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EMPLOYMENT LAW FOR CHARITIES SEMINAR JUNE 2006

FAIRNESS REVEALED

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At the Wrigleys Employment Seminar in 2005 I spoke on the topic of Managing a Fair Dismissal running through some of the practical considerations that you as an employer would need to consider if you found yourself in the position of having to consider dismissing one of your employees.

In this paper I am going to take a step not backwards but rather to the side and consider those processes from the perspective of the Employment Tribunal. I'm going to be looking at the legal framework in which the Tribunal looks at the question of fairness and whether it is simply a case of put your finger in the air to test which way the wind is going or if there is method to what may sometimes be seen as their madness.

Ultimately it will be an Employment Tribunal that will have the final say on whether you have acted in a reasonable manner. Technically speaking you will have the right of appeal against the Tribunal's decision but whether it is the Employment Tribunal or some other Court considering the issue they will be applying the same criteria in considering any claim by the now ex-employee that you have acted unfairly.

The Right not to be Unfairly Dismissed

The starting point is section 94 of the Employment Rights Act 1996 (ERA). This states that:

"An employee has the right not to be unfairly dismissed by his employer"

Every employee has the right not to be unfairly dismissed and it is important that you start at that position - the Tribunals will. It isn't right to say that you only have the right to be unfairly dismissed if you have one year's continuous employment. That is an issue as to whether or not you are eligible to bring a claim and it is an important distinction. Eligibility covers a number of areas including the question of whether or not an individual is an employee, are you their employer? How old are they? These are all relevant issues and I will touch on those in a moment.

So the starting point is not whether an employee has the requisite continuous period of employment but:

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- Are they an employee?
- Are you the employer?
- Was there a dismissal?

Qualifications

Is the claimant an employee?

Section 230 sets out the relevant definitions

"Employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. This is perhaps one of the least helpful definitions that could exist.

A "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

Recent employment legislation has tended to focus on "worker" rights extending more and more protection to a wider category than individual which will include many who are self employed, sub-contractors and agency workers who are not employees but who have contracted to personally provide a service.

Whether or not an individual is an employee is a question that deserves a talk all on its own and is not something that I will focus on here, save to say that in recent years the Courts have highlighted two factors which must be present if an employment relationship is to be established. The first is the question of 'mutuality of obligation' which is reduced to the employer's obligation to pay for work done and the employee's duty to be ready and willing to work.

The question isn't one of do you pay the individual, since that would be an incentive simply not to pay anyone. The sector will be very familiar with the status of volunteers. We have the case of **South East Sheffield Citizens Advice Bureau -v- Grayson [2004] IRLR 353**. This was a slightly unusual case in that it rested on a claim of disability discrimination and there was a need to show that volunteer advisors were employees thereby bringing the number of employees in the bureau above the small employer exemption which existed at that time under the Disability Discrimination Act 1995. That small employer exception no longer exists, but the case still confirmed that in the circumstances the volunteers were not advisors and set out the various factors that we need to take in to account.

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In contrast just before Christmas we had the widely reported case **Percy -v- Church of Scotland** in which a minister, traditionally an office holder who is not an employee, came within the wider definition of employment for purposes of the Sex Discrimination Act.

The second requirement is that the employee must provide that work personally and have no right to send a substitute. Of course it isn't simply a case of including a provision that would allow an individual to send substitutes. Those involved in services to young persons and vulnerable adults will be aware of the need to ensure that anyone working for them has been vetted through the Criminal Record Bureau which will limit any freedom to substitute. In the case of **Glasgow City Council -v- McFarlane (2001)**, McFarlane and others were gymnastic coaches who sought clarification of their work status. When one of the coaches was unable to take a class they arrange a replacement from a list of approved coaches maintained by the council. In this case the coaches had to be absent for some good reason, often the council arranged the replacement cover from their own list and the council would pay the replacement coach directly. This was held to amount to employment

Who's the employer?

In part this will have been answered by the question of is the individual an employee because that will look at the nature of the relationship between the Claimant and the Respondent. However it is still possible for the Claimant to be an employee, but not the Respondent's employee.

Equally we have developing case law relating to the use of temps or agency staff which has held that a contract can exist between the organisation using the temp and the individual temp even if that temp provides their services through a service company and an employment agency and the contracts have an express statement that no employment relationship exists.

Two cases cover this point:

- **Dacas -v- Brook Street Bureau 2004**
- **Muscat -v- Cable & Wireless [2006] EWCACIV220**

There must have been a dismissal

An employee will clearly have to demonstrate that he has been dismissed. This will cover three situations:-

1. Employment is brought to an end by the employer whether or not he gives notice;

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2. The employment was for a fixed term which came to an end without a renewal; or
3. The employee terminates the relationship (with or without notice) in circumstances where he is entitled to do so by reason of the employer's conduct. This is usually referred to as constructive dismissal.

Within the above are a number of situations where there will be a deemed dismissal:-

- Failing to allow an employee to return from maternity leave;
- Death of the employer;
- A heat of the moment resignation which is withdrawn but the employer does not allow the employee back to work;
- Pressuring an employee to resign or agreeing a termination payment if the employee resigns.

Some common examples of matters which may amount to a constrictive dismissal are:-

- Failure to pay wages in time;
- Suspension without pay without an express contractual right;
- Changes to working hours;
- Breach of the duty of employer trust and confidence such as:-
 - verbal abuse or bullying;
 - failure to deal with grievances promptly;
 - false accusations;
 - treatment that undermines an individual's authority;
 - lack of support and excessive workloads.

It follows that there will be no dismissal in the following cases:-

- Termination by mutual agreement. This is not the same as when an employer given notice and the employee asks to leave earlier.

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- Termination by the employee in the absence of constructive dismissal.
- Termination by the doctrine of "frustration", where through no fault of the parties the contract cannot be performed or if performed becomes radically different from that which was originally anticipated.

Exceptions to the Right not to be Unfairly Dismissed

So the right exists under section 94 ERA. But that right, not to be unfairly dismissed, is enforced in an Employment Tribunal and in order to bring the claim there are certain eligibility criteria that the employee must satisfy.

Continuous Employment

Unless one of the exceptions applies the employee must have a continuous period of one year's employment in order to bring the claim for unfair dismissal. The Employment Rights Act provides detailed provisions dealing with the calculation of continuous employment to take account of sickness absence, strikes and lock-outs and notice.

The actual period of continuous employment will be extended where an employee has been dismissed without notice. So the true test is not continuous employment for one year, but rather 11 months and 3 weeks where no notice has been given (even if it is paid in lieu) as the employee will be able to add on the minimum statutory notice of one week. Many cases in this area focus on taking account of any period where the employee may have worked under a temporary contract, for example under an agency or where employment may have transferred under the Transfer of Undertaking (Protection of Employment) Regulations and you must add on a period of service with the previous employer.

Automatic Unfair Dismissal

The fact that all employees have a right not to be unfairly dismissed is significant because of the ever increasing categories of automatic unfair dismissals where the period of continuous employment doesn't matter. You can guarantee that with every new piece of employment legislation the list of matters that will give rise to an automatic unfair dismissal is increased. Many of these will not affect you but you do need to be aware of them.

A dismissal is at risk of being automatically unfair if it falls within one of the following categories:-

- Taking leave for family reasons.

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- Performing health and safety activities.
- Refusal to work Sundays.
- Asserting a statutory right.
- Performing functions as an employee representative.
- Acting as a trustee of occupational pension schemes.
- Making a protected disclosure (whistle blowing).
- Rights of a part-time worker or fixed term employee.
- Participation in protecting industrial action.
- Involvement trade union membership or activities.
- Trade union recognition.
- Working time issues.
- Selection for redundancy because of an automatically unfair reason.
- Discrimination, victimisation and harassment, and this will include under the new Age Equality Regulations.

This does not mean to say that the one year rule is not important because there are also categories of dismissal which would be automatically unfair but that there is still a requirement for the individual to have a minimum one year's continuous employment. This includes dismissals in connection with:-

- A spent conviction.
- Flexible working.
- TUPE.
- A failure to follow the statutory dismissal procedure.

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Where an employee is dismissed on medical grounds the qualifying period in order to bring a claim of unfair dismissal is 1 month

Age

Until the Age Equality Act comes into effect in October this year an employee who is over the age of 65 or the normal retirement age for the post that they hold if there is one cannot bring a claim for unfair dismissal. However, where the reason for the dismissal is for one of the "impermissible" reasons where there will be automatic unfair dismissal the age limit does not apply.

For a number of years we have been awaiting the outcome of a challenge to this upper age limit which, in the case of **Rutherford**, argued that the age limit was indirectly discriminatory on the ground of sex on the basis that at age 65 more men than women were in employment and were therefore disproportionately affected by this restriction. The European Court of Justice earlier this year confirmed that the challenge could not be sustained but this has been rendered of limited application to future claims when the new Age Equality Rules will apply and the upper age limit will be removed.

Members of the Armed Forces

Civil Servants in the security service, super intelligence service and GCHQ with a power of generally for ministers to issue exemption certificates in any unfair dismissal case where issues of national security are involved.

Illegal Contracts

As a basic principle of contract law the Courts will not allow parties to seek to enforce an illegal contract. This would cover a contract to employ an individual to commit a crime, and an individual working without the required work permit and where the employee assists the employer evade tax for a failure to pay PAYE and National Insurance.

Police Service

Where police officers are not employees within the meaning of the Employment Rights Act 1996 as their service is governed by statute and not contract.

Profit Sharing Fishermen

Strikes

Whilst an employer cannot dismiss an employee engaged in official industrial action during the initial protected period (which would be an automatic unfair dismissal). Once outside

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the protected period an employee in official action can only complain of unfair dismissal if there has been selective dismissal or offers of re-engagement.

An employee taking part in unofficial industrial action cannot claim unfair dismissal unless the reason for dismissal is some other protected or ineligible reason where automatic unfair dismissal may apply.

The Unfair Dismissal Test - Section 98 Employment Rights Act 1996.

Once an employee has established that he eligible to bring a complaint of unfair dismissal the *employer* will need to satisfy two tests.

- to identify the reason for the dismissal, or if there is more than one reason the principal reason, and that it is a permissible reason; and
- whether that reason is sufficient to justify the dismissal.

Taking these in turn, let's look at the permissible reasons which may allow a fair dismissal.

The employer will only be allowed to rely upon facts which were known to him at the time of dismissal. The employer will not be permitted to point to facts which were subsequently discovered to justify a dismissal although such facts may assist in demonstrating that the employer genuinely believed circumstances existed at the time of dismissal and alternatively may be relevant to the question of the level of compensation which may be appropriate in the circumstances.

The following are accepted as potentially fair reasons:-

1. Capability or qualification of the employee for performing work of a kind which he was employed to do (Section 98 (2)(a));
2. Conduct of the employee (Section 98 (2)(b));
3. Redundancy (Section 98 (2)(c));
4. The employee could not continue to work in the position which he held without contravention of a duty or restriction imposed by or under an enactment (Section 98 (2)(d));
5. For some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (Section 98 (1)(b)); and

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6. (From October 2006) retirement at age 65 or above.

Capability

Capability is assessed by reference to skill, aptitude, health or any other physical or mental quality.

An employer is not required to prove that an individual is incapable or incompetent but only that there is evidence of the employee's inability to perform adequately and that the employers belief that the employee is incapable is genuinely held on reasonable grounds.

There is a distinction between incompetence and laziness with the latter being an issue of conduct rather than capability.

It may be difficult to show that an employee is incompetent if he has been doing the same job for a long time particular where there have good performance reviews and pay rises based on merit. Incompetence is more common where there has been a change in role or in the requirements of that position, for example, through introducing performance targets although it should be noted that introduction of performance targets where none have previously existed may give rise to a claim for constructive dismissal.

Often the question of competence is a matter of perception rather than objective evidence. This evidence can come from complaints from customers or co-workers, comparison of performance figures ranging from sale targets through to number of telephone calls made or received or letters responded to depending upon the nature of the work.

Qualification refers to any degree, declaimer or other academic, technical or professional qualification which is relevant to the position which the employee held. It does not include a mere licence, credit or other authorisation unless it does directly relate to the ability of the individual to do the work.

In cases where an employee may have misled an employer as to the nature of any qualifications that they may hold it is likely that such matters will have been identified within the first year of continuous employment. Even in such cases action is generally taken on the basis of the employee misleading the employer which is a conduct issue rather than on the basis of qualification. There are practical advantages for doing so in that part of the procedure which an employer will have to follow will be to allow an employee an opportunity to put right any failings save where that failing is so serious that it would justify dismissal without warning. It is questionable whether this would apply in the case of formal qualification but would clearly depend upon the circumstances. Where an employer can demonstrate that the employee has lied this goes to the fundamental basis of trust and confidence in the employment relationship and the employer is often on stronger ground

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using this route.

This will be a relevant heading for disciplinary action where an employee loses their driving licence where that is a requirement of their job and relevant to the work that they undertake. However, even in such cases consideration would need to be given to alternatives to dismissal, for example, reassigning an employee to other duties whilst they serve out any driving ban.

Capability - Ill Health

An employee will be incapable of performing their job if they are absent due to ill health, whether that absence is through intermittent short-term absences or long-term.

Sickness absence dismissals are one of the more frequent causes of a dismissal on the grounds of capability. It is important to remember that the Tribunal is not as concerned about the period of actual absence but the question of how long that absence is likely to continue. An employer must also be aware of its obligations under the Disability Discrimination Act.

Conduct

Conduct refers to anything which is likely to affect the employee's ability to perform his contract. This will include behaviour during working hours as well as behaviour outside. The test as applied by a Tribunal is set out in the case of **British Home Stores -v- Burchell [1980] ICR303EAT** which requires the Tribunal to consider:-

1. Whether the employer genuinely believed that the employee had been guilty of the misconduct at the time of dismissal;
2. Were there reasonable grounds for that belief;
3. Did the employer make reasonable enquiries?

There is a distinction between gross misconduct, conduct so serious it justifies instant dismissal without notice, and other misconduct.

Even if an employee has admitted his misconduct the employer is not excused the requirement to conduct an internal disciplinary procedure in a fair and proper way - **Whitbread Plc -v- Hall [2001] IRLR275CA**

Redundancy

This is one of the more complex areas of dismissal and although many dismissals may be

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stated to be on grounds of redundancy they aren't because there is a "narrow" definition of redundancy in law. If you seek to make someone redundant when you are in fact undertaking a reorganisation or restructuring and the circumstances don't fit the narrow legal definition of a redundancy then you will not fall under this head and you are at risk of an unfair dismissal.

In addition there are particular procedures that must be followed if there is a proposal to dismiss on grounds of redundancy 20 or more employees at one establishment within a period of 90 days or less.

What is redundancy? - Section 139 Employment Right Acts 1996

An employee is taken to be dismissed by reason of redundancy if:-

- (a) The employer ceased or intends to cease:-
 - (i) to carry on the business for the purpose of which the employee was employed by him; or
 - (ii) to carry on that business in the place where the employee was so employed, or
- (b) The requirements of that business:-
 - (i) for employees to carry out work of a particular kind; or
 - (ii) employees to carry out work of a particular kind in the place where the employee was employed by the employer,

has ceased diminished or are expected to cease or diminish.

This effectively covers two situations:-

- the business closes; or
- you can do the work with fewer employees.

It is this latter category that causes the most difficulty. It will cover a drop off in business as well as alternative methods of work such as computerisation or new machinery.

It is important to remember that where you simply change the way in which you are doing work, for example, assigning work to a different department or team, but you still need the same number of staff to do that work then this may amount to a reorganisation but it will not satisfy the definition of a redundancy.

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Contravention of any Enactment

This again will generally be seen in cases where someone loses their driving licence, an essential requirement for their work.

There may be other cases where reliance is placed on health and safety but here there is an important consideration that genuine belief is not sufficient: it is necessary for there to be a breach of statute.

Other Substantial Reasons

So what is a substantial reason?

Although the categories are potentially open ended, most of the cases that have been decided under this heading arise where an employer has taken action to protect their business interest.

Protecting Business Interests

The law does not prevent an employer from seeking to change their terms and conditions of employment. In certain cases this might be restricted, for example following a transfer of undertaking subject to the Transfer of Employment (Protection of Employment) Regulations 2006 (TUPE) but still permitted if you can satisfy the Economic, Technical or Organisational Changes test. I will not deal with the relevant procedures here.

A variation of the contract of employment can, in law, amount to a dismissal with an offer of alternative employment on the amended terms. As a dismissal, it may in the circumstances be unfair. The change can be effected by agreement between the employer and the employee, in which case the issue is unlikely to come before a Tribunal, but where the employee does not agree to accept the changes the employer may be able to rely upon the 'Other substantial Reason' category as a potentially fair reason.

Case law suggests that it is simply not enough that an employer wishes to reorganise its business in a manner which it considers advantageous. The employer must demonstrate that there are discernable advantages. This is consistent both with the burden of proof being on the employer to show that the reason for dismissal falls within this potentially fair category and that the reason is substantial in terms of having some basis other than the uninformed opinion of the employer or worse, based on some subjective prejudice.

This demand on the employer to demonstrate his claims is reflected in other areas of employment protection. For example, the requirements in considering requests for flexible working under the family friendly policies require that an employee's request for altered hours or other changes must be subjected to a proper consideration by an employer on

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matters such as cost burden, ability to meet customer demand and impact on quality and performance.

The case law also confirms that whilst the Tribunals will give consideration to what is in the employer's interest, the interest of the employee cannot be ignored. Whether the employer acts properly in all the circumstances will depend at least in part on whether the employee has acted reasonably in refusing the change.

A tribunal may not simply impose its own view as to what may be necessary or what steps an employer should take but the tribunals do still have considerable scope to permit their own view of the reasonableness or an employer's actions to hold sway. An employer may have a good business reason for seeking to cut pay or increase over time, but in practice if this is merely to make a profitable business more profitable, tribunals are likely to view the change with disapproval.

Where the employees are adversely affected, particularly financially, the tribunals are more likely in practice to need persuading that it is necessary for the employer to impose the burden on the employees. There is a great deal of grey area between the position where an employer seeks to suggest that changes will improve its business and those where the survival of the business is threatened.

Where a proposed change does not directly affect the financial wellbeing of an employee, it is likely to be easier for an employer to justify the change as fair. But it is also less likely that any such change will find its way before a Tribunal.

One of the principal factors, although it is only one of a number of different factors that will be considered by a tribunal, is the question of whether an individual employee stands alone in their objection to the changes that the employer seeks to impose, or whether the changes are in fact being introduced following a lengthy period of consultation with unions, employee representatives or the individual employees themselves.

It is not true to say that where an employee may be acting reasonably in refusing to accept a change the employer must be acting unreasonably by imposing it. Both may be acting perfectly reasonably.

Examples of cases upon this point are as follows:

- **Farr -v- Hoveringham Gravels Limited [1972] IRLR 104, IT** - Company Headquarter moved and the employee refused to move within a reasonable travelling distance;
- **Moreton -v- Selby Protective Clothing Co. Ltd [1974] IRLR 269, IT** - A woman

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required to work during school holidays and unable to do so, although she had been given twelve months to make alternative arrangements.

- **Robinson -v- Flitwick Frames Limited [1975] IRLR 261, IT** - Employee refused to work overtime and was the only one to do so. This created difficulties with sharing bonus money.

Examples of an employer imposing changes in terms and conditions and an employee refusing to accept and being held to have been fairly dismissed for some other substantial reason as follows:-

- **RS Components Limited -v- Irwin [1974] 1 ALL ER 41, [1973] ICR 353** - This is a case where the employer faced a serious problem from staff leaving, setting up in competition and soliciting former customers. The business was losing profits, so they sought to impose restrictive covenants on staff to prevent them operating in competition. One employee refused and was dismissed. Dismissal was held to be fair.
- **Hollister -v- National Farmers Union [1979] IRLR 238, [1979] ICR 542** - Reorganisation was introduced at the insistence of and for the benefit of employees. Mr Hollister refused to accept the reduced contractual rights. Even though there was a failure to consult with the individual over the reorganisation, the dismissal was held to be fair.
- **Sycamore -v- H. Myer & Co. Ltd [1976] IRLR 84** - An employee refused to accept a union negotiated agreement which would have led to a reduction in his salary. He was held to have been fairly dismissed.
- **Skyrail Oceanic Limited trading as Goodmos Tours -v- Coleman [1980] IRLR 226 [1980], IRC 596 EAT** - A travel agency clerk was dismissed because she was about to marry an employee in a rival firm. It was held that the employee had access to confidential information and that the dismissal could be justified under the head of some other substantial reason. It is important to note that in this case the dismissal was held to be unfair because the employee had been given no warning of the dismissal, not so that she could take a view as whether to go through with the marriage, but such that she would have had an opportunity to find alternative employment. A claim under the Sex Discrimination Act failed, because a male member of staff in a similar situation would also have been dismissed.

It is of course not every case where there may be a breach or potential breach of confidence, which will give rise to a right to dismiss and claim a fair dismissal under other substantial

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reason. In many contracts an actual breach of confidence would amount to conduct on the part of the employee in breach either of an express term of confidence or an implied obligation of good faith.

The case of **Nova Plastics Limited -v- Froggatt [1982] IRLR 146** confirmed that working for a rival employer in an employee's spare time will not justify dismissal unless by so doing the employee is causing substantial harm to his employer's business.

In all of these cases it is important to note that a dismissal for some other substantial reason is not automatically fair. Just as with any of the five potentially fair reasons, once the reason has been established, consideration must be given to the second stage of the test as to whether or not the employer acted reasonably in treating that reason as sufficient to justify dismissal. This requires consideration of alternatives as well as a requirement to ensure that a fair or reasonable procedure has been followed.

Other examples which illustrate the potentially wide scope of the category of some other substantial reason are as follows:-

Personality Differences

In the case of **Treganowan -v- Robert Knee & Co. Ltd [1975] IRLR 247, [1975] ICR 405, QBD** the office working environment had become unbearable and was seriously affecting the company's business. A personality clash arose "from a difference of opinion as to the merits of the permissive society". The employee had an illegitimate child and was boasting of a relationship with a partner almost half her age.

Having established that the principal reason fell under the category of other substantial reason, an employer must show that there is not only a break down of the working relationship but that it is irredeemable and that every step short of dismissal should first be investigated in order to seek an improvement in the relationship.

Third party pressures

A dismissal may be fair even though an employer is reluctant to dismiss where a request comes from some third party, for example, if an employee upsets a major customer who then insist on that employee's dismissal (**Scott Packing and Warehousing Co. Ltd -v- Patterson [1978] IRLR 166 EAT**).

An employer seeking to suggest that there is third party pressure must still satisfy a tribunal that this is the case. In the case of **Grottcon (UK) Ltd -v- Keld [1984] IRLR 302** the employer failed to indicate how the third party instruction to dismiss had been given or what consultations there had been with the third party to avoid the dismissal.

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The mere fact that a valued customer or client insist upon dismissal will not always mean that a subsequent dismissal is fair. It is still a requirement that the employer must balance their own interest against the individual interest of the employee.

Redundancy - Bumping

In **Church -v- West Lancashire NHS Trust [1998] IRLR 4**, the EAT held that a "bumped" employee is not redundant within the statutory definition.

Bumping is sometimes known as a transferred redundancy. This is where an employer having gone through the redundancy process identifies a particular individual as being redundant, within the statutory definition. In considering alternatives the employer may redeploy the selected employee, subject to that individual having the appropriate qualification or capability, into another role and make the person already in that role redundant in their stead. This last person is dismissed or bumped as a result.

Bumping may fall under the category of some other substantial reason. In doing so it has a particular effect in that because the individual who is actually dismissed is not being made redundant but rather being bumped, they are not entitled to a redundancy payment.

Mrs C Barnes -v- Gillmartin Association [1998] LTL 24/8/98

A secretary who had already reduced her hours to part time sought to reduce them further, but following an increase in work the employer decided to replace the claimant with a full time secretary. The full time position was not offered to the employee and as the employer was a small firm, there were no alternative positions. This was not a redundancy within the statutory definition but there were sufficient facts for the dismissal to be held fair as a business reorganisation under the other substantial reason category. Again there was no entitlement to redundancy pay, although there was an expectation expressed by the Tribunal that such reorganisations would be treated as redundancy by the employer.

Intermittent but persistent absences

Long term sickness absence may give rise to an issue of capability. However where the employee remains fully capable of performing the job, for example, where absences are intermittent and unrelated, such absences remain perfectly valid and therefore do not give rise to an issue of conduct. However, in many cases the matter is most appropriately dealt with in the context of an employer's need for reliable attendance by its staff under the category of "other substantial reasons".

Such cases of course, may also give rise to a need to consider potential Disability Discrimination Act implications.

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Other cases have indicated circumstances which are justifying dismissal on the grounds of some other substantial reason.

Priddle -v- Dibble [1978] 1 ALL ER 1058, [1978] ICR 149. Dismissal to make room for the employer's son.

Kelman -v- Orman [1983] IRLR 432. The dismissal of a spouse where a married couple had been employed together (e.g. living in a public house) and the other spouse had been dismissed, even if that dismissal was unfair.

Ely - v- YKK Fasteners Ltd [1993] IRLR 500. Where an employee indicated that they intended to resign and move abroad, but who subsequently and without ever formally having resigned, changed their mind. The employers nonetheless treated the employment at an end and the belief that the employee had resigned, constituted a substantial reason for the dismissal.

Genuine Beliefs

Again the **Saunders** case (above) confirms that where an employer can show that he had a fair reason in his mind at the time when he decided on dismissal and that he genuinely believed it to be fair, then it would be enough to bring the case within the category of other substantial reason. An employee cannot claim the reason is substantial if it is whimsical or capricious which no person of ordinary sense would entertain but where the belief is one which one can agree that many employers would be expected to adopt, it may be a substantial reason even where a modern sophisticated opinion may suggest that it has no scientific foundation.

However, if a majority opinion is based on blind prejudice an employee who follows it is likely to be acting unreasonably.

Is the reason sufficient to justify dismissal?

I mentioned that a fair dismissal was a two part test. The first, whether the reason is potentially fair; does it fall within one of the permitted reasons? The second test is whether that reason is sufficient to justify the dismissal

The statutory test of fairness is set out in Section 98(4) ERA.

This section states that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer:

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- depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- shall be determined in accordance with equity and the substantial merits of the case.

Whilst these words are vague and general, they confirm that the focus is always on the particular circumstances of the case. However general principles on the reasonableness test do exist.

- The tribunal is not to substitute its own view.
- The tribunal is to determine whether the employer has acted in a manner which a reasonable employer might have done, even though the tribunal itself may have acted differently. Also referred to as the "band of reasonable responses" this test has been criticised on the basis that it suggests that an employee could only be successful in a claim for unfair dismissal, if it could show that an employer had acted in a perverse fashion (that is in a way no reasonable employer would have acted).

Two factors are relevant in considering whether the employer acted in a reasonable manner.

Tribunals are expressly required to take into account the size and administrative resources of the employers undertaking. In particular this effects the question of the structure of the disciplinary procedure itself, where often there may be no one to appeal to and whether there may be any proper consideration of alternative employment where there are only a few employees.

However small the employers undertaking or limited the resources may be, certain matters cannot be explained or justified:

- In **Henderson -v- Granville Tord Limited [1982] IRLR 494**, the EAT refused to excuse a failure by the employer to properly investigate a complaint which led to dismissal.
- **De Grass -v- Stockwell Tools Limited [1992] IRLR 269**, the EAT would not excuse the failure to consult over redundancies.

Size and resources may permit more informal methods. It cannot justify the lack of procedure.

Tribunals will also take into account relevant codes of practice, in particular the statutory disciplinary procedure and the ACAS Code on Disciplinary and Grievance Procedures. The

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tribunals have stressed and the position is now supported in the Employment Act 2002, that a failure to apply full procedural safeguards will not automatically mean that a dismissal is unfair. The focus is on what the employer actually did as opposed to what he might have done.

The employer must be careful to ensure that in whatever procedures they adopt the principles of natural justice are followed. Extracting these from the statutory disciplinary procedure and ACAS guidance, confirms that employers must endeavour to ensure that there is a disciplinary hearing where the individual should be given an opportunity to state their case. The statutory disciplinary procedure does provide, under its modified procedure, for dismissal without a hearing in appropriate circumstances, provided that reasons are subsequently given and an appeal may be made, but such circumstances remain to be clarified.

Other factors considered by a tribunal:-

- **length of service**, may influence the question whether dismissals is a fair sanction to impose;
- **consistency** - including events occurring after notice of dismissal. Where dismissal is with notice the test of fairness is not simply applied to the facts as they existed at that date, but also to events which occur during the period of notice.

Relevant Procedures

The rules must be clear, recorded in writing and readily available to workers whether this is on a notice board, staff handbook or on internal computer systems. An employer must do all that they can to ensure that every worker knows and understands the rules and that they are aware of the likely consequences of breaching the rules. Specifically where an employer seeks to suggest that certain acts may amount to gross misconduct and warrant summary dismissal these should be given particular precedence.

It is good practice to promote the Disciplinary Procedures as a way of encouraging improvement amongst workers whose conduct or performance is unsatisfactory rather than viewing those procedures simply as a means of imposing a sanction or leading to dismissal.

The Statutory Dismissal and Grievance Procedures seek to promote discussion between an employer and a worker in order to identify any cause of complaint and to facilitate working together to resolve that issue. Only once there has been any reasonable dialogue on the issue, and that includes the employer having properly identified the areas of complaint and

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allowing the employee an opportunity to respond, should any decision to be taken. That decision should clearly be communicated to the worker to ensure that there is no misunderstanding either of what decision the employer has taken or as to the consequences of that decision.

Whilst the statutory process promotes dialogue it does not require that an employer and a worker actually reach agreement. The employer's decision must be notified to the worker who will then either have an opportunity to raise a grievance or if the decision is already part of the grievance procedure will have an opportunity to appeal against that decision but ultimately the employer's decision is final subject only, in the case of dismissal, to the assessment of the Tribunal as to whether that decision in all the circumstances was fair.

The Statutory Dismissal Procedure will apply to all dismissals not just those relating to conduct or performance. It will apply to dismissals on grounds of redundancy, termination for health reasons, non-renewal of a fixed term contract and even retirement.

The procedure will also apply where the employer is contemplating any disciplinary action short of dismissal. Here the procedures seek to distinguish between normal work place procedures, such as an oral or written warning or suspension on full pay to allow investigations, and disciplinary penalties. For example a disciplinary suspension, where the employer is suspended without pay or reduced pay, will attract the Statutory Disciplinary Procedure. An investigatory suspension will not although the employee would be entitled to initiate the Statutory Grievance Procedure, particularly if the employer doesn't have the right to suspend.

The Statutory Procedure does not define what may amount to "action short of dismissal" but it will in all likelihood include the imposition of performance targets as part of the identification of what an employee must achieve to avoid further disciplinary action, transfer or demotion following a disciplinary warning and the loss of seniority, status or benefits.

This leaves employers in a very difficult situation in that the Statutory Disciplinary Procedure does not apply to the normal issue of warnings but it will apply where in consequence of that warning some disciplinary sanction is imposed. Employers will need to have a greater regard for the options available to them when initiating a disciplinary process in order to avoid the need having gone through its own internal procedures and having reflected upon all the circumstances to decide to impose a disciplinary sanction to then have to implement the Statutory Procedure. It will be far easier and employers are advised to have one process which incorporates the Statutory Procedure for all types of disciplinary action.

The Standard (Three Step) Statutory Disciplinary Procedure

The new Statutory Disciplinary Procedure has three main elements.

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Step 1. The employer must send to the employee a written statement outlining the basis of the complaint and the circumstances that may lead to a dismissal or other disciplinary action.

Step 2. There must be a meeting followed by notification of any action to be taken.

Step 3. There must be an appeal process.

The Modified (Two Step) Dismissal Procedure.

The Modified Dismissal Procedure applies in exceptional circumstances where:

1. the employer dismissed the employee without notice on the basis of the employees conduct;
2. the dismissal took place at the time the employer became aware of the gross misconduct (or immediately afterwards);
3. the employer was entitled to dismiss for gross misconduct without notice or payment in lieu; and
4. it was reasonable for the employer to dismiss without investigating the circumstances.

In such circumstances the Modified Dismissal Procedure must be completed in full. Failure to do so may result in any dismissal being found automatically unfair and an award adjustment being applied.

The Procedure requires: -

Step 1. The employer must provide a written statement identifying the right of appeal, and outlining the alleged misconduct that led to dismissal and the evidence relied upon.

Step 2. An appeal hearing following which the decision must be communicated to the employee.

Exceptions to the Statutory Disciplinary Procedure

There are only limited circumstances where an employer has no need to comply with the statutory procedure and generally those are in circumstances where the individual characteristics of the employee will not play any real role in the decision to dismiss such as in:

Collective redundancies

Where an employer wishes to make 20 or more employees at the same establishment redundant within a 90 day period there is a statutory obligation to consult representatives.

For redundancies where the statutory obligation to consult does not arise the statutory disciplinary procedure will apply.

Where all employees are dismissed and offered re-employment in the same or a suitable alternative position.

A dismissal and re-employment is often used as a mechanism for re-issuing contracts or changing terms of conditions of employment.

Industrial action dismissals

Where an employer seeks to dismiss employees engaged in a lawfully organised industrial action the Employment Relations Act 1999 sets down steps that an employer must take before the employer can fairly dismiss strikers. Those requirements are to be modified in the current Employment Relations Bill which will seek to make clearer the minimum requirements necessary for an employer to promote settlement of any dispute.

But where an employer may seek to make selective dismissals amongst strikers engaged in a lawfully organised industrial action this exception would not apply and the statutory disciplinary procedure will apply.

Constructive dismissals

Constructive dismissals are not covered by the Statutory Disciplinary Procedure. In general terms this is because circumstances which may give rise to constructive dismissal are so wide and particular to the individual circumstances it cannot be said that the employer intended to dismiss rather that the employer's actions had that effect.

In cases of constructive dismissal the employee will be required to follow the Statutory Grievance Procedures.

The employer's business ceases unexpectedly

For example the premises may burn down and it may become impractical to continue employment.

Alternatively, continued employment may breach a legal duty or restriction. For example it is unlawful to employ someone with certain medical conditions in a number of industries or

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a valid driver's licence may be an essential qualification for the position.

A dismissal procedure agreement exists

Where the employee is covered by a dismissal procedure agreements, designated by an order under Section 110 of the Employment Act 1966 the Statutory Disciplinary Procedures will not apply. No such orders have as yet been made.

Exceptions for the Modified Dismissal Procedure Only

Where an employee has been dismissed in circumstances where the Modified Dismissal Procedure applies they are free to present an Employment Tribunal claim straight away. If the employee presents the application before the employer sends out the Step 1 letter under the Modified Dismissal Procedure, the Procedure will not apply and no award adjustment will be made.

If the employer sends the Step 1 letter to the employee before the Tribunal complaint has been presented then the Modified Procedure will be followed.

Circumstances in which the parties are treated as having complied with the Statutory Disciplinary Procedure

Interim Relief

In certain situations where an employee may seek to claim automatic unfair dismissal (for example in Working Time cases, and where dismissal relates to trade union membership or activities and protected disclosures) the employee can make a claim under section 128 of the Employment Rights Act 1996 for interim relief. The Tribunal has power, where it considers it likely that at the full hearing it would uphold the complaint, to order immediate reinstatement or make an order for the temporary continuation of the contract of employment. The application for interim relief has to be made within seven days of dismissal and both parties will be treated as having completed the appeal stage of the Statutory Disciplinary Procedure.

Appropriate Procedure

In some industries more sophisticated dispute resolution procedures exist, which may include appeals to be heard by external panels comprising employer and union representatives. If such an 'appropriate procedure' has been agreed by two or more employers or an employers association and at least one independent trade union then this kind of external appeal will have complied with appeal stage in the Statutory Disciplinary Procedure. It will however still be necessary to follow the Step 1 (Advanced Notice of

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Complaint) and Step 2 (Meeting).

It must be remembered that even though the Statutory Disciplinary Procedure may not need to be followed in a particular case it does not mean to say that no procedures need be followed. The usual considerations of fairness will apply.

ACAS Code of Practice - Disciplinary and Grievance Procedures

The ACAS Code of Practice does not have contractual force but is an important document which Tribunals will refer to when assessing whether an employer has acted fair and reasonably in its treatment of an employee during any disciplinary or grievance process.

It must be remembered that whilst failure to follow the Statutory Disciplinary Procedures will render a dismissal automatically unfair following the statutory process will not mean that the dismissal is fair. Also the Statutory Procedures are a minimum requirement that you must satisfy where they apply. In circumstances where they don't apply the Tribunal will continue to apply the same test of fairness and consider the procedure that you have applied. Your own procedures should go further than the statutory requirements and at this point I shall simply refer you to the content of my talk last year about Managing a Fair Dismissal and re-emphasise that the key to demonstrating a fair procedure lies in the

- quality of your investigation into the circumstances which you claim support the reason for your decision to dismiss; and
- whether the employee has had sufficient warning that dismissal would result

Investigation

Before taking any disciplinary action you must have conducted as full and fair an investigation as possible. One of the biggest dangers to an employer is to make an assumption without checking it out. In terms of any disciplinary procedure, if you want to make an assumption, assume that the tribunal will find the dismissal unfair.

When it comes to the investigation - do your homework. Tribunals will often pay more attention to the investigation process than the actual disciplinary meeting.

Ideally, the person who undertakes the investigation should not be the person who is actually going to conduct any disciplinary meeting. Size and resource may make that impossible.

It is important that you talk to any potential witnesses and that proper written records are kept. As part of your investigation, you should meet with the employee against whom any

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complaint has been made. Whilst you will need to identify the nature of the issues which are to be discussed you should make it clear that any meeting forms part of an investigation and it is not a disciplinary meeting.

In cases of sickness absence a meeting with the employee is an essential part of your investigation. You need to know what the reason for the absence is, whether there is any underlying medical condition and what the prognosis is for a return to work. Often this will require you to consider medical evidence but unless you happen to be a doctor disciplining your own staff, you will not be expected to have any medical knowledge or understanding. You are entitled to rely upon any medical evidence that is given to you whether that is by the employee, their GP, or a specialist that either they have been referred to, or one that you have asked them to see. Where there may be a conflict of medical evidence, you do not have to work out which is correct.

If the employee refuses to co-operate, then you will have to act upon the facts that are within your knowledge. You cannot assume any sinister reason for the refusal and you should not dismiss on the basis of any refusal, although a refusal may warrant separate disciplinary action on the basis of a breach of contract, where your contracts of employment require your staff to co-operate with a request to undertake a medical.

Whilst you should always be cautious about proceeding in the absence of a medical report, that is not the same as being afraid of being proactive in dealing with the situation. A tribunal may decide that you acted unreasonably where you were not in a proper position to judge whether the dismissal was an appropriate course but if the employee won't co-operate there is nothing more that you can do. Equally, you should not have to wait for months for an employee to be referred to a specialist where the circumstances of the role require that the duties are immediately assigned and it may be unreasonable to expect colleagues to cover the additional workload or impossible to find temporary cover. Clearly both those alternatives would have to be investigated as part of any decision.

In the cases of redundancy or a potential TUPE transfer an investigation would also encompass the obligation to consult with affected staff. Remember that redundancy is still a dismissal and only potentially fair if the tribunal is satisfied that the decision to dismiss was reasonable in all the circumstances.

Common issues that arise in an investigation will determine the strength of any complaint against an employee. For example, were rules properly communicated to staff and explained? Were those rules clear or is there any ambiguity? How have other employees been treated and is there any issue of consistency?

Employees are not entitled to cross examine witnesses, but can question what has been said, or if only statements are provided the employee can question what has been put into the

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statement. Such matters may require that you make further investigation, possibly reconvening the meeting with the employee when you have further details or answers.

Warnings

Always remember that a dismissal should be a last resort and you should consider whether there is any alternative.

- If there are performance factors, are they simply the result of your exaggerated expectations of what can reasonably be achieved? Do you need to consider changing your expectations?
- Does the conduct deserve a dismissal? Dismissal for a first offence which in itself is not gross misconduct will seldom be fair.
- Does the employee's previous behavior, length of service or loyalty deserve some sanction other than dismissal?
- Are there any other mitigating factors?
- Remember that in some circumstances you are obliged to consider alternatives such as in the case of redundancy or where an employee's disability may be a relevant factor.

Consider what power you have to transfer an employee, demote them or subject them to some other sanction rather than dismissal. Check your disciplinary procedures. These questions should already have been answered as part of a process of prior warnings, or as a minimum as part of the investigation process. If you are the one making the decision to dismiss and you don't know the answer to these questions then you can hardly be acting fairly and you cannot expect a Tribunal to find that you have acted reasonably in treating your reason as a sufficient reason for dismissing the employee in accordance with equity and the substantial merits of the case.

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