

Whitepaper Conference

23 November 2016

Trust and confidence:

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

- Its an implied contractual term
- Its in every contract of employment
- But what is meant by the term trust and confidence?
- Conduct for which
 - there is no "reasonable or proper cause" and
 - is calculated and likely to destroy or seriously damage the relationship of trust and confidence

(Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL)

- Term implied by courts to give protection to employee
- Employer's conduct was at centre of the cases not the employee's
- Provided employees with a right to resign as a consequence of breach of contract and claim constructive dismissal
- Mutual obligation – but when would employer need to rely on the term?

- Breakdown in trust and confidence
- Conduct, Capability or 'Some other substantial reason'
- Perkin v St George's Healthcare NHS Trust (SOSR)
 - 'Awkward' attitude led to fall out with other employees
- McFarlane v Relate Avon Ltd (conduct)
 - Refusal to counsel same sex couples
- Leach v Ofcom (SOSR)
 - Allegations of illegal activities in foreign countries

- Substantial reason – not frivolous or insignificant
- Procedural fairness
- Acas Code
- Application to SOSR dismissals
- Lund v St Edmunds School
 - Acas Code applied as disciplinary issues
- Phoenix House v Stockman
 - Acas Code does not apply to SOSR

- Phoenix House v Stockman
- Reorganisation – employee resented new role
- Belief that Director against her
- Grievance and disciplinary proceedings
- Could employee be reincorporated into the workforce?
- Dismissal unfair as evidence that she could have been
- No Acas Code – no uplift of compensation

- Follow steps in Acas Code
- Consider how conduct case dealt with in relation to disciplinary matters
- Has there been a fair procedure?
- Grievance or complaints about employee
- Conduct - no shortcuts
- Lund v St Edmunds School
- Disciplinary case following on from misconduct
- Not doing job
- Why? Conduct or capability

- Action following grievances or complaints
- Is it victimisation? Can we separate the reason from the discrimination complaint?
 - Martin v Devonshires Solicitors
 - Jhoots Pharmacy v Woods
 - Micheldever Tyre Service v Burrell
- Contrast
 - Gillingham FC c McCammon
 - Woodhouse v West North West Homes Leeds Ltd

- Public interest disclosure?
- Reason for dismissal separate from disclosure?
- Bolton School v Evans
 - Hacking school IT system
- Panayioutou v Chief Constable Kernaghan
 - Campaign against police force

- Conduct issues
- Follow disciplinary procedure and Acas Code
- Capability
- Follow performance management procedure
- Trust and confidence not a shortcut to dismissal
- All circumstances to take into account
- Key issue
- Can the employee return or remain in the workplace or will it be unduly disruptive?

Questions