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## When is it safe to dismiss?

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# Scenario

- Employee lodges a number of grievances/makes allegations which are not upheld
- Can employer dismiss for breakdown in trust and confidence?
- What issues/potential claims are engaged?

## Key issues engaged

- Whistleblowing detriment or dismissal
- Discrimination
- Victimisation
- Unfair (constructive) dismissal

# Key Caselaw

- *Martin v Devonshires Solicitors* [2011] ICR 352, EAT;
- *Woodhouse v West North West Homes Leeds Ltd* [2013] IRLR 773, EAT;
- *Panayiotou v Kernaghan* [2014] IRLR 500, EAT;
- *Shinwari v Vue Entertainment Ltd*, 12 March 2015, *unreported*, UKEAT/0394/14/BA
- *Salisbury NHS Foundation Trust v Wyeth* 12 June 2015, *unreported*, UKEAT/0061/15/JOJ
- *Bham v 2gether NHS Foundation Trust* 7 August 2015, *unreported*, UKEAT/0030/15/DXA (and others)

# *Martin v Devonshires Solicitors*

- Discrimination/victimisation
- Distinction drawn between the protected act itself and one or more features and/or consequences which were properly and genuinely separable from it
- EAT upheld ET's decision that reason for dismissal was not the fact that C had made a complaint but that she had refused to acknowledge its falsity and the likelihood of recurrence of the mental illness (which had caused her to make the complaint)

# *Martin v Devonshires Solicitors*

- Example given by EAT of an employer dismissing because an employee had made a complaint of discrimination in such a manner, e.g. accompanied by threats of violence, that the manner in which the complaint had been made was properly and genuinely separable from the complaint itself.

## *Woodhouse v West North West Homes (Leeds) Ltd*

- More restrictive approach taken
- EAT stressed the dangers of an employer evading the statutory protection given to employees by the device of saying it was only the employee's *methods* to which it objected
- Such a distinction would only operate in 'exceptional' cases
- Few cases would be like *Martin*, which should not be used as a template

## *Panayiotou v Kernaghan*

- Disagreed with and distinguished *Woodhouse*
- Cited *Martin* and earlier CA authority (*Bolton School v Evans* [2007] ICR 641), in a whistleblowing context
- No requirement that the case be exceptional, whilst acknowledging the need to guard against spurious defences
- There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed, or the steps taken by the employee in relation to the information disclosed.

## *Shinwari v Vue Entertainment*

- Whistleblowing case
- Adopted the same approach, without citing *Panayiotou*

## *Salisbury NHS Foundation Trust v Wyeth*

- Cited *Martin*, with the qualification in *Woodhouse*, whilst citing none of the later cases

## *Bham v 2gether NHS Foundation Trust*

‘In my judgment, the ET was entitled to conclude (a finding for which there was cogent evidence) that the Appellant was put on this [at risk] register because of his longstanding and thoroughly uncollegiate behaviour and not because of his protected acts. Those were no more than a background factor, on the ET's reasoning.’

## *Bham v 2gether NHS Foundation Trust*

- Here again, no reference to later caselaw
- ‘The ET reminded itself carefully of the two relevant authorities. Whether this case was one of the exceptional types of case which Underhill P referred to in *Martin* was a question of fact for the ET.’



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## Note of caution

## *Leach v OFCOM* [2012] IRLR 839, CA

- Very different circumstances: police disclosure of credible, but untested, allegations that employee had committed child sex offences.
- ‘The legislation is clear: in order to justify dismissal a breakdown in trust must be a “substantial reason.” “Breakdown of trust” is not a mantra that can be mouthed whenever an employer is faced with difficulties in establishing a more conventional conduct reason for dismissal.’

## *Leach v OFCOM* [2012] IRLR 839, CA

‘The mutual duty of trust and confidence is an obligation at the heart of the employment relationship. It is not a convenient label to stick on any situation, in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate.’

# Conclusions

- Cases highly fact sensitive
- In the right case, dismissal can be justified
- Should be sparingly used
- Likely to arise in the context of (alleged) protected acts
- Not without risk for the employer



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