WHITE PAPER DISMISSAL CONFERENCE 2023

HOW DO YOU NAVIGATE THE COMPLEXITIES OF SHORT-NOTICE DISMISSALS FOR NEW EMPLOYEES WHO FAIL TO MEET EXPECTATIONS, IN OTHER WORDS, IT WAS SIMPLY THE WRONG HIRE, INCLUDING PROTECTED CONVERSATIONS?

Introduction

1. Most employers will breathe a sigh of relief when the time-consuming and costly process of recruitment comes to an end and a new employee comes aboard. However, that relief may soon turn to dismay if the new starter fails to live up to expectations.

2. This will be the case where the employee's performance is below par in some way. Despite scrutiny of CVs and careful reference checking, it will sometimes emerge that the employee lacks the basic technical skills needed to do the job. Or they may have them but are just too slow and do not achieve productivity targets. Or they may be able to the job but fail to establish good relationships with colleagues or clients or demonstrate an inflexible attitude. Alternatively, the new employee's behaviour in the workplace may breach conduct standards. For example, lateness, idleness, failure to follow instructions, suspected malingering or inappropriate behaviour towards colleagues.

3. Occasionally, the poor performance or misconduct in question is so serious that an employer will have no choice but to treat it as gross misconduct and summarily dismiss the employee without notice. However, it is rare that poor performance will be so grave as to justify summary dismissal. And the misconduct issues that tend to arise with new employees are often not clear cut enough to justify instant dismissal without notice. They may be serious yet unproven (e.g. suspected malingering) or minor yet insidious (e.g. arriving late to work every day). The end result is that employers are often left with a new employee on their hands who they feel was simply the wrong hire.

4. In some cases, there is merit in having one last shot at helping the employee turn things around. For example, if productivity levels are the problem, the provision of further training, or better line manager support to help with prioritising work, might rectify the issue. Or if the problem is that the employee is late to work every day or is spending too much working time on the internet, an informal word from a line manager that it has been noticed and needs addressing might be enough. Such interventions are certainly less disruptive, time-consuming and expensive than going back to square one in the recruitment process, so long as they are effective.

5. However, there will be employees who are going to be problematic no matter what steps are taken – an if they are problematic this early, it is only likely to get a whole lot worse as things progress. Where this is the case, employers are often better off cutting their losses and terminating the employment relationship. The new employee's manager should not be deterred from dismissal by the sunk cost of recruitment or by a reluctance to start the process all over again. Nor should a manager be tempted simply to stick their head in the sand in the hope that things will magically get better. Although there are some legal risks associated with the dismissal of new employees, in most cases it is far better to dismiss sooner rather than later. This is because the longer the employment relationship goes on, the greater the scope for further problems to emerge, "detriments" for the employee to complain about and for legal claims to crystallise.

6. In most cases, the dismissal of a new employee is relatively straightforward from an employment law perspective. The employee will not have accrued the two years' service necessary to claim ordinary unfair dismissal. Provided that the principal reason for the dismissal is not discriminatory or an "automatically unfair" reason, the dismissal should be regarded as low-risk.[1]

7. This paper discusses the following issues:

    a. The dismissal of a new employee in "vanilla" situations where there are no aggravating factors present. Here, the main risk is dismissing in breach of contract, which could give rise to a wrongful dismissal claim. That said, there is always the risk that the employee may nevertheless believe a protected characteristic or whistle blowing to be the cause, or allege it even if they do not believe it and the employer can be left with the substantial irrecoverable costs of defending an unmeritorious claim.

    b. The dismissal of a new employee in situations where there are aggravating factors present, which risk claims of discrimination or automatic unfair dismissal. These higher stakes claims could arise where the ostensible reason for the dismissal is either:

        i. a *sham* reason constructed to hide the true and unlawful reason for the dismissal; or

        ii. the *real* reason for the dismissal but one which is inseparable from an unlawful reason.

    c. Whether it is possible to hold a "protected conversation" with the employee about the proposed exit.

<u>Dismissal of a new employee where there are no aggravating factors present</u>

8. New employees do not have the two years' continuous service needed to qualify for the rights not to be unfairly dismissed[2] or to receive a written statement of the reason for their dismissal.[3] This means that employers are not obliged to identify a fair reason for dismissal[4] nor demonstrate that they acted reasonably in dismissing, including by following a fair process.

Identifying and communicating the reason for dismissal

9. Although not strictly required, it would be sensible for employers to *identify* a reason for the dismissal as this will help deflect allegations that the dismissal is for a discriminatory or automatically unfair reason. The reason would not necessarily have to constitute a fair reason for the purposes of unfair dismissal law, but it would need to be a reason which is not discriminatory nor automatically unfair. For example, dismissing an employee because they are deemed not to be a "good fit" is unlikely to be sufficient to justify dismissal on the

[1] A full list of automatically unfair reasons for dismissal is set out in the Appendix to this paper.
[2] The Labour Party has announced that it if comes to power it intends to make unfair dismissal a "Day 1" employment right.
[3] Employees with under two years' service do not have a statutory entitlement to a written statement of the reason for their dismissal, save where they are dismissed while on maternity leave.
[4] Namely, capability, conduct, redundancy, illegality or some other substantial reason.

basis of "some other substantial reason" in an ordinary unfair dismissal claim. However, all the employer needs to do when dismissing a new employee is demonstrate that the reason is not an unlawful one. That said, "good fit" is probably a poor choice because it can lead to an argument that the reason why the employee was not a good fit was due to them having a protected characteristic.

10. A similar logic applies to *communicating* the reason for dismissal to the employee in writing i.e. although not strictly required, doing so will help demonstrate that the reason is not discriminatory or automatically unfair. However, if the reason is communicated to the employee, it is important that the employer does not hide the truth out of kindness, embarrassment or a desire to avoid confrontation. Doing so could have adverse consequences for an employer, as was seen in the cases of Rawlinson v Brightside Group Ltd[5] and Base Childrenswear Ltd v Otshudi.[6]

11. In Rawlinson v Brightside Group Ltd Mr Rawlinson was Group Legal Counsel at an insurance broking business. The day after he started employment, the CEO who had recruited him left the business. A new CEO took over and quickly identified concerns with Mr Rawlinson's performance. Two months later, the decision was taken to dismiss Mr Rawlinson due to his performance. However, the company wanted him to work out his notice period to ensure a smooth handover. To secure this, and soften the blow, the company told him that the reason for the dismissal was that it had decided to outsource legal services. Mr Rawlinson resigned with immediate effect and made a data subject access request. The documents he received revealed the real reason for his dismissal. He claimed damages for constructive wrongful dismissal, contending that the company had misled him as to the reason for his dismissal and this amounted to a breach of trust and confidence. Ordinarily, when claiming constructive dismissal, an employee must be able to show that they resigned *in response* to a repudiatory breach of contract. However, in Tullet Prebon plc and others v BGC Brokers LP and others, the High Court held that an employee should be able to point to an employer's fundamental breach to justify their refusal to perform their contract, regardless of the reason why they left their employment or whether they knew of the breach at the time.[7] At first instance, the Employment Tribunal held that the employer's failure to communicate the real reason for dismissal was not a breach of trust and confidence because the employer was not obliged to provide him with this information. However, the Employment Appeal Tribunal (**EAT**) overturned this decision. It held that in all but the most unusual of cases, the implied term of trust and confidence imports an obligation not deliberately to mislead. The employer's deliberate lie about the reason for the dismissal justified Mr Rawlinson's decision to walk out and meant that he was entitled to damages for wrongful dismissal.

12. In Base Childrenswear Ltd v Otshudi Ms Otshudi was dismissed without notice, purportedly by reason of redundancy. However, she believed that she had really been dismissed because of her race and she brought a claim of racial harassment. During the course of proceedings, the employer changed its position and said that the real reason for dismissal was that it believed that Ms Otshudi had stolen from them (even though it had not conducted any form of investigation). The employer said it had told her that she was redundant in order to avoid confrontation. The Employment Tribunal found that this lie was enough to shift the burden of proof to the employer. As the employer was unable to show that the employee's race had no bearing on the decision to dismiss, the dismissal was found to be discriminatory. The Tribunal awarded compensation of £30,000 plus an uplift of

[5] [2018] IRLR 180.
[6] [2020] IRLR 118.
[7] [2010] IRLR 648.

25% for the failure to comply with the Acas Code of Practice on Discipline and Grievance (**Acas Code**). It also ordered the employer to pay the employee's costs of dealing with the false reason for dismissal. The employer's appeals to the EAT and Court of Appeal failed. The Court of Appeal held that although the employer genuinely believed that she had committed theft, the fact it had believed this so readily, and without having conducted an investigation, meant it had likely made a stereotypical assumption based on race.

13. Therefore, when dismissing an employee with under two years' service, it is prudent to identify and communicate the reason for dismissal and be truthful about that reason. Misleading the employee may result in constructive dismissal. As well as giving rise to a claim of damages for wrongful dismissal, the employee would be released from other contractual obligations which may be important to the employer, for example, post-termination restrictive covenants. It may also strengthen a claim that the real reason for dismissal was unlawful, and it could also have adverse costs consequences.

Following a process prior to dismissal

14. There are also a number of good reasons why employers might want to follow a dismissal *process* which at least aligns to the essential elements of the Acas Code.

    a. Although unusual outside of the public sector, where an employer has a contractual obligation to apply a particular procedure prior to dismissal this should be followed. A failure to do so would entitle the employee to claim losses for the amount of time the procedure would have lasted had it been applied.[8]

    b. Following a fair process underlines that the reason for dismissal is the real reason and that the employer has nothing to hide.

    c. By giving the employee an opportunity to make representations, it should also help flush out any aggravating factors that may require further consideration before dismissal (e.g. the impact of a disability on the employee's performance). Further, when employees feel they have been heard, they tend to be less likely to seek to complain through external channels, like the Employment Tribunal.

    d. It insures against the risk of an uplift to compensation of up to 25%. If the dismissal concerns a matter to which the Acas Code applies (i.e. misconduct or poor performance), and the dismissal is ultimately held to be automatically unfair or discriminatory, an Employment Tribunal may uplift compensation if the employer's failure to comply with the Acas Code was unreasonable (as was seen in Otshudi discussed above).

    e. Following a process in these circumstances is helpful from a workforce morale point of view. Being seen to adopt an unforgiving approach to the dismissal of new employees risks harming good employee relations.

15. Therefore, identifying and communicating a reason for dismissal *and* following a dismissal process is advisable in most cases to protect the employer's position and limit the risk of unexpected claims. However, in *all* cases the employer must dismiss in accordance with the

[8] Gunton v Richmond upon Thames London Borough Council, 1980 ICR 755 CA.

terms of the employment contract to avoid a claim for wrongful dismissal in the Employment Tribunal (or breach of contract in the County Court or High Court).

Dismissal in accordance with the contract

16. Employers must abide by the notice of termination provisions in the employment contract. Where the employee is still within a contractual probationary period it is likely that a shorter-than-usual notice period will apply. However, statutory rules on notice mean that once the employee has been employed for a month, this must be at least one week for employees with under two years' service.[9] It is important for employers to diarise the end date of any probation period in order to decide whether it is necessary for it to be extended, or the employment relationship terminated. If an employer omits to address this issue before the expiry date, the probationary period will lapse, and the employer will be bound by the standard notice period in the contract, which could be significantly longer.[10] It should also be remembered that if the contract runs for a fixed-term without a notice period, the employer would need to pay out the remainder of the fixed-term, which could be many months or even years. For this reason, it is a good idea to build a break clause into fixed-term contracts which allows for early termination on notice.

17. Where an employee is nearing the two-year anniversary of their employment (which would entitle them to bring an unfair dismissal claim), it is important that termination takes effect more than one week before the anniversary date. This is because the Employment Rights Act 1996 (**ERA**) provides that where an employee is dismissed with no notice, or less than the statutory minimum notice due (including where a payment in lieu of notice is made), then the "effective date of termination" (**EDT**) used to calculate continuous service for the purposes of an unfair dismissal claim is deemed postponed to the date on which the proper *statutory* notice would have expired.[11] The EDT will also be extended in this way where the employee resigns and successfully claims constructive dismissal. However, if an Employment Tribunal finds that an employer was entitled to dismiss an employee summarily for gross misconduct, then the EDT will *not* be extended.[12] Where the extension rule applies, statutory notice is deemed to be given on the day of actual termination (or the date that inadequate notice was given, if given).[13] However, it has been held that the notice does not begin to run until the day *after* the notice is deemed given.[14] Since employees with under two years' service are entitled to one week's statutory notice, this means that the dismissal must take effect *more* than one week before the two-year anniversary to avoid the employee acquiring sufficient service for an unfair dismissal claim. For example, if an employee's two-year anniversary of employment fell on 21 November 2023, termination would need to take effect not later than 13 November 2023 as the seven-day statutory notice period would be deemed to run from 14 November 2023 and would expire on 20 November 2023.

18. An employer is entitled to ask the employee to work throughout their notice period. However, in a scenario where things have not worked out, it is often better for both parties to have a clean break as soon as possible. Therefore, the employer will usually wish to

[9] Section 86(1), Employment Rights Act 1996.
[10] Przybylska v Modus Telecom Limited, UK EAT/0566/06.
[11] Section 97(2), ERA 1996.
[12] Lancaster & Duke Ltd v Wileman, 2019 ICR 125, EAT.
[13] Section 97(3), ERA 1996.
[14] West v Kneels, [1987] ICR; Wang v University of Keele, [2011]IRLR 542.

dismiss with immediate effect and make a payment in lieu of notice (**PILON**). A well-drafted employment contract should give the employer the right to do this.

19. If the contract does *not* include a PILON clause, the employee may agree to waive the notice period and accept a payment in lieu instead. This will be an effective contractual agreement, meaning the employee could not later bring a wrongful dismissal claim.[15] However, employers must remember that the subsequent payment for what would have been the notice period should not be treated as a tax-free termination payment. Although the employee has technically waived the notice period, HMRC will still view the payment as referable to the notice period and taxable in accordance with the rules on post-employment notice pay. A failure to pay tax and National Insurance contributions on such a payment leaves the employer exposed to a demand from HMRC for the outstanding sums.

20. If the contract does *not* include a PILON clause *and* the employee does not agree to waive the notice period, the employer may still dismiss with immediate effect and make a payment for the notice period. However, this would be a dismissal in breach of contract, meaning that the employer would lose the benefit of any post-termination restrictions. If these are important to the employer, then the employee should be asked to work out the notice period instead. Where there is a garden leave provision in the employment contract, the employee could be instructed to stay at home.

21. The only situation in which an employer may lawfully dismiss without the appropriate notice, or a PILON, is when the dismissal is in response to the employee's gross misconduct. However, as discussed above, it is rare that poor performance will be so grave as to justify summary dismissal. And as far as misconduct is concerned, where the employer has concluded that a new employee is simply the wrong hire, this suggests a series of smaller incidents of misconduct as opposed to something serious enough to warrant dismissal without notice.

22. Aside from dismissing in accordance with the notice provisions of the contract, the employer must take care to make any other payments which are properly due to the employee. For example, if the employee had a contractual entitlement to a bonus or commission payment but was dismissed before the payment date, the employee may be able to argue that the contractual entitlement to the payment crystallised before the dismissal and the payment date was chosen merely for administrative reasons. As such, a failure to make the payment could give rise to an unlawful deduction from wages claim. Similarly, employers should ensure that payment is made in respect of outstanding salary (aside from the notice payment) and/or accrued but untaken holiday. A failure to do so risks claims of unlawful deductions from wages.

23. Other than as discussed above, in "vanilla" dismissal situations the employee will usually have no other claims against the employer. That being the case, there is no particular need to enter into a settlement agreement. Of course, an employer may wish to have one for commercial reasons, for example, to agree mutual non-disparagement, referencing arrangements or to strengthen post-termination restrictions.

24. That said, there is always the risk that the employee may nevertheless believe a protected characteristic or whistle blowing to be the cause, or allege it to be the cause of their dismissal, even if they do not believe it and the employer can be left with the substantial

[15] Baldwin v British Coal Corporation, 1995 IRLR 139 QBD.

irrecoverable costs of defending an unmeritorious claim. For that reason, a settlement agreement can still be worth considering.

25. The question of how to approach settlement discussions is set out later on in this paper.

Dismissal of a new employee where there are aggravating factors present

26. Before dismissing a new employee, a prudent employer should also pause to consider whether the dismissal is for a discriminatory or automatically unfair reason, or could appear that way. This is important for a number of reasons:

    a. The employee may be able to bring a discrimination or automatic unfair dismissal claim in the Employment Tribunal. Both claims may be brought from Day 1 of employment and are, therefore, available to new employees in the same way as long-serving employees.[16]

    b. The potential compensation award is uncapped in discrimination claims and also in whistleblowing and health and safety-related automatic unfair dismissal claims. Compensation is capped in the usual way where the dismissal is for one of the other automatically unfair reasons (i.e. currently, a maximum basic award of £19,290 and a maximum compensatory award of the lower of 52 weeks' gross pay or £105,707).[17]

    c. Where it is claimed that the dismissal was for certain automatically unfair reasons, the employee may apply for "interim relief" within seven days of their dismissal.[18] If successful, the Employment Tribunal will order the employer to continue employing the employee or, failing that, to continue paying their salary until the final determination of their claim (and such monies are not repayable even where the employee ultimately loses the claim).

    d. Hearings in these claims (and in interim relief applications) are usually open to the public and press. This may well attract negative publicity which, in turn, could damage the employer's reputation.

27. Under the Equality Act 2010, employees are protected from discrimination in connection with nine protected characteristics, namely: age, sex, race, disability, sexual orientation, religion or belief, gender reassignment, pregnancy or maternity and marriage or civil partnership. An employer must not discriminate against, victimise or harass an employee by dismissing them.[19] A discriminatory dismissal may arise where a protected employee is dismissed in one of the ways discussed below.

    a. A dismissal will be directly discriminatory if it is because of the employee's protected characteristic. For example, if an employee is dismissed because it is discovered they have HIV, this would be direct disability discrimination. It might be assumed

[16] Save that two years' service is still required where the automatically unfair reason for dismissal is a spent conviction, a TUPE transfer or connected to exercising rights in relation to the removal of the Swedish derogation.
[17] A Tribunal will order a minimum basic award where the automatically unfair reason for dismissal is trade union activities, carrying out activities as a health and safety representative, carrying out duties as an occupational pension trustee or carrying out functions as a representative for collective consultation or working time purposes.
[18] Namely trade union membership or activities, whistleblowing, or activities as a health and safety representative, working time representative, an employee representative in the context of a collective redundancy or TUPE transfer, or as a pension scheme trustee.
[19] Sections 39(2)(b) (discrimination), s.39(4)(c) (victimisation) and s.40(1)(a) (harassment) of the Equality Act 2010.

that directly discriminatory dismissals of new employees are uncommon because hiring managers will usually be aware of many of a candidate's protected characteristics, such as their sex, race, age, marital status and perhaps others. If these things were a problem for the employer, then surely they would not have hired them in the first place? However, it may be the case that certain protected characteristics only become known to the employer after employment begins (e.g. pregnancy or religion or belief or sexual orientation). Or a known characteristic may only be viewed as a problem once the employment is underway (e.g. a homophobic manager may be assigned to line manage a new recruit who is gay).

b. A dismissal will be indirectly discriminatory if it is the result of the application of an apparently neutral "provision, criterion or practice" which substantially disadvantages those belonging to a protected group and the individual employee, and which the employer cannot show was a proportionate way of a achieving a legitimate aim ("objective justification"). For example, if an employee is dismissed because they have aired their protected religious or political beliefs on social media contrary to an employer's social media policy, this may be indirect religion or belief discrimination (which may or may not be justifiable depending on exactly how the employee has expressed their views).

c. A dismissal will be discrimination arising from a disability if a disabled employee is dismissed for something which is a consequence of their disability, and the employer cannot show that the dismissal was a proportionate way of a achieving a legitimate aim. For example, if an employee is dismissed for having a high level of sickness absence, and the absence arose out of his or her disability, this may be discrimination arising from disability.

d. A dismissal will be harassment if it is unwanted conduct related to a protected characteristic which violates the employee's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for them. For example, if a male employee is dismissed for having challenged his employer's strategy for improving gender diversity, this may amount to harassment related to sex. Note also that a constructive dismissal may amount to harassment where the employee has resigned in response in response to discriminatory harassment.[20]

e. A dismissal will be victimisation if it is because the employee has committed a "protected act" (or the employer believes that the employee has done so or may do so).[21] For example, if an employee is dismissed because they have complained about sexual harassment by a colleague, this would be victimisation.

28. If there are facts from which an Employment Tribunal could decide that the employer has dismissed in breach of the Equality Act 2010, it will hold that the dismissal was discriminatory, unless the employer is able to provide a non-discriminatory explanation. It is open to an employer objectively to justify a dismissal where it is indirectly discriminatory or discrimination arising from a disability. Objective justification is also possible in direct age discrimination claims but no other form of direct discrimination.

[20] Driscoll (nee Cobbing) v V&P Global Ltd and anor, [2021] UKEAT 876/20/1507.

[21] The following things are "protected acts": bringing a discrimination claim, giving evidence in a discrimination claim, doing any other thing for the purposes of, or in connection with, the Equality Act 2010, alleging that the employer or someone else has breached the Equality Act 2010 or taking various steps in relation to pay disclosures.

29. Under the ERA, a dismissal will be automatically unfair where the sole or principal reason for the dismissal is one of a number of specified inadmissible reasons, for example, because the employee has blown the whistle.[22] Where an inadmissible reason is made out, the Employment Tribunal will find that the dismissal is unfair and will not go on to consider the reasonableness of the employer's actions or the process followed prior to dismissal. In other words, the employee will automatically win the claim.

30. Separately, employers should keep in mind that where a whistleblower is dismissed, he or she may also be able to bring a detriment claim against a co-worker who was involved in the decision to dismiss, where it can be shown that the co-worker was materially influenced by the whistleblowing.[23] This is important for a number of reasons. First, the causation threshold in detriment claims is lower than in dismissal claims (i.e. materially influenced vs sole or principal reason), meaning detriment claims are potentially easier to win. Second, an employer may be held vicariously liable for such detrimental treatment, unless it can show that it took "reasonable steps" to prevent it. Third, where a detriment claim of this nature succeeds, the employee is able to claim both post-dismissal losses *and* an injury to feelings. Therefore, employers should remember that the risks of dismissing whistleblowers runs deeper than just the dismissal decision itself (the issue addressed in this paper) and may capture pre-dismissal detriments.

Ostensible reason for dismissal is a sham constructed to hide the true and unlawful reason

31. One common way in which a dismissal may be argued to be discriminatory or automatically unfair is where the given reason for dismissal is a deliberate sham designed to conceal a discriminatory or automatically unfair reason. There follows examples of cases where employees (in most cases with under two years' service) were dismissed, and it was argued that the ostensible reason for dismissal was a sham designed to conceal an unlawful reason.

Discriminatory dismissals

32. In Churchman v Frazier & Deeter UK LLP it was held that the dismissal of a disabled employee on the grounds of loss of trust and confidence was a *"…sham reason adopted in haste to justify dismissal of an employee whom* [the employer] *no longer wanted to employ, because of her disability".*[24]

    a. Ms Churchman began working for Confluence Tax LLP as a Tax Associate on a part-time basis on 4 March 2021. On 1 June 2021 she moved onto a full-time contract. In July 2021, she told her employer she suffered from depression and asked to have Wednesdays off to help her manage this. Her managers agreed to her taking Wednesdays off as annual leave. She went on to take sick leave in August and was signed off sick with depression for the latter half of September 2021.

    b. On 24 September 2021 she asked to return work, but without any direct client contact. Her employer refused, saying client contact was a fundamental part of her role and it would be unreasonable to ask other Tax Associates to send out her work in their own names and deal with client responses. Ms Churchman replied to clarify that she was not asking for other Tax Associates to send out her work in their names, rather she meant that she could act as an assistant to a manager. She also

[22] Set out in the Appendix to this paper.
[23] Timis and Sage v Osipov, [2018] EWCA Civ 2321.
[24] ET Claim No: 2200604/2022.

said she only wanted this arrangement on a temporary basis. The firm later relied on this as an example of Ms Churchman changing her position and/or not being honest.

c. On 15 November 2021, Confluence Tax LLP merged with Frazier & Deeter LLP. Three days after the merger, Ms Churchman failed to attend the office to meet the new owners. Ms Churchman sent various emails explaining that she was not coming in because she had been in contact with someone with Covid-19. The employer felt the emails were not straightforward and gave differing accounts of why she was not there.

d. On 19 November 2021, just eight months into her employment and only four days after the merger, Ms Churchman was dismissed with immediate effect and paid in lieu of notice. No disciplinary process was followed. The reason given for her dismissal was that her employer had lost trust and confidence in her to be an open, honest and reliable employee and because she had failed to attend the meeting with the new owners. Ms Churchman claimed that the real reason for her dismissal was her previous sickness absence and that she had asked for reasonable adjustments to be made to her role. She claimed that the dismissal amounted to discrimination arising from disability and/or victimisation.

e. The Employment Tribunal upheld the claims, concluding that Ms Churchman had not been either dishonest or unreliable, and the employer's stated reason for dismissal was a *"sham reason".* The true reason for the dismissal was the belief that her absence was becoming harder to manage and because she had asked not to perform client-facing work. The Tribunal said both of these things amounted to discrimination arising out of her disability, which could not be justified. Even if the employer had a legitimate aim, the fact that it had not undertaken any form of disciplinary process prior to dismissal meant it would not have acted proportionately. Further, the request not to perform client-facing work was a request for a reasonable adjustment and a protected act, meaning that the dismissal was also an act of victimisation.

33. In Walsh v Rose Medical Ltd, it was held that the dismissal of a disabled employee on performance grounds was *"not conceivable"* and the real reason was sickness absence which had arisen from her disability.[25]

a. Ms Walsh began working for Rose Medical Ltd on 3 April 2017 as a counter assistant in a pharmacy. She was aged 63 and suffered from osteoarthritis. She was asked to dispose of medicines, which involved sitting and bending and proved particularly difficult for her due to her condition. After she had completed the task, she was left in pain, suffered a dizzy spell and fell over. She was sent home and took the next two days off sick.

b. Unusually, she was asked to attend a return-to-work meeting. In the course of that meeting she was told she was not suitable for the role and was dismissed with effect from 20 September 2018 (so after approximately 17 months of employment). In the meeting, she asked why she was being dismissed and the manager simply replied that he would tell staff that she had hurt her back and had decided to leave.

[25] ET Case No. 2416449/2018.

In the letter confirming dismissal, it stated that she was being dismissed due to *"unsuitability to the role".*

c. Ms Walsh brought a claim of discrimination arising from disability, alleging that she had been dismissed for taking sickness absence which had arisen out of her disability. The employer put forward various reasons for her dismissal, including that she had been dismissed for poor performance. However, there were no contemporaneous notes, or corroborating statements from staff, recording any such performance concerns. Ms Walsh had passed her probationary period, there was no investigation or instigation of a capability or disciplinary procedure.

d. The Employment Tribunal, therefore, rejected the argument that there were serious concerns about Ms Walsh's performance prior to dismissal. If she had been a poor performer, the employer would have dismissed her for this sooner and would not have allowed her to pass her probationary period. The Tribunal held that she had been dismissed for taking two days' sickness absence, which had arisen out of her osteoarthritis that had been aggravated by the medicine disposal task. Therefore, the dismissal amounted to discrimination arising from disability. The employer did not run a defence of objective justification and so this question was not considered.

34. In Bayfield and Jenner v Wunderman Thompson it was held that the dismissal of two male employees on grounds of redundancy was *"…a sham designed to ensure the predetermined decision to dismiss…was seen to be justified"* and the real reason for the dismissals was because they had raised complaints of discrimination and were seen as an impediment to the company's agenda on gender diversity and the gender pay gap.[26]

a. Messrs Bayfield and Jenner are both advertising professionals who began working for J Walter Thompson (**JWT**) on 4 January 2016. Both are white British, heterosexual, middle aged men. By the end of 2017, the employer had concerns that they were overly attached to "traditional" forms of media advertising and feedback from colleagues highlighted that the pair lacked enthusiasm and could be indecisive.

b. In April 2018, JWT published its gender pay gap report for 2017, revealing a median gender pay gap of 44.7%, the highest figure across the advertising industry in that year. The report noted the lack of female representation in senior creative roles within the organisation. The following month, representatives of JWT gave a presentation at an external conference that was intended to explain how JWT planned to address its gender pay gap figures. The presentation referred to the fact that JWT was recruiting new female talent and contained a slide with the following words scored out with a black line: *"WHITE, BRITISH, PRIVILEGED, STRAIGHT, MEN CREATING TRADITIONAL ABOVE THE LINE ADVERTISING".* One of the speakers went on to say that: *"…the reputation JWT once earnt as being full of white, British, privileged, straight men creating traditional above the line advertising has to be obliterated."*

c. Messrs Bayfield and Jenner complained about the presentation by email. They were called to a meeting with their line manager and JWT's HR Director. The HR Director later described the conversation as *"horrible"* and as the *"lowest point"* she

[26] ET Case Nos. 2200540/2019V and 2200546/2019V.

experienced during her time working for JWT. JWT then decided to commence a redundancy exercise. Messrs Bayfield and Jenner (plus three other male employees who had also complained about the presentation) were made redundant on 23 November 2018. In 2019, JWT merged with Wunderman to form Wunderman Thompson (UK) Ltd. Messrs Bayfield and Jenner brought various claims against Wunderman Thompson (UK) Ltd in the Employment Tribunal, including for direct sex discrimination, harassment related to sex and victimisation.

d. The Employment Tribunal held that the redundancy exercise was a sham designed to ensure the predetermined decision to dismiss could be justified. The real reason for the dismissals was that Messrs Bayfield and Jenner had raised complaints of discrimination and because they were seen as an impediment to the company's agenda on gender diversity and the gender pay gap. A similar challenge raised by two comparable women would not have been viewed as a threat to the company's wish to change its reputation. Moreover, the company would not have been motivated to remove two senior female employees. By contrast, removing Messrs Bayfield and Jenner would have an impact, both in terms of the gender pay gap figures and through opening up senior positions to female candidates. Therefore, the dismissals were held to be directly discriminatory on the grounds of sex or, alternatively, harassment related to sex. Furthermore, the decision to dismiss was taken because they were seen to have *"overstepped the mark"* with their complaints about the presentation (which were protected acts). Therefore, the dismissals also amounted to unlawful victimisation.

35. In Black v Drain t/a Pat Drain Barbers, it was held that the dismissal of a newly-pregnant employee on the grounds of redundancy could not be shown to be *"in no sense whatsoever on the grounds of the* [employee's]*…pregnancy"*.[27]

a. Ms Black began working as a hairdresser at Pat Drain Barbers on 23 October 2019. She discovered that she was pregnant with her first child in 2020. When she told her employer, the owner, Ms Drain, tried to dismiss her. Ms Black reminded Ms Drain of her employment rights and Ms Drain backtracked on the dismissal. In the lead up to the coronavirus lockdown, business was suffering and so Ms Black agreed to a request to reduce her working hours, which she understood would apply to all staff. Ms Black was then placed on furlough between 23 March 2020 and 11 July 2020.

b. Ms Black's maternity leave began on 12 July 2020, and it was agreed that she would return to work on a part-time basis on 11 April 2021. The business was still in financial difficulties and Ms Drain's accountant had advised her to consider redundancies as a means to cutting costs. A few days before her return to work, Ms Black informed Ms Drain that she was pregnant with her second child.

c. On 11 April 2021, eighteen months into her employment and on her first day back at work after maternity leave, Ms Black was told that she was to be made redundant. No other staff were made redundant. Ms Black claimed that the real reason for her dismissal was the fact that she was pregnant, which amounted to pregnancy discrimination.

[27] ETS Case No: 4110323/2021.

d. The Employment Tribunal held that the employer was unable to show that the dismissal was not on the grounds of Ms Black's pregnancy. Although the business was in financial difficulties, the timing of the "redundancy", together with the failure to undertake any form of consultation and Ms Drain's actions after Ms Black had announced her first pregnancy, led the Tribunal to draw inferences of pregnancy discrimination. The claim was upheld.

36. In Alcedo Orange Ltd v Ferridge-Gunn, it was held at first instance that the dismissal of a newly-pregnant employee on performance grounds was, in fact, significantly influenced by the employee's pregnancy and pregnancy-related sickness.[28]

a. On 27 January 2019, Ms Ferridge-Gunn began working for Alcedo Orange Ltd and was subject to a three-month probationary period. Around two weeks after she started work, on 14 February 2019, she met with Mr Boardman, the Managing Director, and Ms Caunt, her line manager. They raised concerns about her performance. A few days later, Ms Ferridge-Gunn announced that she was pregnant. On 21 February 2019, a second meeting was held to discuss her performance and it was accepted that there had been a degree of improvement.

b. On 24 and 25 February 2019, Ms Ferridge-Gunn was absent on sick leave as a result of morning sickness. When informed of this, Ms Caunt asked her whether it was contagious, how much time off she would need and that she was sorry to be unsympathetic but she had never been pregnant before. During the period of sickness absence, Ms Caunt discovered that certain documents (such as references, DBS checks and training certificates) had not been uploaded to the employer's IT systems. She told Mr Boardman that Ms Ferridge-Gunn had misled them by saying that she had made progress in her performance targets.

c. On 27 February 2019, one month into her employment and a mere eight days after announcing her pregnancy, Ms Ferridge-Gunn was called to a meeting and dismissed. She was told that her performance was *"below par"* and things were *"not working out"*. Ms Ferridge-Gunn claimed that the real reason for her dismissal was her pregnancy and this amounted to pregnancy discrimination and was also an automatically unfair dismissal.

d. The Employment Tribunal dismissed the automatic unfair dismissal claim, holding that the pregnancy was not the sole or principal reason for the dismissal. However, it upheld her pregnancy discrimination claim. In deciding to dismiss, the decision-maker, Mr Boardman, had relied upon Ms Caunt's views about Ms Ferridge-Gunn's performance. In turn, Ms Caunt's views had been negatively influenced by the claimant's pregnancy and sickness absence. Alcedo Orange Ltd appealed to the EAT, arguing that Mr Boardman was the sole dismissal decision-maker and he had dismissed in good faith on performance grounds. Although Ms Caunt had supplied information to Mr Boardman, she was not a decision-maker and, as such, her motivations were not relevant to the dismissal decision.

e. The EAT acknowledged that the Tribunal had not been referred to the leading authority on this point, namely, the Court of Appeal's decision in CLFIS (UK) Ltd v Reynolds.[29] The Court of Appeal in Reynolds had held that the correct approach is to

[28] ET Case No: 2402724/2020.
[29] [2015] IRLR 562.

consider different acts separately. If a person supplying information or opinions has discriminatory motives, but the dismissal decision-maker does not, then the discriminatory act would be the supplying of the tainted information, not the dismissal. In contrast, where it can be said that a decision has been made jointly, then a Tribunal should assess the motives of all the parties involved in that decision. A decision may be regarded as a joint decision where the appointed decision-maker has been heavily influenced by someone else, even if they have not been formally appointed as a decision-maker. A discriminatory motive held by one co-decision maker would be enough to taint the overall decision.

f. The EAT said that this case cried out for an analysis of whether Mr Boardman was a sole decision maker, a sole decision-maker who had been heavily influenced by Ms Caunt or whether he and Ms Caunt were, formally, joint decision-makers. The case was remitted to the Employment Tribunal to consider and its decision is awaited.[30] In the event that the Tribunal decides that Ms Caunt *was* a joint decision maker (whether formally or on a *de facto* basis), then it is likely that the original Tribunal decision will be upheld, and the dismissal will be an act of pregnancy discrimination.

37. In Oyekenu v BP Exploration Operating Company Ltd and anor, it was held that the dismissal of a Nigerian employee for poor performance was *not* direct race discrimination.[31]

a. Mr Oyekenu began working for a subsidiary of BP Plc as a software developer on 10 March 2021. The employer quickly identified concerns with his performance, but these were never raised with Mr Oyekenu. Mr Oyekenu was dismissed on the grounds of poor performance on 23 March 2021, having been employed for just two weeks. Mr Oyekenu claimed that the real reason for his dismissal was his race.

b. The Employment Tribunal acknowledged that Mr Oyekenu was denied the courtesy of being told what he had done wrong, nor given an opportunity to explain himself. It said that this was *"unfair, disrespectful and lacking in civility".* However, there was nothing inherently discriminatory in the failure to discuss the performance concerns with him, nor in the decision to terminate for poor performance. The Tribunal was satisfied that the dismissing officer was motivated by Mr Oyekenu's performance and not by his race. The claim was dismissed.

Automatically unfair dismissals

38. In Royal Mail Group Ltd v Jhuti it was held that the dismissal of an employee on the grounds of poor performance was a false reason concocted by her line manager who wished to dismiss her because she had blown the whistle.[32]

a. Ms Jhuti began working for Royal Mail as a media specialist on 17 September 2013. A few weeks into her employer, she made several whistleblowing disclosures to her manager, Mr Widmer. He forced her to retract them and retaliated by bullying her and painting a false picture of inadequate performance. While Ms Jhuti was off sick with stress, Royal Mail began a process to decide whether she should be dismissed for poor performance. A Ms Vickers was appointed to chair that process and review the evidence. As Ms Jhuti was too ill to attend a hearing, she made written

[30] [2023] EAT 78.
[31] ET Case No. 3310008/2021.
[32] [2020] IRLR 129.

submissions in the form of some 50 lengthy and incoherent emails. Within them, she alleged that she was going to be *"sacked for telling the truth".* Ms Vickers asked Mr Widmer about this allegation. He said that Ms Jhuti had made allegations of malpractice, which she had later accepted were wrong and had withdrawn. He maintained that Ms Jhuti was a poor performer. Ms Vickers accepted this evidence at face value and did not probe the whistleblowing issue any further. On 21 July 2014, Ms Vickers gave Ms Jhuti notice that she would be dismissed by reason of poor performance. The dismissal took effect on 21 October 2014, just over one year after Ms Jhuti's employment had begun.

b. Ms Jhuti claimed that she had been automatically unfairly dismissed by Royal Mail because she had blown the whistle. She initially lost the claim on the basis that Royal Mail was only responsible for the motivations of the dismissal decision-maker. Here, Ms Vickers had acted in good faith and had genuinely believed that Ms Jhuti's performance was unacceptable. It did not matter that Mr Widmer had concocted the poor performance story to try to secure her dismissal. These improper motivations did not belong to Ms Vickers, and, in turn, did not belong to Royal Mail. The Court of Appeal upheld this decision.

c. Ms Jhuti appealed successfully to the Supreme Court. The Supreme Court held that where the real reason for dismissal has been concealed from the dismissal decision-maker, a Tribunal's role is to *"…penetrate through the invention rather than to allow it also to infect its determination".* If it is revealed that a person senior to the dismissed employee (such as a line manager) had hidden the real reason for dismissal behind a false one, and the false reason was accepted by the dismissing officer, then the reason for dismissal will be the *real* reason not the ostensible reason. In Jhuti, the real reason for the dismissal was the whistleblowing and not the alleged poor performance, meaning she had been automatically unfairly dismissed.

39. In Cadent Gas Ltd v Singh it was held that the dismissal of an employee on the grounds of gross misconduct was a result of manipulation by his line manager who wished to dismiss him because of his trade union activities.[33]

a. Mr Singh was a long-serving gas engineer who had worked for Cadent Gas for 29 years. He carried out trade union activities as a shop steward and health and safety representative. He had previously had difficulties with his line manager, Mr Huckerby, in relation to his trade union role. Mr Singh was called out to attend to a gas leak in the early hours of the morning. He responded even though he had worked more than his contracted hours, had only had two hours' sleep and had not eaten anything since the previous morning. On the way to the job he stopped to pick up something to eat and he arrived one minute outside the required response time.

b. When Mr Huckerby heard about the late arrival to the call out, he contacted HR to initiate disciplinary proceedings against Mr Singh. He provided misleading information to them and got involved in the disciplinary investigation, despite an investigating officer having been appointed. He changed the terms of reference for the investigation to highlight Mr Singh's trade union role. He also told Mr Singh that he would face gross misconduct charges before the investigation was even

[33] [2019] UKEAT 24/19/810.

complete. Another manager chaired the disciplinary hearing and took the decision to dismiss, and a further manager heard and dismissed Mr Singh's appeal. Mr Singh claimed that the real reason for his dismissal was his trade union activities and that his dismissal was automatically unfair.

c. The Employment Tribunal held that the disciplinary and appeal managers were not motivated by anti-union prejudice against Mr Singh. However, it found that he had been held to a higher standard than other employees in similar circumstances due to his trade union role. Mr Singh's role meant he had faced gross misconduct charges, whereas another employee would have faced less serious charges. Therefore, Mr Singh had established a *prima facie* case that he had been dismissed because of his trade union activities. Cadent Gas had failed to persuade the Tribunal that there was a lawful reason for his dismissal, meaning the dismissal was automatically unfair. Cadent Gas appealed on the basis that the Tribunal had found that the disciplinary and appeal managers were not motivated by anti-union prejudice and only their motivations mattered - Mr Huckerby's prejudices were not relevant to the dismissal.

d. The EAT dismissed the appeal. Even though the disciplinary and appeal managers were not prejudiced against Mr Singh, it did not mean that his union activities had not factored in their decision. It was clear that his union activities had led to him being held to a higher standard than others and this had led to his dismissal. In any event, the fact that Mr Huckerby had played a leading role in the disciplinary investigation meant this his motivations *should* be attributed to Cadent Gas. His involvement in, and manipulation of, the process meant the dismissal was automatically unfair.

40. In Albion Hotel (Freshwater) Ltd v Silva and anor it was held that the real reason for the dismissal of two employees was not poor performance but the fact that they had complained about the non-payment of a bonus and demanded that it be paid.[34]

a. Mr and Mrs Silva were employed as managers of the Albion Hotel on 20 April 1997. Their contracts entitled them to a basic salary plus bonus, which was calculated by reference to the average cost of a bed per night. The bonus payments were due to paid on 31 December each year. However, the hotel did not fare well under their management. It lost both its AA and RAC accreditations and the directors of the hotel received complaints from customers about the standards at the hotel.

b. In January 1999, the auditor's report revealed that cash takings had fallen significantly. The bonus was not paid on 31 December 1998 and in January 1999 the Silvas met with the directors of the hotel on two occasions. At both meetings, the Silvas raised the issue of their bonus entitlement and suggested that a bonus of over £100,000 was due to them. On 10 February 1999, around 22 months into their employment, Mr and Mrs Silva were dismissed by reason of poor management of the hotel. Mr and Mrs Silva claimed that the real reason for their dismissals was that they had asserted a statutory right, namely their right not to suffer an unlawful deduction from their wages as a result of the failure to pay the contractual bonus.

[34] [2001] UKEAT 375/1511.

c. The Employment Tribunal held that the Silvas had not been dismissed because of poor performance but, rather, because they had asserted the infringement of a statutory right. Accordingly, they had been automatically unfairly dismissed. The employer's substantive appeal was dismissed on the basis that the Tribunal had made sufficient factual findings to justify its decision.

How can employers navigate this risk?

41. It is not possible for employers to insulate themselves entirely from the risk of a discriminatory or automatically unfair reason being identified as the true reason for dismissal. However, there are some practical steps employers can take to help minimise this risk.

    a. Codes of conduct and training should set out the standards expected from managers and should emphasise the importance of honest, ethical and non-discriminatory behaviour in all dealings, and the consequences of a failure to meet these standards (i.e. disciplinary action against the manager up to and including dismissal).

    b. A fair process which aligns with the Acas Code should be followed prior to any dismissal. This will demonstrate that the employer is acting transparently and proportionately (which will be particularly relevant in claims of discrimination arising from disability where the employer wishes to justify any discriminatory treatment). It will also insure against an uplift to compensation for failure to comply with the Acas Code.

    c. Decision-making within such processes should be transparent and those providing information or evidence to a decision-maker should be instructed not to stray into the territory of lobbying for a particular outcome. In the event that a dismissing officer is heavily influenced by someone else when making their decision, the safest course would be to regard that person as a joint decision-maker.

    d. Dismissing (and investigating) officers should receive detailed training on the scope of the role. Such training should underline the importance of looking for, and interrogating, evidence that supports the proposed reason for dismissal, as well as any evidence that supports the employee's position. As the Supreme Court noted in Jhuti, dismissing officers should *"address all rival versions of what prompted the employer to seek to dismiss the employee".*

    e. Dismissing officers must satisfy themselves that the apparent reason is the real reason, even if this requires obtaining more extensive witness evidence and/or reviewing more documentation than initially planned or desired. This will be of greater importance where the employee is too ill to participate in the process and make cogent submissions in their defence.

Ostensible reason for dismissal is the true reason, but is inseparable from an unlawful reason

42. Even where an employer is confident that the ostensible reason *is* the real reason for dismissal, there remains a risk that the reason is found to be closely related to an unlawful reason. This is a common occurrence in claims of discrimination arising from disability, where it is argued that the reason for the dismissal arises from the employee's disability. It is also a particularly pertinent issue in whistleblowing and health and safety dismissal cases.

This is because whistleblowers and those carrying out health and safety activities often deliver unwanted messages which may, in turn, lead to friction in the workplace. If the employee is then dismissed for causing problems, the question will be whether this conduct is genuinely separable from the whistleblowing or health and safety activities.

43. There follows some examples of cases where employees (in some cases with under two years' service) were dismissed, and it was argued that the ostensible reason for dismissal was inseparable from an unlawful reason.

Discriminatory dismissals

44. In City of York Council v Grosset it was held that dismissal for misconduct was discriminatory because the misconduct arose from the employee's disability.[35]

    a. Mr Grosset was a teacher who suffered from cystic fibrosis. In the course of 2013, his role was redesigned. He said this left him with an unmanageable workload and unachievable deadlines, all of which meant he found it difficult to manage his health effectively which, in turn, caused him stress. He complained to the Head Teacher, but nothing was done. Later that year, he showed the 18-rated horror movie "*Halloween*" to a class of 15- and 16-year-old pupils. He went off sick with stress, and while he was away, the incident with the film was discovered.

    b. Mr Grosset argued that his judgement had been impaired by stress, which was connected to his disability. Nevertheless, he was dismissed for gross misconduct. The Employment Tribunal concluded that it was probable that Mr Grosset's judgement had been impaired as a result of stress which was largely a consequence of his disability. Therefore, the dismissal was discrimination arising from a disability, which, on the facts, could not be justified. In particular, the Tribunal noted that there was compelling medical evidence in Mr Grosset's favour (even though this evidence was not available to the employer at the time of dismissal). Further, the employer had failed to make any reasonable adjustments which might have reduced Mr Grosset's stress levels.

    c. The school's appeal was dismissed by the EAT and it appealed again to the Court of Appeal. The Court of Appeal set out the correct approach to such claims. The first question is a subjective question of what was in the mind of the employer at the time of the treatment (i.e. the dismissal)? Here, it was the fact Mr Grosset had shown the film to the students. The second question is an objective question of whether there is a causal link between the disability and the thing that led to the treatment (i.e. showing the film to the students). Here, it could be said that there was such a causal link. It did not matter that the school did not realise that he had shown the film to the students due to stress arising out of his disability.

45. In contrast, in Bryce v Nuneaton and Bedworth Borough Council it was held that dismissal because of poor performance which arose from the employee's disability was *not* discriminatory.[36]

    a. Mr Bryce started work as an Enforcement Officer for the Council on 24 September 2019. He is disabled by reason of Asperger's syndrome and dyslexia, and this was

[35] [2018] IRLR 746.
[36] ET Case Nos. 1311185/20, 1302667/21, 1302668/21 and 1303357/21.

known by the Council. The Council made various reasonable adjustments to accommodate his disability and provided him with extra training and support. Despite this, Mr Bryce struggled with the role. By November 2019, when he was just two months into the role, his line manager had identified a number of serious performance concerns including an inability to take on oral instructions, a lack of concentration and a significant number of errors on basic tasks. His "error rate" was recorded at between 60% to 90% depending on the task. He failed to meet any of the milestones included in his training plan and it was noted that he was *"not fulfilling any part of the role".* It was also noted that he was consistently late for work.

b. Mr Bryce's six-month probationary period was due to end in March 2020. Given the performance concerns, the Council decided to extend the standard six-month probationary period and place him on a performance improvement plan. The Council also sought advice from Occupational Health about any further reasonable adjustments that should be made for him, many of which were subsequently put in place. In February 2020 a probationary review meeting was held. Although Mr Bryce's error rate had dropped to around 50%, it was noted that he was still struggling with basic tasks, and there had been no progression with his training plan. Further, it was noted that his timekeeping remained unsatisfactory. In June 2020, a report was prepared on Mr Bryce's performance, which recorded that his error rate was still poor and that he was only performing about 25% of the role of an Enforcement Officer.

c. On 29 July 2020 a meeting was held with Mr Bryce. The Council acknowledged that his disabilities were a factor in his poor performance. However, a number of reasonable adjustments had been made and yet there had been very limited progress and there was *"no positive direction of travel in performance".* At the end of the meeting, Mr Bryce was told that the decision had been taken to terminate his employment on the grounds of poor performance and the failure to pass his performance improvement plan. His employment was terminated on 24 September 2020. Mr Bryce claimed his dismissal was discriminatory as his poor performance arose from his disabilities.

d. The Employment Tribunal accepted that the dismissal was unfavourable treatment because of poor performance which arose from his disabilities. However, it held that the dismissal could be objectively justified. The Council had a legitimate aim of ensuring the proper performance of a public service. Given all the steps that had been taken to support Mr Bryce in the role, it had also shown that dismissal was a proportionate way of achieving that aim, and there was no less discriminatory measure that could have been taken. By the time of dismissal, the Tribunal said the Council had *"done enough"* and extending the probationary period further was unlikely to have produced a different outcome.

46. In Forstater v CGD Europe Ltd it was held that decisions not to renew a visiting fellowship or offer a contract of employment because of the employee's alleged misconduct when expressing her beliefs on social media was direct philosophical belief discrimination.[37]

[37] ET Case No.2200909/2019.

a. Ms Forstater was a visiting fellow of CGD Europe and also worked on specific projects for them on a consultancy basis. CGD Europe is linked to the Centre for Global Development based in the US. Ms Forstater holds "gender critical beliefs" and believes that being male or female is a biological fact which is not capable of being changed and is not a feeling or identity. As a result, in her view, a trans woman is not really a woman and a trans man in not really a man.

b. In late 2018, Ms Forstater began expressing her beliefs on her personal Twitter account. Colleagues from the Centre for Global Development in the US saw her tweets and raised concerns that they were transphobic and offensive. The matter was investigated. Ms Forstater maintained that her statements were factually correct, but she said that out of courtesy she would respect a person's preferred pronouns. She agreed to avoid discussing her views at work unless there was a particular need to do so. She also added a disclaimer to her Twitter account to make it clear that her views were her own and not those of CGD Europe. Nevertheless, the decision was taken not to renew Ms Forstater's visiting fellowship and not to offer her a contract of employment.

c. Ms Forstater claimed that she had suffered discrimination, victimisation, and harassment because of her philosophical beliefs (it was decided at a preliminary stage that her beliefs were protected under the Equality Act 2010). The Employment Tribunal decided that the way in in which Ms Forstater had manifested her beliefs had significantly influenced CGD Europe's decision not to renew her fellowship or offer her a contract of employment. However, it could not be said that Ms Forstater's tweets, or the other ways in which she manifested her beliefs, were objectively offensive or unreasonable. Rather, they were simple assertions of her belief and not unreasonable, particularly given the tone of the wider public debate on the issue. The unobjectionable expression of her beliefs could not be separated from the beliefs and, therefore, the treatment amounted to direct philosophical belief discrimination.

Automatically unfair dismissals

47. In Whalley v Pinewood Veterinary Practice Ms Whalley was a veterinary nurse who blew the whistle about the conduct of a vet who had stood on a dog's neck to restrain it and later sent it home with a limp.[38] Relations between Ms Whalley and the vet were already strained and deteriorated further after this incident. Ms Whalley asked not to work alone with the vet during evening surgeries and he then made a complaint about her and said he could no longer work with her. The employer asked Ms Whalley to work at a different site and she refused on the basis that her nursing duties would be reduced. She was dismissed on grounds that the relationship with the vet had broken down. However, the dismissal was held to be automatically unfair on whistleblowing grounds. The relationship breakdown could not be separated from the fact that she had blown the whistle.

48. In Sinclair v Trackwork Ltd Mr Sinclair was a track maintenance supervisor who was given a mandate to implement a new safety procedure.[39] His colleagues were unhappy with his approach, considering him to be overcautious and overzealous. Mr Sinclair was dismissed for having created friction and upset by the manner in which he had gone about implementing the new procedure. He brought a claim alleging that his dismissal was

[38] ET Case No. 2407735/15.
[39] [2020] UKEAT 0129/20/0112.

automatically unfair on the basis that it was inseparable from the health and safety activities he performed. The EAT concluded that the manner in which Mr Sinclair had performed the activities could not be separated from the activities themselves and the dismissal was, therefore, automatically unfair. The EAT noted that the purpose of the automatically unfair dismissal protection was to guard against the fact that the carrying out of health and safety activities will often be unwelcomed and even resisted. Allowing an employer to distinguish the activities from the upset they caused, and relying on the latter to dismiss the employee, would undermine the protection.

49. However, sometimes the reason for dismissal will be held to be genuinely separable from an automatically unfair reason, with the result that the dismissal is lawful. In Panayiotou v Chief Constable of Hampshire Police and another, Mr Panayiotou was a police officer who made protected disclosures to his employer.[40] He was dissatisfied with his employer's response and began to campaign relentlessly for his complaints to be dealt with in the way that he wanted. As a result, his employer had to devote significant time to dealing with Mr Panayiotou's correspondence and complaints. At the same time, Mr Panayiotou was no longer able to work on medical grounds. He was dismissed and he complained that this was because he had blown the whistle. However, the EAT said that Mr Panayiotou's dismissal was due to the combination of his long-term sickness absence and the manner in which he pursued his whistleblowing disclosures. This was genuinely separable from the disclosures themselves and, therefore, the dismissal was not automatically unfair.

50. In Kong v Gulf International Bank (UK) Ltd, Ms Kong was the Head of Financial Audit at Gulf International Bank (UK) Ltd who made protected disclosures about the use of a particular legal template governing one of the Bank's new financial products.[41] The Bank's Head of Legal, Ms Harding, was unhappy with the concerns raised by Ms Kong and confronted her about it. In the course of the discussion, Ms Kong questioned Ms Harding's legal knowledge regarding the right type of agreement to be used. Ms Harding complained to the Head of HR and the CEO, giving the impression that she could not work with Ms Kong anymore. Ms Kong was dismissed on the basis that her behaviour, manner and approach had resulted in colleagues not wanting to work with her. The dismissal letter referred to her questioning of Ms Harding and said that this fell *"well short of the standard of professional behaviour expected"* and was contrary to the principles of treating colleagues with dignity and respect. Ms Kong claimed she was dismissed because she had made whistleblowing disclosures. However, the Court of Appeal held that the reasons for the dismissal were genuinely separable from the whistleblowing disclosures. The Court said the role of the Employment Tribunal is to identify the reason or reasons operating on the mind of the decision-maker when deciding to dismiss. Tribunals should be able to identify a feature of the conduct relied upon by the decision-maker that is genuinely separable from the whistleblowing disclosure. Provided it can do this, the principal reason for the dismissal will not be the whistleblowing disclosure.

51. In Rattray v Gas Call Services Ltd, Ms Rattray began work as a Service and Repair Technician for Gas Call Services Ltd on 11 January 2021.[42] The company had a contract with Aberdeen City Council to service and repair the heating systems in tenants' homes. Ms Rattray was allocated to work on this contract. In April and May 2022 she raised three health and safety concerns after she had found disconnected and removed microswitches on gas boilers in tenants' homes, which she considered could be a fire risk. She was unhappy with the

[40] [2014] IRLR 500.
[41] [2022] EWCA Civ 941.
[42] ETS Case No. 8000025/2022.

company's response and on 7 June 2022 she made a number of critical posts about the company on Facebook, including that *"no one seems to want to do their jobs right"* and *"I'm wanting out now it's that bad!".* She soon realised the posts were inappropriate and she took them down within an hour. However, the company was made aware of them and dismissed her the next day, around 17 months into her employment. It was concerned that the posts had the potential damage to its reputation, for example if an employee, tenant or client (including Aberdeen City Council) had seen them. Ms Rattray claimed that she had been dismissed for having made health and safety disclosures and this was automatically unfair. The Employment Tribunal noted that the decision to dismiss *"…was not one we consider fair and reasonable … but that is not determinative, not least as this is not a case of 'ordinary' unfair dismissal".* In the Tribunal's view, the *"only reason"* for the dismissal was the company's concerns that the Facebook posts may have damaged, or could damage, the company's reputation. This was separable from the fact that she had made health and safety disclosures, meaning the dismissal was not automatically unfair.

How can employers navigate this risk?

52. There are some practical steps employers can take to help minimise this risk.

    a. As discussed above, Codes of Conduct and training should set out the standards expected from managers and thought should be given as to whether a fair process which aligns with the Acas Code should be followed prior to any dismissal.

    b. In terms of particular risk areas:

        i. If there is a concern that the employee might be disabled, it would be sensible to probe the issue further before dismissal. Once an employer has knowledge of a disability, it would be wise to pause to consider whether the treatment of the employee is based on "something" (e.g. misconduct, poor performance, absence levels) which could have arisen out of the disability. Where there is a potential link, then it would be wise to step back from the treatment in question to consider obtaining medical evidence on the point and also whether any reasonable adjustments might alleviate the problem. If the employer decides to proceed with the treatment then it should be clear that: (i) it has a legitimate aim which is legal, not inherently discriminatory and represents a real, objective need; and (ii) the treatment is a proportionate way of achieving that aim (i.e. it is reasonably necessary and there is no less discriminatory option available).

        ii. If an employee has blown the whistle, ensure that where dismissal for misconduct is proposed as the reason for dismissal, the decision-maker is dismissing for misconduct which is genuinely separable from the whistleblowing disclosure. It is not always easy to predict when this will be the case and a prudent employer should seek legal advice in this situation before moving to dismiss.

Is it possible to have a "protected conversation" with a new employee about the proposed exit?

53. Where there are aggravating factors which might lead to a discrimination or automatically unfair dismissal claim, an employer may wish to make a settlement offer in exchange for the waiver of any potential claims against them. Even where there are no aggravating factors,

some employers may wish to enter into a settlement agreement with the departing employee for commercial reasons or just to know that finality has been achieved.

54. Holding an honest chat "off the record" with an employee about a proposed exit can, if that member of staff is receptive, be the best way to bring about the termination of their employment. However, if the employee is not willing to engage, or has unrealistic expectations, then it carries with it legal dangers and complexity.

55. One concern is that the new employee may resign and bring claims of wrongful dismissal, discrimination and/or automatic unfair dismissal. Even if they do not do this, and the employer begins a performance management or disciplinary process, if the parallel settlement discussion falls apart and an Employment Tribunal claim follows, it may cause the employer to lose the case. This might happen because, in the expectation of the conversation being "protected", the employer has said something that is unhelpful from a legal standpoint. Or it may be simply if the Tribunal discovers that the employer has made a generous offer it assumes it has done so because it knows it is at risk of being found liable.

56. These risks arise from the fact that there are just too many loopholes in the regime to mean that an employer can ever be completely sure that the conversation will be off the record. However, whilst the risks can never be eliminated, they can be minimised by taking care, and ultimately the benefit of having the right kinds of protected conversations significantly outweigh the risks.

"Without Prejudice" discussions

57. Without prejudice (**WP**) discussions are often described as "off the record" but that is not quite correct; there is no such thing as "off the record". There is, however, privilege from disclosure in certain fora for certain material in certain circumstances i.e. typically from disclosure to the Court or Tribunal in respect of the dispute to which the discussions relate. This privilege extends not just to the contents of meetings and offers included in writing, but to discussions within the employer about any such offers.

58. WP privilege does not, however, extend to disputes about whether a settlement has been reached, whether such agreement has been procured by misrepresentation, fraud or undue influence, or about the interpretation of the settlement agreement. WP privilege can be waived by unequivocal (albeit sometimes implied) agreement of both parties. Subject to the above, the fact that such discussions have taken place is not privileged, but the contents are. However, a number of hurdles must be jumped in order to acquire WP privilege

The need for a dispute

59. There cannot be a WP discussion about settling a dispute when there is no dispute or prospect of a dispute in the first place. In the employment context, concern about this imprecise pre-requisite has popped up routinely, and particularly since the EAT decision in Mezzoterro v BNP Paribas.[43] Ms Mezzoterro had taken maternity leave and raised a grievance that she had been prevented from returning to her old job. A meeting was organised with the stated purpose of resolving the grievance. In that meeting, the Bank proposed to terminate Ms Mezzoterro's employment and offer her a settlement package.

[43] [2004] IRLR 508.

Significantly, the Bank said that this would not stop her continuing to seek a resolution of her grievance.

60. Ms Mezzoterro refused the offer and brought a claim of discrimination. She sought to refer to the contents of the meeting at the Employment Tribunal. The Bank claimed that the discussion was protected by WP privilege. However, Ms Mezzoterro succeeded in bringing the material before the Tribunal on the basis that there can only be WP conversations about a "dispute". Cox J said that the grievance had not yet turned into a dispute. That might have happened had the grievance been heard and rejected, though not necessarily. In any event, the settlement proposed by the Bank did not relate to her grievance, but to her leaving the Bank. There could not, the EAT said, have been a dispute as to termination at the time the so-called WP meeting took place, since Ms Mezzoterro had no idea it was even being contemplated. Nor could the settlement package be said to relate to a grievance if that would be allowed to continue to run after the settlement had been entered into.

61. However, the Mezzoterro decision may be regarded as the "high watermark" of the limitations on the WP rule, and it runs contrary to the tenor of many other decisions that both pre-date and post-date the ruling. For example, in Garrod v Riverstone Management Ltd it was held that a settlement offer made to an employee after she had complained about discrimination, but before she had started legal proceedings, was genuinely WP.[44] On appeal, Ms Garrod relied on the Mezzoterro decision, arguing that the fact she had raised a grievance did not mean that there was a dispute. The EAT rejected this argument, holding that the Mezzoterro decision did not mean that an employee who had raised a grievance could *never* be in dispute with their employer, rather, it is not *necessarily* the case. In this case, the Tribunal Judge had been entitled to conclude on the facts that a dispute *was* in existence at the time she raised her grievance and at the time of the meeting.

62. In Portnykh v Nomura International Plc the employer proposed to dismiss the employee for misconduct.[45] An amicable negotiation took place resulting in the employee being offered a settlement agreement and enabling him to keep his deferred remuneration. The employee claimed this was admissible in evidence on the basis that there had been no dispute in contemplation at the time. The EAT disagreed – even though the settlement discussions were amicable, a potential dispute was still within contemplation and WP privilege applied. However, in contrast, in Scheldebouw BV v Evanson, the EAT upheld an Employment Tribunal's decision that a settlement offer made by an employer in the context of amicable exit discussions was *not* protected by WP privilege because, on the facts, there was no dispute between the parties.[46] The EAT found that the decision to enter into a settlement agreement was made for commercial reasons and did not indicate that there was a dispute.

Genuine attempt to settle a dispute

63. The existence of a dispute and a conversation or correspondence stated to be for the purposes of settling that dispute are not enough. There must also be a genuine attempt to settle that dispute. In Hudson v Oxford University the employee appealed against his dismissal.[47] The University wrote to him on a WP basis stating that whilst it would clearly be desirable to reach a solution, it would not be possible unless and until the employee accepted it was unrealistic and unworkable for him to return to work. Given that the dispute

[44] [2022] EAT 177.
[45] UKEAT/0448/13.
[46] [2022] EAT 157.
[47] UKEAT/0488/05/DM.

at that time concerned whether or not the employee should return to work and all the University had done in the letter was hold its ground, the EAT held that WP privilege did not apply. There was no evidence of a genuine attempt to settle the dispute and, therefore, the letter was admissible.

Absence of unambiguous Impropriety

64. It has been a long-standing rule that parties may not use WP privilege to cloak perjury, blackmail or other unambiguous impropriety but *"only in the clearest cases of abuse"*.[48] In Mezzoterro, the EAT also held that the content of the conversation in which Ms Mezzoterro was offered a settlement demonstrated a clear act of sex discrimination. Given the great evil that discrimination is and how hard it is to prove, this should be treated as unambiguous impropriety. In other words, the Bank would not have been able to benefit from WP privilege even if there had been a dispute in play.

65. However, in Woodward v Santander UK Plc the EAT clarified that discrimination is *not* a free-standing form of unambiguous impropriety and that there is no rule that because discrimination is hard to prove, the WP rule should be narrowed for those claims.[49] In Garrod, Ms Garrod had also argued on appeal that the Tribunal Judge was wrong not to have found that there was unambiguous impropriety, meaning WP privilege should be disapplied. She argued that responding to a grievance with a proposal of termination was an act of victimisation. The EAT rejected this ground of appeal, noting that WP privilege should be disapplied only in the very clearest of cases of very serious wrongdoing. The Tribunal Judge was right to conclude that this was not such a case. The EAT concluded that making a settlement offer which could, on one view, provide a clue to a party's discriminatory attitudes fell far below the threshold needed to disapply WP privilege.

Protected conversations under section 111A of the ERA

66. The "protected conversation" regime came into force on 29 July 2013. In contrast to WP conversations, there is no need for the parties to be in dispute, or in prospect of a dispute, in order for the protected conversation to be inadmissible in legal proceedings. Section 111A of the ERA provides that evidence of "*pre-termination negotiations*" is inadmissible in ordinary unfair dismissal proceedings. "*Pre-termination negotiations*" means any offer made, or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee. However, an Employment Tribunal may admit the material where there has been "*improper behaviour*" if it considers it just to do so.

67. The ACAS Code of Practice on Settlement Agreements is designed to aid the understanding of the section 111A regime and, in particular, the admissibility provisions. It states that "*improper behaviour*" includes all aspects of unambiguous impropriety but is wider and extends to such other behaviour as a Tribunal may regard as improper. The Code also gives (albeit limited) guidance on how to conduct negotiations, including:

    a. It may be helpful if any reasons for the proposal are given when the proposal is made.

[48] Unilever PLC v The Procter & Gamble Co, [1999] EWCA Civ 3027
[49] [2010] IRLR 834.

b. Employees should be given a reasonable time to consider a settlement proposal. As a general rule, a minimum period of ten calendar days should be allowed to consider the proposed formal written terms and to receive independent legal advice.

c. Allowing employees to be accompanied to meetings is good practice though not a legal requirement.

68. On the one hand, the section 111A regime frees the employer from worrying about whether or not a dispute has arisen. However, it is more limited than the WP rule, such that it does not help employers seeking to exit new employees. This is because the inadmissibility of the protected conversation only applies in claims of ordinary unfair dismissal. The discussions will be admissible when, for example, a discrimination, automatic unfair dismissal or wrongful dismissal claim is being considered (unless WP privilege applies). As discussed earlier in this paper, employees with under two years' service are not eligible to bring ordinary unfair dismissal claims, meaning that the section 111A regime provides *no* protection in settlement conversations with such employees. Additionally, by choosing to use the section 111A regime in the first place, it suggests that there is no existing dispute which would enable the WP rule to apply.

The dangers of not having the "honest chat"

69. Much energy can be spent analysing and worrying about whether WP privilege applies, and employers can torture themselves trying to shoehorn a conversation into the regime. Clearly, there are risks to an employer if such a discussion is ultimately admitted in a subsequent claim. However, in "vanilla" situations at least, the chances of litigation are much lower and so an employer should take the risk of having a discussion. In these situations, the compensation a new employee could claim is usually limited to the monies due in respect of the notice period. And the notice period for new employees is likely to be short, perhaps even as low as the one-week of statutory notice. Where an employer makes a settlement offer which covers the notice period (perhaps with an *ex gratia* amount on top) the employee will be advised that it really makes no sense to for them to litigate. Indeed, the employee is likely to want to agree exit terms that will help smooth the path to finding new employment, for example, reference wording and non-disparagement terms.

70. In more complex scenarios, the question to keep in mind is: is it higher risk to try or not to try to have such a conversation? In most cases the risks are far more profound, and more likely to occur, if an employer does not have an honest chat than the risks of the consequences of a failed WP conversation.

a. It keeps unwanted employees in the business longer, upsetting customers, demoralising staff and absorbing management time that can be better spent. High performing workplaces get these employees out of the door sooner rather than later.

b. It deprives employees of the chance to leave with dignity and employers to handle these matters with compassion.

c. Without the option of an amicable severance, employees are left with a binary choice. They either swallow being fired or fight, which leaves many employees with rather more to gain than lose by going through the Tribunal process.

d. Maybe, by *not* having the honest chat the employer has increased its chances of winning at a Tribunal marginally, but it will also have significantly increased its chances of having to endure the process at all. Win or lose: a claim is still a defeat for the business. There is significant irrecoverable cost, wastage of management time and energy and a publicity risk.

How to navigate having an "off the record" discussion

71. Other things being equal, an employer would prefer to be inside both rules (although for employees with under two years' service the WP regime is the only one that matters). However, as can be seen, the legal position is too intricate to feel certain that this is achievable in every case. There are, however, ways of minimising the risks by the careful handling of these conversations. Whilst there is no one size fits all script, the simple guidelines below are likely to reduce the risk of admissibility, or even having a claim being issued, significantly:

    a. Where possible and not too unconstructive, try to get the open position on the record first (e.g. that the employee's performance or conduct has not met expectations), whether in writing or by having a discussion beforehand – this should help get the employer inside the wider WP rule by teeing up the prospect of a dispute.

    b. Given that even the fact that the employer is having a section 111A protected conversation cannot be disclosed, even by consent, it is imperative to ensure that it can explain by other means any delay or other acts or omissions by reference to other material. In other words, it needs to keep the open base covered at all times.

    c. If practicable, allow the employee to be accompanied to the meeting.

    d. Have a manager or member of HR at the meeting to take notes, so that any argument of improper behaviour can be refuted.

    e. Do explain that the conversation is being conducted on a WP basis and explain what this means. Ask the employee to confirm that they understand and agree to this.

    f. Most importantly, frame the conversation in a way that if it ended up before an Employment Tribunal, it would not be embarrassing. Explain the concerns in a neutral way, giving enough information that the employee has a clear understanding of the risks of staying in employment, but making sure to avoid any suggestion that, for example, any performance management or disciplinary process is a foregone conclusion, or that the employee does not have options.

    g. Test the waters first. Ask the employee if they would be willing to explore settlement discussions, but do not provide a pre-prepared settlement agreement or even a figure just yet. Only once the employee confirms that they are receptive would the employer follow up with the formal proposal.

    h. Treat the employee with dignity and respect and give them time (ideally no less than ten working days) to reflect on their options.

i. Make sure correspondence is clearly marked as pursuant to section 111A of the ERA and on a "WP Subject to Contract" basis.

72. If an employer does the above, not only would the conversation not be harmful if it got to the Tribunal and it was not protected, much more importantly, the employer is far less likely to end up in the Tribunal at all.

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21 November 2023

APPENDIX

LIST OF AUTOMATICALLY UNFAIR REASONS FOR DISMISSAL

Reasons for which no qualifying period required

Reason for dismissal	Compensatory award capped?
Unfair dismissal in connection with carrying out jury service.	Yes
Unfair dismissal for reasons connected with pregnancy, childbirth, statutory maternity paternity, adoption, shared parental, parental or parental bereavement leave, time off for attending antenatal and adoption appointments or time off for dependants.	Yes
Unfair dismissal for a health and safety reason.	No
Unfair dismissal of a shop or betting worker for refusing to work on a Sunday.	Yes
Unfair dismissal for a reason connected with rights under the Working Time Regulations 1998.	Yes
Unfair dismissal for performing functions as an occupational pensions trustee.	Yes
Unfair dismissal for performing functions as an employee representative on a TUPE transfer or collective redundancy.	Yes
Unfair dismissal for whistleblowing.	No
Unfair dismissal for asserting a statutory right listed in section 104(4) of the ERA 1996.	Yes
Unfair dismissal related to the national minimum wage	Yes
Unfair dismissal for enforcing rights in relation to working tax credit.	Yes
Unfair dismissal in connection with an application for flexible working.	Yes
Unfair dismissal of a jobholder if the reason for dismissal was the employer's duties under the auto-enrolment regime or its contravention of those duties.	Yes
Unfair dismissal in connection with time off for study and training request rights.	Yes
Unfair dismissal in connection with a prohibited list under the Employment Relations Act 1999 (Blacklists) Regulations 2010 (SI 2010/493).	Yes
Unfair dismissal for refusing to accept an offer to become an employee shareholder.	Yes
Unfair dismissal in connection with European works council activities.	Yes
Unfair dismissal related to status as a part-time worker.	Yes
Unfair dismissal related to status as a fixed-term employee.	Yes
Unfair dismissal in connection with information and consultation agreement activities.	Yes
Unfair dismissal in connection with carrying out functions as an employee representative under the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI 2006/349).	Yes
Unfair dismissal in connection with performing functions under the European Cooperative Society (Involvement of Employees) Regulations 2006 (SI 2006/2059).	Yes

Unfair dismissal in connection with performing functions under the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009 (SI 2009/2401).	Yes
Unfair dismissal in connection with exercising prescribed rights as an agency worker.	Yes
Unfair dismissal for a reason relating to the employee's political opinions or affiliation.	Yes
Unfair dismissal in connection with the employee's membership of a reserve force.	Yes
Unfair dismissal in connection with trade union recognition.	Yes
Unfair dismissal for trade union membership or non-membership, or participation in trade union activities.	Yes
Unfair dismissal in connection with exercising the right to be accompanied to a disciplinary or grievance hearing.	Yes
Unfair dismissal for taking part in protected industrial action.	Yes
Unfair dismissal in connection with the breach of an exclusivity term in a zero hours contract.	Yes
Unfair dismissal following selection for redundancy on certain of the grounds listed above.	Yes (unless selected because of whistleblowing or a health and safety reason)

Reasons for which 2-year qualifying period is required

Reason for dismissal	**Compensatory award capped?**
Dismissal because of a spent conviction.	Yes
Dismissal where the sole or principal reason for the dismissal is a TUPE transfer itself, unless it is an ETO reason entailing changes in the workforce.	Yes
Unfair dismissal in connection with exercising prescribed rights in relation to the removal of the Swedish derogation.	Yes