reason for your chat
- Be super specific by giving “evidence-based” examples
- Be crystal clear about how these examples are affecting the organisation
- Ask open questions (Don’t interrupt, don’t judge)
- Ask if the employee has any suggestions as to how to fix things
- Jot down everything which is said.
- Set a date to speak again, with the option of the settlement agreement

Questions?



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