

## Whitepaper Conference

### 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?*

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### Introduction

Persistent misconduct will be subject to the employer's disciplinary rules and procedures.

This will usually require that warnings are given before the employee is dismissed unless the employee commits an act that amounts to gross misconduct.

Sometimes persistent repeated conduct though will cast doubt on the effectiveness of such warnings.

An example of repeated misconduct was the case of **Stratford v Auto Trail VR Ltd 2017 UKEAT/0116/16/JOJ** which was reported early last year.

Very briefly, in this case Mr Stratford had received 17 previous disciplinary warnings for failing to follow various shop floor rules. When he was finally dismissed, for using his phone on the shop floor in breach of a clear ban, the employer did so because it felt that, given all the previous warnings, it could see no hope of him behaving himself sufficiently in the future.

Mr Stratford brought a claim for unfair dismissal, claiming that this was an unlawful reliance on expired previous warnings under the disciplinary process.

However it was held that it was a fair dismissal. It wasn't the expired warnings that had led the employer to the conclusion that he was never going to change but rather the overall history of his conduct.

The case drew upon the Court of Appeal observations in the earlier case of **Airbus Ltd v Webb [2008] EWCA Civ 49** in which it was established that having regard to previous conduct, regardless of the fact that it was the subject of an expired warning was permissible, when deciding on sanction for a dismissible offence. The expired warnings were just objective factors to take into account and the key question of whether the employer acted reasonably would depend on the particular circumstances.

### Poor behaviour

In this talk we are looking at persistently 'poor behaviour', e.g. bad manners, undermining, not speaking to people, rather than misconduct, although the two as we will see are sometimes very difficult to tell apart.

These are problem types of conduct that cause disruption and inconvenience but they may not easily fall under the heading of misconduct which could be dealt with under the employer's disciplinary rules and procedures.

The impact of the behaviour has to be considered. Whilst it may not breach a specific rule it could, particularly where repeated, lead to a breakdown in the working relationship or as is it sometimes described a breakdown in trust and confidence.

This could then be a potentially fair reason for dismissal under the category of "some other substantial reason" (SOSR).

SOSR is found in Section 98 (1) (b) of the Employment Rights Act 1996 (ERA) following the list of specific grounds that could be potentially fair and on which an employee may be dismissed. It is a catch-all category covering dismissal for '*some other **substantial** reason of a kind such as to justify the dismissal of an employee holding **the position which the employee held***'.

It must be a **substantial reason**

What is substantial? In relation to the breakdown in the relationship between employer and employee the test was set out in **Harper v National Coal Board 1980 IRLR260**, EAT — where an employer could show a genuinely held belief that it had a fair reason for dismissal, that reason may be a substantial reason provided it was ***not whimsical or capricious***.

### **The position which the employee held**

Whether the dismissal is reasonable will depend on whether the conduct has breached trust and confidence. That may be more easily established where the employee is in a senior position but it will not be exclusively those that will be at risk.

The more senior the position held then the more that will be reasonably expected from that employee in terms of their general conduct and the greater responsibilities they carry.

The facts of the particular case always have to be taken into account for it to be assessed what has been the impact of the conduct in question.

### **Mutual trust and confidence**

This is not a term used in the statute. It has been referred to as grounds for dismissal but it was originally a term reserved for those cases where an employee resigned on grounds that the employer had breached mutual trust and confidence.

This was a point highlighted in the case of **McFarlane v Relate Avon Ltd 2010 ICR 507**, EAT.

In that case a relationship counsellor was dismissed for objecting to having to provide sex therapy to same-sex couples. In addition to religion and belief discrimination he claimed unfair dismissal. He lost both claims. In regard to the unfair dismissal claim the employer's argument that it had lost trust and confidence in Mr McFarlane was accepted.

However HH Justice Underhill, then President of the EAT, commented that referring to trust and confidence in this context was 'unhelpful' as in almost all cases where an employee was dismissed for something he or she had done, the employer will have lost trust and confidence in him or her. It was suggested that it would be more helpful to focus on the employee's specific conduct rather than use such general terminology. It was still fair under SOSR but the general use of the term trust and confidence as a description that was suitable for all acts was not approved.

## **Avoiding the disciplinary process**

The criticism regarding use of the term “mutual trust and confidence” rather than the conduct in question does help address the issue of whether the employee should be more appropriately dealt with under the disciplinary process.

In some circumstances, employers may attempt to rely on SOSR for dismissal in order to avoid having to dismiss an employee for misconduct. However, if conduct was the genuine reason for the employee’s dismissal, the employer may risk a finding of unfair dismissal if it neglected to follow an applicable disciplinary procedure.

In **Bown v Bristol City Council ET CaseNo.1402472/10** Mr Bown had been accused of bringing the Council into disrepute when he had tried to challenge a decision that the Council had made regarding Tree Preservation Orders. The investigation concluded that there had been a breakdown in trust and confidence and Mr Bown was dismissed because his ‘inappropriate and ill-advised’ action had resulted in ‘an irretrievable breakdown of relationships’ with management. His claim for unfair dismissal was successful as it was held that given that the breakdown resulted from his conduct the Council should have treated it as a conduct issue. Consequently, the manner in which the Council pursued the matter rendered the dismissal unfair

It can be extremely difficult to identify the line where conduct crosses over into that which should be dealt with as a disciplinary matter rather than being SOSR.

In **Lund v St Edmunds School [2013] UKEAT/0514/12** Mr Lund was employed as a graphic design teacher by St Edmunds School. His relationship with the school and work colleagues became strained after he complained about the school’s computer equipment, and eventually took it upon himself to dismantle it. He then refused to allow a consultant to observe and report on his teaching.

Subsequently an investigation revealed that a number of other teachers had serious concerns about working with him. He was called to a meeting and handed a letter which explained that his employer had lost confidence in his commitment to the school and that he had alienated colleagues who no longer wanted to work with him. It stated that Mr Lund would therefore be dismissed with immediate effect. Mr Lund’s claim for unfair dismissal succeeded. No warning had been given that the meeting would be a dismissal meeting and he had not been given the opportunity to appeal. Furthermore the school had made no attempt to deal with Mr Lund’s concerns about the computer equipment. In the EAT it was stated that even though a disciplinary process was not invoked, it was clearly in the contemplation of the school that he might be dismissed as a result of the effect of his conduct on his colleagues it could therefore be argued that the school had, or ought to have, invoked their disciplinary process.

However in **Ezsias v North Glamorgan NHS Trust 2011 IRLR 550** a different conclusion was reached. There had been problems between Mr Ezsias and his work colleagues, allegations and counter allegations were made by the employees. The Trust investigated the allegations by running an inquiry to establish what the situation was. The inquiry concluded that a conflict at work and interpersonal issues were the cause of the problem and there were no issues with the clinical standards. The inquiry recognised that Mr Ezsias’ complaints were excessively frequent and too detailed.

Mr Ezsias failed to accept these findings and made further complaints. The senior members of the team became so frustrated that all of them presented a petition to the Trust’s Chief Executive. This was, effectively, a “vote of no confidence” in Mr Ezsias. The Trust suspended Mr Ezsias and asked an HR professional from another NHS Trust to investigate further.

The conclusion of the investigation was that there had been an irretrievable breakdown in relations. It was held that this was mainly due to Mr Ezsias’ behaviour. The HR professional concluded that the

Trust had the option of either commencing disciplinary action against Mr Ezsias or ending his employment on the basis that there had been an irretrievable breakdown in the relationship with his colleagues.

The Trust wrote to Mr Ezsias, dismissing him on the grounds that there had been a “fundamental breakdown of trust and confidence” between Mr Ezsias and his colleagues.

Mr Ezsias brought claims which included unfair dismissal as the Trust had failed to follow the NHS’ contractual dismissal procedures. His claim failed as it was held that the Trust could rely on the breakdown of the working relationship between him and his colleagues as a fair ground for dismissal falling under SOSR rather than conduct.

However it was recognised that Tribunals need to be alert to the risk that an employer is using the SOSR heading as a pretext to conceal the real reason for the employee’s dismissal.

There was an important distinction between dismissing the claimant for his conduct in causing the breakdown of his relationships and dismissing him for the fact that those relationships had broken down. This may appear to be a difficult distinction but it is one that needs to be considered by the employer before taking action against the employee as it is the test that the Employment Tribunal is bound to follow.

In this case it was found it was the fact of the breakdown which was the reason for the claimant’s dismissal and that his responsibility for that breakdown was incidental. In the circumstances, the employer’s failure to follow the contractual disciplinary procedure did not render the dismissal unfair because that procedure did not apply to dismissals for SOSR.

### **Personality clashes**

The difficulty in separating a conduct dismissal from one of SOSR was also highlighted in the case of **Perkin v St George’s Healthcare NHS Trust 2006 ICR 617**.

In this case Mr Perkins worked for an NHS trust as its finance director. His responsibilities included managing a team of employees, liaising with senior colleagues and establishing working relationships with people outside the Trust. When members of staff raised concerns about his personality and management style, the Trust’s chief executive asked him to resign. He refused. At a subsequent disciplinary hearing, the Trust’s chairman concluded that Mr Perkin’s management style had led to a breakdown of confidence in his ability to fulfil his role among the executive team. He had also failed to establish the necessary relationships with stakeholders and external advisers to advance the Trust’s interests. Moreover, his *‘personal attacks’* on colleagues, *‘extending on occasions to abuse’*, had made it impossible for him to resume his previous role and re-establish an effective working relationship with them. As a result, Mr Perkin was summarily dismissed and he brought a claim for unfair dismissal.

Mr Perkins argued that he had effectively been dismissed on the ground of his personality. The Court agreed that personality of itself could not be a ground for dismissal. For there to be a potentially fair reason for dismissal, an employee’s personality must manifest itself in such a way as to bring the actions of the employer within the potentially fair grounds provided for in the statute. On the facts Mr Perkins unacceptable behaviour and the breakdown in confidence between him and the Trust, for which he was responsible and which had the potential of damaging the Trust’s operations, amounted to the potentially fair reasons of conduct and SOSR.

The Court of Appeal considered that the case fell under the heading of SOSR but acknowledged that in the Employment Tribunal it had been treated as a case that mainly fell under the heading of conduct. However it did not consider this fatal to the reasoning that was applied in this case and therefore did not affect the correctness of the decision.

As the Perkin case suggests, there is a fine line between SOSR and conduct when it comes to cases involving personality clashes.

In **Huggins v Micrel Semiconductor (UK) Ltd EATS 0009/04** the relationship between Mr Huggins and management deteriorated to the point that a disciplinary meeting was arranged to discuss his attitude.

In the course of that meeting he suggested that he had problems with his health which management sought to investigate but Mr Huggins refused to disclose a medical report obtained from his GP. When Mr Huggins wrote an intemperate letter undermining the management of the company — while still refusing to disclose the report — he was dismissed.

It was held that his dismissal was fair and that it was for SOSR. The way that Mr Huggins had conducted himself had caused or contributed to a breakdown in trust and confidence. The dismissal was fair even though no recognised orthodox procedure had been followed.

It was noted in the judgment that Mr Huggins had chosen not to help resolve the issues by refusing to disclose the medical report.

In **Treganowan v Robert Knee and Co Ltd [1975] ICR 405 QBD**, an employee's frank discussions about her sex life offended some female employees. It was stated that the atmosphere in the workplace "*had become so tense that it was unbearable*" and this was found to be seriously affecting the employer's business.

It was held that the dismissal was fair because of the impact on the small business.

## **What evidence is going to persuade a tribunal?**

### **Reasonableness**

Once an employer has shown a potentially fair reason for dismissal, the tribunal must go on to decide whether the dismissal for that reason was fair or unfair.

This involves deciding whether the employer acted reasonably or unreasonably in dismissing for the reason given.

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'*.

So it is not enough that the employer has a reason that is capable of justifying dismissal i.e. SOSR or conduct, the Employment Tribunal must be satisfied that, in all the circumstances, the employer was actually justified in dismissing for that reason.

The reasonableness test is that it is the employer's conduct which the tribunal has to assess, not the unfairness or injustice to the employee.

The test of whether or not the employer acted reasonably is usually expressed as an objective one — i.e. tribunals must use their own collective wisdom as industrial juries to determine 'the way in which a reasonable employer in those circumstances, in that line of business, would have behaved'

However there is also a subjective element involved in as much as tribunals must also take account of the honest beliefs of the employer at the time of the dismissal.

What tribunals must not do is put themselves in the position of the employer and consider what they themselves would have done in the circumstances. They must not usurp a function which is properly that of management. What a tribunal must decide is not what it would have done if it had been management, but whether the employer acted reasonably.

In determining the reasonableness of a dismissal, the tribunal can only take account of those facts (or beliefs) that were known to those who took the actual decision to dismiss – provided that there has been a reasonable investigation.

In determining whether the employer acted reasonably in the circumstances, the tribunal must have regard to the 'size and administrative resources of the employer's undertaking'

### **The process**

If an employer has established SOSR correctly, a fair process must then be followed before deciding on dismissal. Care should be taken not to refer to 'disciplinary' or any other label that could confuse the true reason for the action. There is no official guidance but best practice is to afford the employee the same safeguards as under a disciplinary process, which would include:

- writing to the employee inviting them to a formal meeting and stating the purpose
- holding a formal meeting at which the relevant issues can be discussed, where the employee may make representations and is offered the right to be accompanied
- notifying the employee in writing of the decision, i.e. to terminate their contract of employment on the ground of SOSR, and giving the right of appeal.

### **Reason for the poor conduct**

Taking those principles into account the evidence that the employer is able to put before the Employment Tribunal should show that the decision to dismiss on grounds of SOSR was taken as a last resort after all reasonable alternatives were considered.

The Employment Tribunal will consider if the employee has put forward any justification for their conduct.

Is there evidence that management have provoked the employee?

In **Mock v Glamorgan Aluminium Co Ltd EAT 493/80** it was the managing director's previous fundamental breach of contract – he had allegedly assaulted him – that triggered Mr Mock's unyielding attitude, it was held that it was this destroyed the trust and good faith essential in employment contracts, not Mr Mock's attitude, so the dismissal was unfair.

That meant there would be an award of compensation but employee's non-conciliatory attitude might be a factor justifying a reduction in the amount of compensation.

It will also be taken into account whether the employer could have made changes in the workplace that could have resolved the problems. This would apply in particular where there was a personality clash between two employees.

### **Have reasonable steps been taken to avoid the conflict?**

If an employer could have easily organised its business in such a way that the conflict situation could have been avoided then it may not in fact give rise to a substantial reason justifying dismissal.

In **SA Brain and Co Ltd v Phillipart EAT0571/06** Mr Phillipart was employed as a pub manager by a brewery. His relationship with his line manager deteriorated and he went on sick leave and lodged a grievance. When his line manager was changed he returned to work. There were no further problems until a major management reorganisation led to the original line manager being reappointed. Mr Phillipart acted inappropriately and was dismissed for misconduct and/or SOSR because of a loss of trust and confidence.

The decision of the employer to place the employees together when it had knowledge that there had been a serious personality clash between the two led to the finding that the dismissal was unfair. The evidence did not show that the brewery had been unable to reorganise the business in a way that would have avoided the two working together.

The evidence should show that transfers and changes to shifts have been given sufficient consideration.

In **Rowe v West Sussex County Council and anor** ET Case No.3101926/11, for example, Miss Rowe, a teaching assistant, had refused to work with a fellow teacher who she had found out had been seeing another teacher during a time that they were having an affair. The school made efforts to minimise her contact with him but could not transfer him to another school. Following her continued refusal she was dismissed. It was held that the school had been entitled to do so for SOSR due to the impasse in the working situation.

In some cases changing where an employee worked would just not be practical and dismissing another employee because his or her refusal to work with him or her may be fair for SOSR.

#### **Has mediation been considered?**

Recognising conflict and taking early action like mediation to resolve it can save time and money.

Personality clashes are often difficult to sort out using grievance processes. On the other hand arranging workplace mediation has achieved great results in a number of cases avoiding any Employment Tribunal proceedings.

It is a step that the Employment Tribunal will expect that the employer should explore and it also recommended by ACAS as an appropriate step to resolve workplace disputes in particular where the employer is trying to help work colleagues to form effective working relationships where a personality clash has arisen.

Of course workplace mediation has to be voluntary and in some cases the employees will refuse to even be in the same room as each other. If it can be shown that steps have been taken to try and convince them though of the benefits of mediation and the confidential nature of the process it can help convince the Tribunal that the employer has acted reasonably in dealing with the matter.

#### **Has the relationship broken down?**

There should not be a presumption that the working relationship has broken down. That has to be a conclusion of last resort.

In the case of **Phoenix House Ltd v Stockman and anor 2017 ICR 84** Ms Stockman was employed as a Financial Accountant at a charity. There was an organisational restructure in which her post was removed and she was given the role of Payroll Controller which she considered was a more junior role. She felt that the job she should have been given had been unfairly allotted to a work colleague by the Finance Director. She complained about his conduct. However before that had been resolved she burst into his office during a meeting to accuse him of conspiring against her. Disciplinary proceedings were begun to run in parallel with the grievance but Ms Stockman went on sick leave.

When she was invited to attend a hearing to decide whether the working relationship had irretrievably broken down she informed the employer that she believed she could still work under the Finance Director and that she wished to return to work after her sick leave. She pointed out that the new role did not even necessitate even day to day contact with the Finance Director.

This was not accepted and she was dismissed on the grounds that the relationship had irretrievably broken down

It was held that the dismissal was unfair. Her protestations that she could continue to work harmoniously with her colleagues should have at least been put to the test.

### **Substantial disruption to the business**

One example of a case in which a senior manager was unfairly dismissed on grounds that his conduct had caused a 'loss of trust and confidence' was **Handshake Ltd v Summers EAT0216/12**. He had disagreed about decision regarding his entitlement to a bonus payment and a part share in the business. There was a lot of correspondence and a number of attempts made to resolve the issue but without success. Finally Mr Summer decided not to continue to try and resolve it himself and instructed his solicitors to write to the company. Their formal letter stated that their client was 'losing all trust and confidence in respect of his employment'. The employer considered that had opened the door to dismissal on the grounds that the relationship had 'completely broken down' and become unworkable.

It was held that Mr Summers's actions – disputing his terms and conditions - had not had the impact of breaching mutual trust and confidence. The dismissal was unfair as it was held the real reason for the dismissal was a genuine dispute about his terms and conditions and that if Mr Summer had signed up to new terms then he would probably not have been dismissed. An employee was entitled to raise issues about terms and conditions and even involve solicitors without breaching mutual trust and confidence.

### **Summary**

If the conduct in question falls within the definition of misconduct use the disciplinary process.

Be aware the Tribunal will spot if this is just an attempt to avoid going through the disciplinary process

Where the behaviour doesn't reach that level of misconduct dismissal under SOSR may be the answer eventually. However it will be necessary to first consider is there an alternative.

Simply addressing problems at an early stage may resolve issues. Reorganising may be appropriate at some point and mediation should always be considered.