

TURCAN CONNELL

## Negative attitudes

When do negative personal opinions or attitudes about the workplace, in the workplace, justify intervention from the employer?

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1 “intervention by employer”- that intervention does not of course mean dismissal – the intervention could be an informal management type discussion or formal procedure short of dismissal- warnings, redeployment etc. However in a conference entitled “Dismissal” dismissal will of course feature prominently.

2 “about the workplace, in the workplace”- so we are not dealing here with negative comments about work made after “Wine O’clock” on social media although there is a lot of case law on that. We are talking about disenchantment of some description expressed in some way at work.

3 “negative personal opinions or attitudes” what are these?

# Legal Framework for dismissal

Where two or more year's service S98  
Employment rights Act

2 stage test

Stage 1- it is for the employer to show—  
(a) the reason (or, if more than one, the principal reason) for the dismissal, and  
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

Subsection 2 potentially fair reasons-

Capability/qualifications

Conduct

Redundancy

illegality

And some other substantial reason of a kind to justify dismissal

The reported cases show conduct and SOSR are the main reasons used

## Stage 2

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.

Some of the dismissals which have made their way to tribunal have resulted from little procedure with the tribunal attaching greater weight to inevitability of dismissal.

# Case Law- Gallacher v Abellio Scotrail Ltd 2020

Senior manager- Head of Customer Delivery and Standards  
Needed to be able to form and maintain good working relationships with  
her line manager

Mrs G became disenchanted-

- Unhappy with salary although an increase was granted

- Unhappy about being required to participate on an on call rota

- Mrs G made clear she was looking for a different role

- Off sick- unhappy with her manager's (Mrs Taggart) recording of a  
back to work meeting

Mrs G's unhappiness- continued

Unhappy about the preferred candidate for a new post

Came across in discussions with her boss as being unhappy with her boss. Seemed to blame her boss for the deteriorating relationship

Mrs Taggart concluded that the relationship was not sustainable, the breakdown was irretrievable, that standing considerable pressure to deliver better returns to the business Mrs G could not remain in post. No alternative jobs available. Mrs T informed Mrs G of the decision to dismiss Mrs G at her appraisal.

Mrs T felt she could not “work with someone who is okay one minute and not the next”  
“irretrievable breakdown in relationship”  
No proper procedure  
Not conduct or performance

Mrs G complained of unfair dismissal and disability discrimination

Tribunal found that there was a breakdown in trust and that the dismissal was for some other substantial reason of a kind to justify dismissal.

It further found that despite the summary procedure the dismissal was substantially and procedurally fair.

Mrs G appealed to the EAT on a number of grounds including lack of fairness/natural justice

The EAT held that as the tribunal had found that proper procedure would have made any difference the tribunal had not erred.

## Adeshina v St George's University Hospitals NHS Foundation Trust 2017

This was a conduct dismissal.

Decision of Court of Appeal

Mrs A claimed unfair dismissal and race  
discrimination

Employed as a pharmacist by the NHS but to work in  
a prison. She was asked to participate in a  
reorganisation. She strongly disapproved of an  
aspect of the proposed changes. The Governor and  
Deputy Governor complained of her lack of  
leadership in the reorganisation. She was suspended  
and a disciplinary process began.

She was accused through her negative attitude of bringing the employer into “disrepute” and of “serious insubordination”, “negligence” **and** “verbal abuse”. It was said she lacked insight into her actions and sought to criticise others.

The tribunal found that the disciplinary process was flawed but that the defects were cured on appeal. For the tribunal the real issue in the case did not turn on the details of the particular incidents but on whether the Appellant’s attitude was indeed one of ‘deliberate resistance’.

There was a clear picture of 'deliberate disengagement' in the meeting and a 'mutinous attitude' in her telephone conversation with her boss during the break.

The Court of Appeal dismissed the appeal.

## Perkin v St Georges Healthcare NHS Trust 2005

Conduct dismissal  
Court of Appeal

Mr P claimed unfair dismissal

He was employed as a director of finance. Senior management position. He was required to manage relationships below and above. Considered to be good technically but many people found his management style to be difficult to cope with.

Mr P was called to a meeting without notice and was asked to resign.

He refused. A disciplinary hearing was convened and chaired by the Chair of the Board. Evidence was led that he was stubborn and intimidating and that he did not contribute constructively. During the hearing he accuse some witnesses of lying and attacked one witnesses' integrity.

Mr P was dismissed with notice. The reason given was that he had a “disabling and negative approach” which lead to a breakdown in relationships with his team. He was criticised for making criticism of the various witnesses.

The tribunal following the approach set out in BHS v Burchell decided that the employer had a belief that Mr P’s style has serious adverse impact and that that belief was formed after reasonable investigation. However it decided the dismissal was unfair because it was known that the Chair had already determined to exit him and had spoken of an “exit strategy”.

It also decided that Mr P contributed 100% to his dismissal.

On appeal to the Court of Appeal there was discussion about whether this was really a SOSR or conduct dismissal.

It was held that the employer was not wrong to label this as conduct.

Although personality cannot be a ground for dismissal the manifestation of that personality may bring the employee's actions within the scope of S98.

Whether the dismissal is conduct or SOSR is not the true issue. The issue is whether the employer has established facts which justify the dismissal. The Court of Appeal was satisfied that the facts justifying dismissal had been established.

It was not wrong to treat the process as if this were a conduct dismissal and not wrong to apply Burchell even though Burchell was a conduct case.

All the cases dealt with here involve breakdown in relationships at work. It is possible the effect of attitudes could be to destroy relationships with say customers. Adeshina is not such a case because although the complaint came from the prison authorities it was in fact her conduct which led to her dismissal.

There are lots of cases where people are dismissed because of pressure from a third party and that pressure could have come about because of negative attitudes. The approach would be exactly the same but with the twist that in such cases the effect on the employee of the dismissal has to be taken into account.

Gallacher and Adeshina are both cases where discrimination claims were brought. The case of Ezsias v North Glamorgan NHS Trust involved a whistleblowing claim. Mr E was a surgeon. He was critical of colleagues' work. He felt standards were too low. His criticisms were described as "excessively frequent, unacceptably detailed and unrelenting to an extreme degree". Mr E said he was merely whistleblowing. There was a petition within his department against him and he was dismissed because of irretrievable breakdown.

Substantial process followed tribunal to EAT to Court of Appeal (mainly on questions of bias) back to tribunal which dismissed his claim and then to EAT again which refused his appeal. Much of the argument involved the extent to which disciplinary procedures were contractual (held not to apply because this was a SOSR not a conduct case). His whistle blowing claim failed at an earlier stage because of no reasonable prospects.

## Conclusion

### Negative attitudes

When do negative personal opinions or attitudes about the workplace, in the workplace, justify intervention from the employer?

1 when the attitudes/personal opinions manifest themselves in such a way that S98 is engaged.

2 The cases tend to focus on the results of attitude on relationships.

For example- Mrs G- boss could not “work with someone who is okay one minute and not the next” and “irretrievable breakdown in relationship”

Mrs A “deliberate resistance”, “deliberate disengagement” and a “mutinous attitude”.

Mr P “disabling and negative approach” leading to breakdown in relationships

Relationships outside work are also relevant.

3 the label (conduct or SOSR) is probably not critical.  
But remember ACAS code of practice on discipline and grievance procedures applies to conduct dismissal though not SOSR

4 A number of cases suggest that process can be light (Mrs G, Mr P and Mr E) where the dismissal would happen anyway but best advice is to carry out a full process, using Burchell so you can run Conduct and SOSR as alternatives. Follow the ACAS code anyway.

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