

Dismissal for loss of trust and confidence was fair despite lack of dismissal procedure

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Dismissal for loss of trust and confidence was fair despite lack of dismissal procedure

A recent decision shows that where there has been an

irretrievable breakdown in relations between colleagues, an employer may be able to dispense with a formal dismissal process and still dismiss fairly.

What does the law say?

It is potentially fair to dismiss an employee for a substantial reason other than conduct, capability, redundancy or illegality. Such dismissals are known as dismissals for “some other substantial reason” or “SOSR” for shorthand. There is no statutory definition or guidance on what reasons fall within the scope of SOSR, but the reason must be substantial and justify the dismissal of the employee holding the job in question.

The dismissal process set out in the Acas Code of Practice on Disciplinary and Grievance Procedures applies to “disciplinary” dismissals only (i.e. misconduct and poor performance) and so will not normally be engaged in SOSR dismissals. This means that employers have a little more leeway in how they run the dismissal process when dismissing for SOSR. However, employers will still usually be expected to follow some form of process involving discussion, consultation and listening to the employee’s representations.

What happened in this case?

The Claimant was employed between 2007 to 2017. In 2014, she developed negative feelings towards her line manager, Ms Taggart, after she had failed to authorise a salary increase.

In the years that followed, their relationship deteriorated further. Ms Taggart felt that the Claimant did not trust her, was intransigent, disrespectful and made poor business decisions. Separately, the Claimant’s direct reports had raised concerns about her leadership qualities and her ability to delegate and provide support.

Ms Taggart concluded that there had been a breakdown in trust and confidence, which was disruptive to the team and the wider

business. This conclusion had been reached at a critical time for Ms Taggart's team, which needed to take forward key deliverables to help the business navigate a trading loss. Taking all of this into account, Ms Taggart decided to dismiss the Claimant.

The Head of HR advised that because this was not a conduct or performance dismissal, and because the decision had already been taken, there was no benefit to following a dismissal process. Accordingly, Ms Taggart told the Claimant that she was to be dismissed in her annual appraisal meeting. Her employment terminated about 3 weeks later. No right of appeal was offered. The Claimant claimed that she had been unfairly dismissed.

What was decided?

The Employment Tribunal concluded that the dismissal was not for either conduct or performance reasons, but for SOSR, namely the loss of trust and confidence between two senior employees which had become a barrier to delivering the objectives of the business. Accordingly, the employer was not obliged to follow the Acas Code of Practice prior to dismissal. Further, the Tribunal did not feel that any other form of dismissal process would have served a useful purpose and, in fact, may have worsened the situation. It also concluded that any appeal would have been going through the motions because "it was not a situation where an alternative decision could be reached". Despite the lack of dismissal process or appeal, the Employment Tribunal concluded that the dismissal was fair.

On appeal, the Scottish EAT noted that a failure to follow a dismissal procedure would often mean that the dismissal was outside the band of reasonable responses and unfair. Although it would be unusual and rare for a dismissal to be fair without any procedure, this was one such case. The loss of trust and confidence had been mutual, there was no suggestion

that the Claimant had been interested in retrieving the relationship and following a formal process would have been futile and even damaging. The appeal was dismissed.

What are the learning points for employers?

This decision highlights that a dismissal due to a breakdown in relations between colleagues may be treated as being for SOSR, rather than conduct or performance. However, employers should also be prepared for greater scrutiny of SOSR dismissals where a junior employee is dismissed following a breakdown in relations with a more senior employee. The EAT warned that “...any substantial disparity in seniority between protagonists [is] likely to put the Tribunal on high alert that the alleged breakdown in relations is a cloak for another reason for dismissal”.

Where a dismissal is categorised as for SOSR, rather than conduct or performance, this will permit greater leeway over the procedure to be followed. Exceptionally, as here, it may be reasonable to dispense with a procedure altogether. However, in the vast majority of cases it would be prudent to follow some form of dismissal procedure (including offering a right of appeal) to limit the risk of an unfair dismissal claim. Once the process is underway, it remains open to an employer to make a without prejudice settlement offer to the employee in order to accelerate the exit.

[Gallacher v Abellio Scotrail Ltd](#)

If you would like to discuss any of the issues raised in this article or how BDBF can help your business navigate a dismissal process, then please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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