

Persistent Poor Attitude

WELCOME TO CLARITY 

David Walker
Morton Fraser LLP

Poor Attitude

- How much do you need to put up with before dismissing an employee because of persistently poor attitude e.g. lack of care, ignoring manager requests, undermining others, poor team relationships?
-

Be Specific

- “Poor attitude” sounds like a personality trait
- But “personality” is not a potentially fair reason for dismissal although it can manifest itself in a way that can bring it within the “conduct” category

Perkin v St George’s Health Care NHS Trust 2006 ICR 617

- Therefore identify the specific unacceptable behaviour(s)
-

Identify the potentially offending behaviour(s) and...

- Are they conduct/capability/SOSR related ?
 - There may be “grey areas”
 - e.g. lack of care by previous good performer
 - If health related- may be a “capability” issue
 - But if employee overlooked for promotion/becomes idle –may be a “conduct” issue
-

Misconduct process quicker than Capability

- If the behaviour can be genuinely labelled as “conduct” it will be quicker to dismiss than if the behaviour is related to “capability”
 - There may be a mix – conduct and capability
 - Prioritise the conduct issues if doing so justifies a quicker route to dismissal
 - Be thorough in analysing the issues
-

Summary dismissal

- Dismissal for first offence limited to gross misconduct/ gross negligence unless giving a warning would be “futile” or “utterly useless”

Polkey v AE Dayton Services Limited 1988 ICR 142

Poor Attitude to organisational change could be gross misconduct

Adeshina v St George's University Hospitals NHS Foundation Trust and Others [2017] EWCA Civ 257

- Employee dismissed for failing to engage with, or properly leading, a project which she opposed.
 - Confrontational, rude and did not pay attention at meetings, failed to implement changes and showed hostility towards the change project.
 - Various specific allegations
 - The real issue was whether the employee's attitude had been one of “**deliberate resistance**”
 - Court of Appeal upheld Gross Misconduct finding.
-

Poor attitude normally requires warning(s) before dismissal

- “ Attitude is something which was potentially capable of change, however unlikely it may have appeared to be ”

Foster v Somerset County Council EAT/0355/03

How Quickly can you dismiss for poor attitude ?

Will depend on the circumstances including

- How serious is the behaviour
 - It's impact on the organisation, employees and externally
 - Sometimes- the seniority of the employee
 - Has the employee accrued unfair dismissal protection?
 - Is there a discrimination/automatically unfair dismissal risk?
 - Personal or professional misconduct?
-

Do Policies help?

- Does it help to have what is arguably a “substitute warning” in a policy or contract ?
 - **Taylor v Parsons Peebles NEI [1981] IRLR 119**
“The proper test is not what the policy of the respondents as employers was but what the reaction of a reasonable employer would have been in the circumstances”
 - Thus “substitute warnings” by themselves are of limited assistance and even then they will require to have been clearly brought to an employee’s attention and applied consistently
-

Don't jump to conclusions

- Are there any underlying reasons for the poor attitude
 - Ill health
 - Mental health – hidden issue in difficult cases
 - Lack of capability
 - Stress (at work or otherwise)
 - Personality clash/wider problems in team or department?
 - Is medical advice required?
 - Is there a relevant procedure that requires to be followed?
-

Is there a justifiable explanation?

Mock v Glamorgan Aluminium co Ltd EAT 493/80

- Employee dismissed for an intransigent attitude
- Tribunal held dismissal fair
- EAT allowed appeal as attitude developed after assault by the MD
- Dismissal unfair.
- May impact award of compensation

NB-Even where behaviour justifies dismissal some employee's have been wronged/unfairly treated to some degree and that has been allowed to fester

Scenario 1- lack of care

- More likely to be a capability issue (taking longer to resolve) but...
 - Negligence or lack of care –where the employee possesses the ability to meet the required standards but simply fails to do so is a matter of conduct not capability
 - Also Gross negligence is exception to general rule that gross misconduct must be deliberate and wilful
 - Some acts or omissions which amount to extreme negligence could be categorised as misconduct
 - Less serious acts should be dealt with via capability procedure
-

Lack of care in extreme cases can be gross misconduct

Adesokan v Sainsbury's Supermarkets Ltd [2017] ICR 590

- Regional ops manager- 26 years service
 - Failed to take adequate steps to remedy the manipulation of survey scores re 20 stores
 - No intentional wrongdoing or dishonesty but negligent failure to act “tantamount to gross misconduct”
 - Court of Appeal – failure to act was serious dereliction of duty amounting to gross misconduct because it undermined trust and confidence in the employment relationship albeit no harm actually caused
-

Scenario 2- ignoring a manager's requests

- Implied term in every contract that employee will obey lawful and reasonable instructions
 - May not be categorised as gross misconduct
 - Process of warnings under disciplinary procedure
 - Consider
 - Is there a contractual right to require employee to carry out duty?
 - Is there a custom and practice of employees of that kind following the instruction?
 - Be aware that inconsistent treatment can be unfair
 - Was the instruction reasonable?
 - Was the refusal reasonable?
-

Example of ignoring manager's requests

Kuteh v Dartford and Gravesham NHS Trust [2019] EWCA Civ 818

- Christian nurse dismissed for failing to follow instruction to stop initiating discussions with patients about religion
 - Nurse admitted not following instruction after complaints
 - Gave an assurance to the employer that she would not initiate such discussions again but did so
 - Employer followed a fair process
 - Court of Appeal held, even having regard to the importance of freedom of religion, plainly open to tribunal to conclude dismissal was fair
-

Persistent refusal to comply

Mintoft v Armstrong Massey Limited EAT 516/80

- Sales manager required to record faults and repairs in second hand cars for warranty purposes
 - 2 letters in 4 months requiring him to follow procedures
 - Sent another letter 4 months later as no improvement warning of dismissal
 - Was abusive to manager, restated dislike of system and said in clear terms not prepared to operate it
 - Fair dismissal upheld on appeal
 - Arguably this process could have been considerably shortened – to say 3 months (including any appeal process) if employee had behaved in the same manner – especially clear refusal to co-operate
-

Refusing to comply -Professional or personal misconduct?

Idu v The East Suffolk & North Essex NHS Foundation Trust [2019] EWCA Civ 1649

- Consultant dismissed for failing to follow reasonable instructions and rudeness
 - Claimed dismissal was procedurally unfair as disciplinary panel was not properly constituted for a professional misconduct hearing
 - Claim dismissed by ET as behaviour not professional misconduct or linked to exercise of medical skill
 - EAT and Court of Appeal dismissed appeals
 - Fact that behaviour may be associated with duties doesn't mean it arises from exercise of medical skills
-

Tips on managing refusals to comply

- In cases where no contractual procedures/ professional standards
 - Follow disciplinary/appeal process with witnesses
 - Dismiss if it is gross misconduct.
 - Or is it so serious to justify dismissal after one warning?
If so warn that any repetition may result in dismissal.
 - Request written assurance that employee will comply
 - If no assurance given that's another failure to obey a reasonable request. Would a warning serve any useful purpose? Probably still review after appropriate period
-

Tips on managing refusals to comply

- Timing of review depends on the frequency/nature of issue. For e.g. 2 weeks after the appeal outcome if the activity is almost daily or longer if less frequent.
 - If issue serious and unjustified behaviour continues. Consider dismissal after review.
 - If issue less serious may need to repeat the process with a Final warning before dismissal
-

Scenario 3- undermining others

- Likely to be misconduct
 - Could be gross misconduct
 - Fully consider all relevant issues
 - Does the “undermining” amount to bullying and harassment?
 - Is it related to a Protected characteristic?
 - Case study – male manager – initial complaint by 1 female then 2 then 3 leading to dismissal for sex discrimination
 - Can be difficult to identify without sufficient evidence
 - Potential grievance(s) from other employee(s)
-

Scenario 3- undermining others

- As an employer should you actively seek evidence from other employees ?
- Possible use of “Stay Interviews”



Scenario 4- poor relationships

- Employees raise concerns about a colleague
 - Investigation finds them to be unsubstantiated or insufficient to warrant dismissal
 - Individual under investigation reacts badly and/or the complainers refuse to accept the outcome
 - A culture of mistrust develops and affects the working of the team creating poor attitudes and bad blood
 - Employer-Does it continue to address the underlying conduct/performance issues that gave rise to initial complaint or deal with the poor relationships separately?
 - The route chosen to try and resolve matters will depend on the employer's objectives
-

Scenario 4- poor relationships

- The employer could seek to mediate to rebuild relationships and remove the attitude issues that had developed. That may be easier said than done
 - Where employees cannot be moved or the issues resolved a breakdown in relationships in extreme cases may justify dismissal for “some other substantial reason”
 - The time frame for trying to resolve such issues tends to be long.
 - Timeframe likely to be shorter the fewer the employees are involved
-

So what is the answer?

- Short serving employees (less than 1 year 51 weeks) with no/low risk of claims (irrespective of service) can be dismissed without too much trouble. Exception might be employers with protracted contractual disciplinary processes.
 - There are examples of gross misconduct justifying summary dismissal for poor attitude but they are rare.
 - Don't analyse in terms of "poor attitude". Deal with specifics. For example "Failure to obey a reasonable instruction namely " "undermining colleagues to their detriment creating a hostile working environment namely " etc.
-

So what is the answer?

- Determine if the issue(s) relate to conduct/capability or SOSR for dismissal purposes. This will influence type and length of process.
 - Most poor attitude issues will be conduct related
 - How long the process takes for repeated poor attitude will partly turn on how serious it is /the impact internally and externally/ has employee shown a willingness to change/whether Professional Misconduct proceedings also apply.
 - There are no hard and fast timelines.
 - For **lack of care** cases –unless it is conduct related a performance management programme may on average take 6-9 months
-

So what is the answer?

- **For failing to ignore management requests** – depends on how serious the issue is- Could be gross misconduct/ or dismissal after 1 warning or several warnings if more minor .
 - **For undermining others** – In the most serious cases could be gross misconduct especially if linked to say bullying and harrasment and/or a protected characteristic. Otherwise may require one, possibly two warnings with review periods depending on how serious the issue is
-

So what is the answer?

- **Personality clashes** –Often time consuming and if linked to other underlying events can take many months especially where several employees involved and all avenues require to be explored before possibly dismissing for SOSR . Resolving issues between 2 employees likely to be quicker but timescale will depend on the facts
-

Is there a Quick Fix?

- Consider Protected Conversation/Settlement Agreement – only for Unfair Dismissal
- Does not help to avoid discrimination/breach of contract claims



Avoiding the problem...

- Make use of probationary periods to identify problematic employees
 - Many problems arise due to poor management!
 - Take action to nip behaviour in the bud
 - Consider the overall working environment
 - Positive or negative?
 - What can be done to improve it?
 - Team building
-



Questions

David Walker
Partner
Morton Fraser LLP
0141 274 1146
david.walker@morton-fraser.com

MAKE CONTACT

For any of these services please contact us.



Edinburgh: 0131 247 1000

Glasgow: 0141 274 1100



info@morton-fraser.com