# Discrimination and disability: failing to actively consider impact of neurodiversity can render a disciplinary dismissal unfair

**In Madden v Commissioner of Police of the Metropolis, the Employment Tribunal concluded that an employee with ADHD was unfairly dismissed and discriminated against for making jokes containing sexual innuendos, as his employer had failed to consider the impact of his condition before making its decision.**

**What happened in this case?**

Mr Madden was employed as a Quality Control Officer with the Police from November 2001 and had a clean disciplinary record until his dismissal in February 2024. He suffered from stress and anxiety from October 2021 onwards, including a mental health crisis, and was referred to Occupational Health by his employer. Mr Madden received counselling and was subsequently diagnosed with ADHD in October 2022, as well as several conditions related to his ADHD which are known to cause significant difficulties with interpersonal relationships.

In September 2022, Mr Madden's line manager emailed him raising concerns about several messages from him which she felt had been "*forward*". She acknowledged that he was having counselling and explained that whilst she was happy to have a

laugh, she felt a line had been crossed. In subsequent emails, Mr Madden explained that whilst he had meant the comments as a joke, he could not risk this misunderstanding happening again so would keep things work-related in future. The Tribunal later acknowledged that, from this point on, the relationship remained on a more professional footing.

In October 2022, Mr Madden shared his diagnostic report with his manager, and in November 2022 they discussed the fact that he would not yet be able to start medication for his ADHD until his high blood pressure was under control.

In April 2023, Mr Madden had several allegations against him brought to his attention by an unexpected Teams call. He was referred to a message that he had sent to a female colleague about a "*joystick*" but was not given details of any of the other allegations. Mr Madden responded in writing apologising for the message, which he explained had been sent outside of work, noting that his ADHD blurred boundaries of what might be appropriate and caused impulsive behaviour.

Mr Madden was subsequently investigated in relation to allegations of inappropriate behaviour towards several female colleagues, specifically unwanted attention, inappropriate conversation and comments containing sexual innuendo.

During the investigation, Mr Madden explained that only one of the colleagues (his manager) had raised concerns with him and that he had stopped making jokes with her after this. He had considered the colleagues to be friends and joked with them as he would in his personal life, but having accepted that he may have interpreted this incorrectly, he was mortified to have upset them. Overall, Mr Madden was remorseful and accepted

responsibility for his actions but asked that they be viewed in the context of his ADHD, which caused impulsive speaking / typing and difficulty with social cues and interactions. He also provided his diagnostic report.

Despite their original investigative report stating there was not a sufficient case for gross misconduct (only misconduct), Mr Madden’s employer proceeded with a disciplinary process for potential gross misconduct. He again raised the impact of his ADHD and, by this point, he also had engaged a solicitor who sent a letter to the case manager for the disciplinary hearing. This letter set out Mr Madden’s health conditions, the impact of the prolonged disciplinary process, the causal link between the conduct and his ADHD, potential premeditation of the process and a range of procedural flaws. It also highlighted his 22-year unblemished record and that because he struggled to pick up on social cues, the incidents could largely have been avoided if the concerns (which were by this point historic) had been raised earlier. This letter from his solicitor, plus a supporting statement from his psychiatrist, were not included in the disciplinary bundle and were not before the disciplinary panel.

The hearing took place by way of written submissions as a reasonable adjustment for Mr Madden, and his responses were read out to the panel by the Chair. The panel unanimously decided that Mr Madden should be dismissed without notice, concluding that the behaviour was a sufficiently serious breach of the expected standards that the breakdown in confidence was irretrievable. They did not consider the risk of recurring behaviour or mention Mr Madden’s disability.

Mr Madden appealed his dismissal, providing additional evidence from his original diagnosing psychiatrist, as well as

again sending both the letter from his solicitor and supporting psychiatric statement. His employer sought Occupational Health advice and made the adjustment of permitting a virtual appeal hearing with his wife attending as companion, as well as permitting written answers to questions. The appeal was unsuccessful, with the Appeal Chair noting that they were satisfied that medical evidence had been properly considered by the original panel and that the new evidence did not change this.

Mr Madden therefore brought claims under the Equality Act 2010 (**EqA**) for a failure to make reasonable adjustments (Section 20 and 21), discrimination arising from disability (Section 15) and indirect disability discrimination (Section 19). He also brought a claim for unfair dismissal. It was accepted by the employer that his condition amounted to a disability under Section 6 EqA.

**What was decided?**

The Employment Tribunal upheld Mr Madden's claims of unfair dismissal and of a failure to make reasonable adjustments on the following grounds:

- With regards to unfair dismissal, there had been several elements of substantive and procedural unfairness in the dismissal process rendering it unfair. In particular, the Tribunal considered:
  - There had been significant delays in the process, which had caused substantial distress to Mr Madden.

- The employer had failed to offer virtual attendance (with his wife permitted to be present) as an adjustment at the original disciplinary stage, rather than just on appeal. The Tribunal concluded that there was no good reason why this wasn’t originally offered, it was unreasonable not to have done so, and that only permitting written attendance deprived Mr Madden of the ability to challenge evidence and present his case.

- The employer had failed to consider the solicitor’s letter and psychotherapist’s statement at the disciplinary hearing, which had set out his case clearly and explained the behavioural work that Mr Madden had undergone in recent months. The Tribunal considered that these could have altered the outcome, particularly in a case where the investigative report had not found sufficient evidence for gross misconduct. This rendered the substantive decision unsafe.

- There had been no consideration of Mr Madden’s disability prior to disciplinary action (contrary to the employer’s own standard operating procedures) and the lack of reference to this in the minutes of the hearing meant it was likely that this was given little, if any, weight.

- The impact on the complainants had been exaggerated in the investigative report compared with their actual evidence, and this factual inaccuracy was carried through to the disciplinary panel’s reasoning.

- There had been no actual reputational damage

evidenced, so the panel's purported concern about potential damage was purely speculative.

- The appeal had not rectified these defects as they had not conducted any form of rehearing, meaning they couldn't have balanced the conduct and mitigation to the extent required.

The Tribunal therefore concluded that whilst there had been a genuine belief in misconduct after a proportionate investigation, in all the circumstances of the case it was not fair and reasonable (or within the band of reasonable responses) to have dismissed Mr Madden.

- The Tribunal considered that Mr Madden's struggle to communicate with colleagues and adhere to social norms arose in consequence of his disability (ADHD). They concluded that the comments he had made were an element of this, as his social boundaries were blurred and he did not appreciate that his actions were inappropriate in a workplace (or realise their potential impact). His dismissal for the comments in question was therefore unfavourable treatment because of something arising from his disability. This could not in their view be justified with reference to the legitimate aims relied on by the employer, which included appropriate management of resources and effective management of employee behaviour (including upholding relevant standards).

However, the Tribunal did not find that the employer’s action amounted to a failure to make reasonable adjustments or indirect discrimination. In particular:

- It was not clearly established that the employer had a practice of not considering ADHD or making sufficient reasonable adjustments for employees in gross misconduct disciplinary processes.

- It would not have been a reasonable adjustment, as argued by Mr Madden, to allow him to be represented by a proxy at the disciplinary hearing. This was not something that was permitted by the employer and, despite any disadvantage, it was not reasonable to expect them to do so.

The remedy judgment for the Tribunal’s decision has not yet been published.

**What can employers learn from this case?**

This decision highlights the real issues that employers can encounter if they fail to give proper attention to an employee’s disability during a disciplinary process.

Neurodiverse conditions, such as ADHD, are not automatically classed as disabilities under the EqA 2010. Each employee’s circumstances will therefore be subject to the usual test of whether the condition causes an impairment that has a substantial and long-term adverse effect on the employee’s ability to carry out normal day-to-day activities. However, where an employer becomes aware of an employee having been diagnosed with a condition, it will likely be wise to approach with caution and assume that the employee *may* qualify for legal protection.

During a disciplinary process (or by analogy, any grievance or other formal process), employers dealing with a neurodiverse employee should consider the following:

- Employment-related decisions will always be highly fact-specific, and Tribunal cases such as these do not mean that employers can never dismiss employees who have a disability. They nevertheless serve as a helpful reminder that employers must always pay proper attention to employees’ disabilities, and document this appropriately. This applies both to the disciplinary process that they follow (and any adjustments that the employee might need to that process), and the substantive decision on the conduct and appropriate sanction. Taking occupational health advice at the earliest opportunity can really help to inform this assessment, as this ensures that the employee’s condition and its impact is clearly set out at the start.

- A policy or business aim to uphold high standards of behaviour, or perhaps even a zero-tolerance stance on certain types of conduct, can be legitimate and understandable. However, applying it on a blanket basis to all employees, without considering whether the behaviour is linked to a disability, puts employers in danger of breaching their legal obligations. Any case of potential misconduct should always be considered on its own merits, and employers should be wary of treating all breaches as equal without regard to the circumstances.

- Decision-makers should always be made aware (with the employee’s consent) of any relevant conditions, and actively consider any explanations provided by the employee that indicate a causal link between their conduct and their condition. Even if a breach of policy is proven, when deciding on the appropriate sanction they will need to consciously assess whether the association with the disability provides any mitigation. For example, if the employee’s explanation is that their disability impacted their ability to understand that their conduct was prohibited or inappropriate, using a warning rather than dismissal may be advisable to clearly set out expectations of behaviour and offer a chance to improve. If the conduct is repeated, an employer is then in a much safer position to dismiss. Conversely, if the decision-maker feels that the conduct is not mitigated by the condition, they should clearly explain their reasoning to the employee.

- It is always advisable to offer an appeal process, particularly as this demonstrates compliance with the ACAS Code of Practice and can permit the employer to rectify any procedural issues with the original process. However, if the appeal does not offer any actual examination of the evidence or issues, it won't necessarily assist the employer if the substantive decision is found to be unfair. In *Madden*, the Tribunal felt that in order to "*cure the defects, and undertake a sound balancing exercise between conduct and mitigation, the panel would have needed to reconsider the matter de novo*" – as the employer had insisted the appeal was "*not a rehearing*" and did not do so, the flaws in the decision weren't corrected.

- During any formal process, employers should remain open to adjustments even if they are outside of their usual policy. As noted above, the employer in *Madden* was criticised by the Tribunal for failing to offer virtual attendance options or companions outside of the usual categories at the disciplinary stage. This was despite other adjustments (written submissions) having been offered and accepted. If any adjustments are genuinely not reasonable, it would be wise to remain consistent in this regard; any later accommodation of such a request (as happened in *Madden*) could end up as evidence that it would have been reasonable for them to do all along.

- Managers and colleagues of neurodiverse staff should

also bear in mind the potential impact of that condition in their dealings with them outside of any formal process. The extent to which this is possible will of course vary depending on the information shared, and it would rarely be appropriate to make assumptions about whether an employee has a condition or how it might affect them. However, where someone is on notice of a potential impact, the proactive duty to make reasonable adjustments will apply even if no request has been made by the employee. This could include, for instance, addressing conduct informally at an earlier stage to ensure the employee understands the implications of their behaviour and how it is being perceived. Such an approach will of course require a careful balancing of duties towards the employee and their colleagues, particularly if the conduct concerns sexual harassment.

- For all employees, including those with disabilities, employers should ensure that they consider any efforts made by the employee to improve or learn from their behaviour. This is particularly crucial where the sanction decision turns on whether the actions are likely to recur (which can often be the line between a warning and dismissal). If, as in *Madden*, the employer concludes that they can’t have confidence that the conduct wouldn’t happen again, this will be hard to justify as fair if there is demonstrable evidence of them taking accountability and/or changing their ways.

**BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Rose Lim (RoseLim@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.**

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# Unfair dismissal: progression-based performance models and Polkey pitfalls

**In *Pal v Accenture (UK) Ltd*, the EAT held that Employment Tribunals must apply the correct counterfactual when assessing Polkey deductions and carefully analyse whether "up or elsewhere" (also known as "up or out") dismissals fall under capability or some other substantial reason.**

**What happened in this case?**

Ms Pal commenced employment at Accenture in August 2009 as an Analyst. In 2011 she was promoted to Consultant, and in 2013 she was further promoted to Manager. The next promotion would have been to become a Senior Manager. Accenture operated what was a called an "up or elsewhere model". Under that model, employees are expected not only to perform competently at their current grade but also to demonstrate readiness for promotion within a typical timeframe. Failure to show such

progression is treated as underperformance, which could lead to dismissal.

In August 2018, Ms Pal’s performance was rated as “Not Progressing”, however, this was not communicated to her until November 2018. In the meantime, in September 2018, Ms Pal informed her managers that she needed to have an urgent operation to remove two ovarian cysts. It was then discovered that she had endometriosis. Ms Pal was off work for a month after the surgery.

In October 2018, she returned to work of her own volition, and against Occupational Health advice. However, she needed a second period of sick leave from late November 2018 to early January 2019. In mid-January 2019, Ms Pal had a further Occupational Health assessment. A report was issued setting out some of the impacts on Ms Pal’s daily activities. It said that Ms Pal was experiencing a poor sleep pattern, that she was completing light everyday tasks, but she was not carrying heavy shopping, and that she could only walk for periods of up to 20 minutes as anything longer was exacerbating her fatigue.

An eight-week phased return was agreed covering the period through to early March 2019. During that eight-week period, Ms Pal met with her managers to discuss her performance and Accenture’s expectations. At a midyear talent discussion held on 21 March 2019, Ms Pal was again rated as “Not Progressing”, however, this was not communicated to her until June 2019. In July 2019, Ms Pal attended a meeting to discuss her performance. At the end of the meeting Ms Pal was told that she was to be dismissed, which was confirmed in a brief letter sent that day. Ms Pal’s appeal against that decision was dismissed.

Ms Pal brought claims for unfair dismissal and disability discrimination:

- On unfair dismissal, the Employment Tribunal found that the dismissal was procedurally unfair because Accenture had failed to comply with aspects of its own Disciplinary and Appeals Policy (i.e. by not conducting a formal investigation and by allowing individuals involved in the performance management process to sit on the dismissal panel). However, the Tribunal applied a 100% "Polkey" reduction to compensation to reflect the fact that Ms Pal would have been dismissed in any event.

- On the question of disability, the Tribunal held that Ms Pal was not disabled on the basis that she had not shown that her endometriosis had an ongoing substantial effect on her normal day-to-day activities, nor had these effects lasted, or were likely to last, more than a year. It was also found that Accenture had no knowledge of disability, nor could it reasonably be expected to have had such knowledge.

Ms Pal appealed to the Employment Appeal Tribunal (the **EAT**).

**What was decided?**

The EAT (HHJ James Tayler presiding) held that the Tribunal had erred in law in several respects.

*The Polkey deduction*

The Tribunal had applied the wrong counterfactual when making the 100% Polkey deduction. Instead of asking what this employer would have done had it complied with its own policy (including conducting an investigation and using independent decision-makers), the Tribunal effectively assumed the employer would have operated under a *different*, more suitable policy. Yet there was nothing in the judgment that demonstrated that Accenture led any evidence that it would have introduced such a new policy or had done so by the time of the Employment Tribunal hearing.

A Polkey assessment must consider what the actual employer would have done if it had corrected the procedural defect. The Tribunal cannot substitute its own view of what would have been fair or assume the employer would have restructured its procedures. Therefore, the Tribunal should have considered whether Ms Palwould still have been dismissed (or dismissed at the same time as she was actually dismissed) had Accenture applied its procedure correctly i.e. what would have happened if the decision been taken by independent managers following a formal investigation?

*Capability and “up or elsewhere” models*

The EAT provided important analysis on the potentially fair dismissal reason of capability. It said that capability must be assessed by reference to the work the employee was

contractually employed to perform.  Where dismissal is based on a failure to demonstrate readiness for promotion, that may not necessarily amount to a fair dismissal for capability if the employee is performing their existing contractual role competently.

Instead, such dismissals may fall within the alternative fair reason of “some other substantial reason”.  However, in such cases the substantial reason must justify the dismissal of an employee holding the “position” which the employee held. A Tribunal would need to consider the reason in light of the employee’s status, the nature of their work and their terms and conditions of employment.

The EAT did not determine the correct label in this case, but made clear that Tribunals must take care to analyse progression-based expectations.

*Disability discrimination*

The EAT also held that the Tribunal had failed properly to analyse whether Ms Pal was disabled within the meaning of the Equality Act 2010 at the material time and whether dismissal was because of something arising in consequence of disability.  The Tribunal had relied heavily on an Occupational Health comment that symptoms had not lasted 12 months, without properly analysing the statutory test (including addressing likely duration and recurrence).

The case was remitted to a different Employment Tribunal.

**What does this mean for employers?**

This is a significant decision for employers operating structured progression or "up or out" models, particularly in professional services, consulting and law firms.

Employers cannot assume that a failure to demonstrate promotion-readiness automatically equates to poor performance justifying a capability dismissal. Tribunals will examine what the employee was contractually employed to do, whether progression expectations are incorporated into the contract; and whether dismissal is properly characterised as capability or SOSR.

As far as Polkey is concerned, employers must be able to demonstrate what they would have done had they complied with their own policy. Tribunals will not assume employers would have redesigned their procedures to avoid unfairness. Evidence is required to support an argument that dismissal would have occurred in any event.

The impact of this decision is likely to be more keenly felt from 1 January 2027 when the statutory cap on compensation for unfair dismissal is lifted.

The decision also highlights a common pitfall: over-reliance by employers on Occupational Health advice instead of considering the legal definition of "disability".

Pal v Accenture (UK) Ltd

**BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact James Hockley (JamesHockley@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.**

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# Misleading employees can amount to a repudiatory breach of contract

***Wainwright v Cennox Plc* concerned an employee who resigned after discovering she had been misled about whether she had been replaced on a permanent or temporary basis during cancer-related sick leave and claimed constructive unfair dismissal and discriminatory dismissal. The Employment Appeal Tribunal found that the Employment Tribunal had strayed in its analysis and reasoning by failing to consider whether the employer's discriminatory acts, including providing misleading information, amounted to fundamental breaches of contract that contributed to her resignation.**

**What happened in this case?**

The Claimant was diagnosed with cancer and went on sick leave for treatment. While she was absent, the employer appointed a colleague to her role on a permanent basis but told the

Claimant that this was only a temporary arrangement. The Claimant discovered that the replacement was permanent and that her own job title and responsibilities had been altered, which she perceived as a demotion. Following disputes over her role, the handling of a grievance she raised, and her treatment during her illness, she resigned.

She brought constructive unfair dismissal and disability discrimination claims, including that the dismissal itself was discriminatory. The Employment Tribunal upheld part of her discrimination claim but dismissed her claims in relation to the dismissal (including that her dismissal was discriminatory).

The Claimant appealed to the Employment Appeal Tribunal (**EAT**) in relation to the decision to dismiss her claims for constructive dismissal and discriminatory dismissal.

**What was decided?**

The EAT upheld the appeal and remitted it to a differently constituted Tribunal to be reconsidered.

The EAT held that the Tribunal had gone wrong in both its analysis and its reasoning in determining the constructive unfair dismissal and discriminatory dismissal claims.

The Tribunal had accepted that discriminatory acts occurred, but had failed to explain adequately why these did not also amount to repudiatory breaches of contract, or form part of Ms Wainwright's reasons for resigning. Given that her resignation

letter and witness evidence referred directly to those acts, the EAT said an explanation was required.

The Tribunal had also misapplied the law by assuming that there could only be one cause of resignation. It did not consider whether the discriminatory acts were repudiatory breaches or whether they materially contributed to the Claimant's resignation.

The EAT further held that the Tribunal had failed to analyse whether misleading the Claimant about whether her replacement was permanent or temporary could itself amount to a breach of the implied term of trust and confidence. The EAT noted that providing untrue statements can be a contractual breach and should have been addressed.

**What does this mean for employers?**

This decision offers a number of key learning points for employers:

- **Handle reorganisations carefully**: where roles are restructured during an employee's sickness absence, consult openly, explain business reasons clearly, and avoid actions that could reasonably be seen as sidelining or demoting the individual.

- **Adopt a transparent and honest approach: e**ven where an employer believes it is acting protectively or

“softening the blow” for employees, providing inaccurate or misleading information may amount to a repudiatory breach of contract allowing employees to treat themselves as constructively dismissed.

- **There can be multiple reasons for resignation**: an employee may resign for more than one reason. Employers should be aware that discriminatory treatment, even if not the only factor, may still materially contribute to the resignation and lead to liability on the employer’s part.

- **Address grievances promptly and fairly**: delays or poor handling of grievances may increase the risk of constructive dismissal claims.

Wainwright v Cennox Plc

**BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Emma Burroughs (**emmaburroughs@bdbf.co.uk**), Amanda Steadman (**AmandaSteadman@bdbf.co.uk) **or your usual BDBF contact.**

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# BDBF Webinar – Handle with care: Avoiding pitfalls in redundancy exercises affecting pregnant employees and those on maternity, adoption or shared parental leave – 22 July 2025

In this 1-hour webinar, BDBF Principal Knowledge Lawyer Amanda Steadman and Senior Associate Connie Berry explore the key legal pitfalls to avoid in redundancy exercises affecting pregnant employees and those on maternity, adoption or shared parental leave. This webinar was originally delivered on 22 July 2025 and reflects our understanding as of that date. Do get in contact with either of the speakers if you would like to discuss any of the issues raised.

To view the PDF webinar slides please click on the image below, or view the recording of the webinar:

BDBF EMPLOYMENT LAW

HANDLE WITH CARE: AVOIDING PITFALLS IN REDUNDANCY EXERCISES AFFECTING EMPLOYEES WHO ARE PREGNANT OR ON MATERNITY, ADOPTION OR SHARED PARENTAL LEAVE

22 July 2025

BDBF EMPLOYMENT LAW

https://youtu.be/kPTyoNudbMk

Please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk), Connie Berry (ConnieBerry@bdbf.co.uk) or your usual BDBF contact, for further advice.

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# Repeated extensions to a notice period do not automatically defeat a constructive dismissal claim

**In *Kinch v Compassion in World Farming*, the Employment Appeal Tribunal (EAT) overturned an Employment Tribunal's decision to strike out a constructive dismissal claim. The Tribunal had said the employee "affirmed" her contract by extending her notice period several times – essentially meaning she had**

**accepted the employer's breach of contract. However, the EAT said the Tribunal had not considered the full context of those extensions. It ruled that evidence needed to be heard before deciding whether the contract had been affirmed.**

**What happened in this case?**

The Claimant was employed by the Respondent as its UK Financial Controller. In June 2022 she submitted a flexible working request asking to work from home due to personal circumstances. The request was rejected. On 26 August 2022, during a phone call with the Global HR Manager, she was told to return to the office for two days per week or face *"a sticky end".*

Four days later, on 30 August 2022, the Claimant resigned and agreed to serve three months' notice from home. This was more than her contractual notice period of one month and was agreed in order to support the team and allow a smooth handover. After this, two further extensions to the notice period were agreed. During this extended notice period, the Claimant asked the Respondent to exercise its discretion to pay her occupational sick pay and also raised a grievance about the rejection of her flexible working request.

The Claimant's employment eventually terminated on 28 April 2023, some eight months after her resignation. She brought a constructive unfair dismissal claim in the Employment Tribunal, alleging there had been a repudiatory breach of the implied duty of trust and confidence, consisting of the refusal of her flexible working request and culminating in the "sticky end" comment by the Global HR Manager. She asserted that the extensions to her one-month notice period had been

sought by the Respondent, save for the final extension which was at her request.

The Respondent denied that it had committed any repudiatory breach of contract but, if it had, the Claimant had accepted such breach and affirmed the contract by:

- continuing to work for them for eight months after her resignation;
- asking them to exercise their discretion to pay additional occupational sick pay to her;
- pursuing a grievance about the flexible working request after she had resigned; and
- seeking two extensions to the notice period for her own benefit (namely, that her planned relocation overseas had been delayed).

The Respondent applied to have the claim struck out as having no reasonable prospect of success.

The Employment Tribunal considered the strike out application without a hearing. It found that the Claimant had affirmed the contract by requesting extensions to the notice period for her own benefit. It struck out the claim. The Claimant

appealed to the EAT.

**What was decided?**

The Claimant argued that the Tribunal had been wrong to proceed on the basis that it was an agreed fact that she had sought the extensions, when this was, in fact, disputed. The Respondent resisted the appeal, arguing that the Tribunal may still strike out a claim where facts are disputed and, in any event, the core facts were not in dispute – she had worked for eight months after her resignation and had sought at least one of the extensions to the notice period.

The EAT held that the Tribunal had erred in striking out the claim. The Tribunal had proceeded on the basis that it was an undisputed fact that the Claimant had sought each of the extensions to the notice period for her own benefit. However, this was neither party's position and there was nothing before the Tribunal to justify the conclusion that the whole of the additional seven months' notice had been requested by the Claimant and for her benefit.

In order to determine whether the Claimant had affirmed the contract it was first necessary to determine who had sought the various extensions. The Tribunal needed to hold a full hearing of the evidence on this issue, but it had not done so.

Accordingly, the strike out decision could not stand, and the case was remitted to a different Tribunal to hear evidence about the circumstances of the notice extensions.

**What does this mean for employers?**

This decision underlines a number of learning points for employers:

- **Don’t assume giving notice rather than resigning with immediate effect means an employee cannot claim constructive dismissal**: the law is clear that employees who give notice remain entitled to claim constructive unfair dismissal, the logic being that an employee who is considerate enough to give notice should not be left worse off than one who leaves without notice.

- **Extending a notice period will not automatically mean that the departing employee has waived the repudiatory breach and affirmed the contract**:affirmation is highly fact sensitive and context dependent and requires an examination of all the circumstances of the case. Where a notice period has been extended, it will be relevant who sought the extension and why.

- **Where an extension to a notice period is agreed, keep clear and contemporaneous records**:keep accurate records detailing who sought the notice extension and why (and ask the employee to agree such records are accurate).

> If an employee later disputes the facts surrounding a notice extension these contemporaneous documents will undermine their position and improve the chances of succeeding in an application to strike out a constructive unfair dismissal claim.

Kinch v Compassion in World Farming

**BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.**

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# BDBF Webinar – Beliefs, backlash, and the workplace: navigating the new culture wars – 29 April 2025

In this 1-hour webinar, BDBF Managing Partner Gareth Brahams and Associate Emma Burroughs explore the legal rights and responsibilities surrounding belief expression in today's complex work environment. This webinar was originally delivered on 29 April 2025 and reflects our understanding as of that date. Do get in contact with either of the speakers if

you would like to discuss any of the issues raised.

To view the PDF webinar slides please click on the image below, or view the recording of the webinar:

BELIEFS, BACKLASH AND THE WORKPLACE:
NAVIGATING THE NEW CULTURE WARS

29 April 2025

https://youtu.be/85bypaD9MVc

Please contact Gareth Brahams (GarethBrahams@bdbf.co.uk), Emma Burroughs (EmmaBurroughs@bdbf.co.uk) or your usual BDBF contact, for further advice.

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# Dismissing an employee who had 406 sick days in four years was unfair and

# discriminatory

**In a recent case the Employment Tribunal held that a dismissal was unfair and discriminatory despite significant periods of sickness absence. While the Tribunal found that the reason for dismissal was the historic sickness absences, it held that the employer did not act reasonably in treating that as a sufficient reason for dismissal, partly because it had failed to recognise that the employee was disabled. Further, dismissal on the basis of historic absences, rather than the propensity for future absences, could not objectively justify the discriminatory dismissal.**

**What happened in this case?**

Ms Kitching was employed as a cleaner at the University Hospitals of Morecambe Bay NHS Foundation Trust (**the Trust**), cleaning the Lancaster Suite, from 2019 until her dismissal in June 2023. Over her employment, she accrued 406 days of absence across 29 occasions in 4 years, with approximately 85% of her absences linked to her mental health conditions, which included bipolar disorder and anxiety.

Ms. Kitching asked to work shorter hours or fewer shifts while remaining on the Lancaster Suite, where she was familiar with the staff and processes. She said that this adjustment would help her manage her anxiety and improve her attendance. However, her request was denied, with the Trust stating that reducing her hours would require her to work in different areas of the hospital, which she would have found stressful and disruptive.

The Trust’s “Attendance Management at Work Policy” outlined absence triggers, where exceeding certain thresholds could lead to formal review and potential dismissal. However, the policy also referenced the “Support and Retention of Disabled Employees Policy”, which allowed for flexibility in managing absences for employees with disabilities. However, the Trust applied the stricter absence thresholds to Ms Kitching.

The Trust dismissed Ms. Kitching based on her history of absences.

**What was decided?**

The Tribunal found that Ms Kitching’s dismissal was unfair and was based on a fundamentally flawed and discriminatory process. There was no chance that Ms. Kitching would have been fairly dismissed if the Trust had followed a fair procedure. Despite multiple fit notes and occupational health reports confirming her disability, the Trust failed to recognise or accommodate her conditions adequately and there was a “*complete lack of an enquiring mind into whether the claimant was disabled or not*”.

The Trust had also failed to make reasonable adjustments, particularly by not adjusting her shift patterns (which would have improved her attendance) or tolerating a higher level of absence in accordance with its own policies. The Tribunal had particular regard for the size and resources of the Trust when considering this.

The Tribunal found that the Trust had dismissed Ms Kitching due to absences directly linked to her mental health condition

and her claim for discrimination arising from a disability was successful. The Trust failed to justify the dismissal as a proportionate means of achieving a legitimate aim, particularly given that its own policies permitted greater flexibility in managing disability-related absence, which had been ignored.

In particular, the Tribunal criticised the Trust's use of a backward-looking process in assessing Ms Kitching's absences. Instead of evaluating her current and future capability to work with reasonable adjustments in place, the Trust focused primarily on her past absences without considering their context or the potential improvements that could have been made. This retrospective approach failed to account for the positive impact any reasonable adjustments would have had.

**What does this mean for employers?**

- **Recognising disabilities**: Employers must consider whether an employee is disabled under the Equality Act 2010 where an employee has heightened levels of absence, and should carefully consider the medical evidence provided, including Occupational Health reports and fit notes.

- **Accommodating disabilities**: Employers should always consider what reasonable adjustments can be made to help get an employee back to work. Employers should commission Occupational Health reports for employees who

have period of absence, or extended absence, which can provide advice in this regard.

- **Following internal policies**: If an employer has policies regarding the treatment of disabled employees, these must be adhered to.

Kitching v University Hospitals of Morecambe Bay NHS Foundation Trust

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# The consequences of providing misleading information on a job application form

**An employee's appeal against the finding of an Employment Tribunal that his dismissal for dishonesty in failing to**

**disclose a prior gross misconduct dismissal was fair was rejected by the Employment Appeal Tribunal (EAT). The EAT upheld the original Employment Tribunal decision, affirming that the employer had acted reasonably in dismissing the employee after a thorough investigation into his omissions on his application form.**

**What happened in this case?**

Mr Easton, a career civil servant, was dismissed from the Home Office in June 2016 for gross misconduct. In 2019, after settling the Employment Tribunal claim related to his dismissal, he applied for a role with Border Force, a part of the Home Office. On his application form, he omitted details of his previous dismissal and a three-month gap in his employment history.

Although the form did not explicitly require applicants to provide the reasons for leaving previous employment nor specify precise dates of employment, Mr Easton was aware that any prior dismissals and employment gaps were relevant to the Border Force’s hiring decision.

After Mr Easton was hired in January 2020, a former colleague alerted his new manager about his past dismissal. An investigation followed, and Border Force concluded that Mr Easton had been dishonest in withholding this information, leading to his dismissal in November 2020.

**What was decided?**

The Tribunal found that Mr Easton deliberately presented his employment history in a way that concealed his previous dismissal and employment gap, despite knowing that such information was relevant. The Tribunal determined that the omission was dishonest, and that Border Force had acted reasonably in treating this as gross misconduct.

Mr Easton appealed to the EAT, arguing that Border Force was already aware of his prior dismissal since it was part of the Home Office. However, the EAT rejected this argument, emphasising that the Home Office is a large organisation and could not be expected to have collective knowledge of all HR records. The Tribunal also found that Mr Easton’s failure to disclose this information deprived Border Force of the opportunity to assess his application fully at the interview stage.

The EAT ultimately agreed with the Tribunal’s conclusion that Border Force had reasonable grounds to believe Mr Easton had acted dishonestly. The appeal was dismissed.

**What does this mean for employers?**

Employers should ensure that job application forms clearly outline the information candidates are expected to provide, particularly in large recruitment exercises where previous employment records may not be easily accessible.

Employers may also wish to review recruitment forms to ensure clarity regarding the disclosure of prior dismissals and employment gaps to prevent disputes of this nature.  Such forms should also ask the applicant to confirm that the

information provided on the form is complete and accurate and that they acknowledge that they may be dismissed from employment if it is discovered that they have provided incomplete, inaccurate or false information.

Easton v Secretary of State for the Home Department (Border Force)

**BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues related to the content of this article, please contact Noelle van Wyk (NoelleVanWyk@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk), or your usual BDBF contact.**

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# BDBF Webinar – Unlocking the future: what the Employment Rights Bill means for employers – 28 January 2025

**In this 1-hour webinar, BDBF Managing Associate Tom McLaughlin and Principal Knowledge Lawyer Amanda Steadman discuss the "once-in-a-generation" changes the Employment Rights Bill will bring for UK employers. This webinar was originally delivered on 28 January 2025 and reflects our understanding as of that date. Do get in contact with either of the speakers if you would like to discuss any of the issues raised.**

**To view the PDF webinar slides please click on the image**

**below, or view the recording of the webinar:**

Unlocking the future: what does the Employment Rights Bill mean for employers?

28 January 2025

https://www.youtube.com/watch?v=dz9obtp5gRQ

Please contact Tom McLaughlin (TomMcLaughlin@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact, for further advice.

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# Failure to greet a colleague could lead to a constructive dismissal claim

**In the recent case of *Hanson v Interaction Recruitment Specialists Ltd* an Employment Tribunal found that a failure to say “hello” to a colleague was conduct likely to destroy or seriously damage the relationship of trust and confidence**

**between employer and employee. Whilst the conduct by itself was not a fundamental breach of contract, it contributed to a breach which led to an employee's constructive dismissal.**

**What happened in this case?**

The Claimant worked for a recruitment business, which was bought by Interaction Specialists Limited (**Interaction**) on 15 September 2023 after the business went into administration. Mr Gilchrist was the owner and director of Interaction.

On 20 September 2023, Mr Gilchrist went to the office to meet the Claimant, Ms Smith and Ms Waite (who both reported to the Claimant). In response to Mr Gilchrist asking if there were any issues, Ms Smith said there were only two members of staff working in the office and they were under pressure, which sparked discussion about the Claimant's working patterns. She explained that she sometimes worked from home but would also work onsite at clients' offices, sometimes for weeks at a time. Mr Gilchrist formed the view that the Claimant was really leaving the work to Ms Smith and Ms Waite to do.

On 26 September 2023, Mr Gilchrist visited the office unannounced. The Claimant arrived late as she had been at a medical appointment. When she arrived, she said *"good morning"* to Mr Gilchrist three times, but he ignored her. Mr Gilchrist then berated her for being late. When she tried to show him her phone with the evidence of her medical appointment, he pushed the phone away and told her "*I suggest if you don't want to be here that you leave*". After this incident, Mr Gilchrist emailed Ms Smith and Ms Waite telling them that they were getting a pay rise, without having consulted the Claimant about this in advance. Later that afternoon, Mr Gilchrist

sent another email to Ms Smith saying it was “*good to see* [the Claimant] *getting stuck in today*”.

On 2 October 2023, the Claimant resigned saying that Mr Gilchrist had made her feel undervalued, including by ignoring her, suggesting that she should leave her job and undermining her to members of her team. She brought a claim for constructive dismissal.

**What is the law?**

To establish a constructive dismissal claim:

- there must be a breach of the employment contract by the employer;
- that breach must be a fundamental breach going to the root of the contract so as to entitle the employee to terminate the contract without notice; and
- the employee must resign in response to the breach, without affirming the contract.

It has been established in case law that it is an implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

It has also been established that individual actions that do not by themselves constitute fundamental breaches of any contractual term may have a cumulative effect of undermining the relationship of trust and confidence.

**What was decided?**

The Tribunal found that the Claimant had been constructively dismissed and that there was no reasonable and proper cause for Mr Gilchrist doing the following things:

- ignoring her when she arrived at work, despite her greeting him three times;
- refusing to look at her phone or listen to her explanations regarding her medical appointment;
- telling her to leave if she did not want to be there;
- offering pay rises to her direct reports in the way that he did; and
- sending the email to Ms Smith regarding the Claimant getting "*stuck in*".

The Tribunal found that, taken together, these matters amounted to a fundamental breach of contract and undermined the relationship of trust and confidence between the Claimant

and Interaction, such that she was entitled to terminate the contract without notice.

The Tribunal accepted that the Claimant had resigned in response to the way Mr Gilchrist had treated her, and Interaction had not suggested that she had affirmed the contract.

**What does this mean for employers?**

This case highlights that seemingly minor incidents, such as a manager not saying *“hello”* to someone, can have a big impact. Often, situations where an individual feels that someone has behaved in a rude or disrespectful manner towards them, particularly in front of others, can be the most upsetting to them.

This case also serves as a reminder that multiple incidents of a relatively minor nature could, together, amount to a fundamental breach of the employment contract and expose the employer to liability for constructive dismissal.

Having a positive workplace environment may largely combat this risk. It is also important to have an awareness of this risk when conducting investigations, such as grievance investigations where the employee has made multiple complaints that could be regarded as minor, or where complaints about the repeated conduct of a particular individual have been made.

**Hanson v Interaction Recruitment Specialists Ltd**

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# The Employment Rights Bill: a closer look at the dismissal-related provisions

**On 10 October 2024, the Government published the Employment Rights Bill, which will take forward many of its proposals for workplace reform.  In the second article in our series analysing the Bill, we consider the proposals for dismissal-related reform.**

Running to more than 150 pages, the **Employment Rights Bill** (**the Bill**) puts forward a vast array of reforms affecting the workplace, including family-friendly rights, dismissals, equality law, contracts and pay, trade unions and industrial action and labour market enforcement. In the second in our series of articles explaining the Bill, we consider all the proposals in the dismissal sphere.

**Unfair dismissal**

*Abolition of the two-year qualifying service requirement*

Currently, an employee must have two years' continuous service with their employer in order to bring a claim of ordinary unfair dismissal in an Employment Tribunal. There is a limited exception to this rule, where it is shown that the dismissal was for an "automatically unfair" reason, such as for having made a protected disclosure. In such cases, the employee is able to claim automatic unfair dismissal from Day 1 of their employment. However, where there are no such aggravating factors, an employer is able to dismiss an employee with under two years' service relatively easily. There is no need to identify a fair reason for the dismissal and nor does the employer need to show it acted reasonably.

The Bill proposes to remove the two-year qualifying period for ordinary unfair dismissal claims, converting it to a Day 1 employment right. To complement the abolition of the qualifying period, a new provision will be introduced preventing employees who have not yet started work from claiming unfair dismissal. However, if the reason for dismissal is automatically unfair, relates to the employee's political opinions or affiliations, or is connected to their membership of a reserve force, then an employee who *has not even started work* will be able to claim unfair dismissal.

*Special rules for new employees*

There has been much speculation in the press about whether the Bill will make it simpler to dismiss employees during a probationary period. Importantly, the Bill provides that regulations may be introduced which will "modify" the standard of reasonableness that must be met to dismiss fairly during the "initial period of employment". The initial period of employment is not specified in the Bill (this will be dealt with in the regulations) however, the Government has signalled

its preference for this period to be set at nine months. In practice, this will be longer than most contractual probationary periods operated by employers, which generally sit at between three to six months.

Exactly how the test will be modified remains to be seen. Currently, employers must show that they have acted reasonably in treating the reason as sufficient to dismiss, viewed in light of the size and resources of the employer. In many cases, this requires the employer to comply with the steps set out in the statutory Acas Code of Practice on Disciplinary and Grievance procedures. In the separately-published Next Steps to Make Work Pay it is suggested that, at the very least, the modified test will require employers to meet with employees to discuss proposed dismissals during an initial period of employment.

All of which will provide some reassurance for employers, however, there are some important limitations to note.

First, the modified test will *only* apply where the reason for dismissal is capability, conduct, illegality or some other substantial reason (**SOSR**) *"relating to the employee"*. It will *not* apply to redundancy dismissals during the probationary period, and nor does it seem to apply to SOSR dismissals which do *not* relate the employee. Where the dismissal is by reason of redundancy (or SOSR which does not relate to the employee), the existing reasonableness test will apply i.e. that the employer has acted reasonably in treating the reason as sufficient to dismiss, viewed in light of the size and resources of the employer.

Second, the modified test will *only* apply where the dismissal

takes effect on or before the last day of the initial period of employment, or where the employer gives notice to terminate before the end of the initial period of employment and the dismissal takes effect within three months of the end of that period.

*What will these changes mean for employers in practice?*

- The abolition of the qualifying period is certain to generate more grievances and Employment Tribunal claims, some of which will be justified and some not. But all of them will take time and money to deal with. Certainly, employers will wish to be more cautious when it comes to recruitment so as to limit the risk of a bad hire. And after recruitment, line managers will need to actively manage probationary periods to ensure that any performance or conduct issues are identified and dealt with at an early stage.

- Making it simpler to dismiss new employees takes some of the sting out of this reform for employers. However, care must be taken to diarise the relevant dates and ensure that notice to terminate is given before the end of the initial period of employment (which is expected to be nine months). And in cases where the employee has a notice period in excess of three months, that notice must be given earlier so as to ensure that the termination date falls within three months of the end of the initial period. A failure to do so may mean that the employer inadvertently falls outside the modified

test, making a finding of unfair dismissal more likely.

- It is also important to remember that it is not the case that new employees can *never* bring an unfair dismissal claim. Although the modified test will make it easier to dismiss them, employers will still be required to do something. Short circuiting those modified requirements could open the door to an unfair dismissal claim. When it comes to redundancy dismissals, employers must remember that the current test of reasonableness will apply. This means that in *all* redundancy dismissals employers will need to warn and consult with employees, adopt a fair basis on which to select employees for redundancy and consider suitable alternative vacancies (and, if applicable, collectively consult). Further, the reforms do not affect an employee's right to claim automatic unfair dismissal from Day 1 of their employment.

- The interplay between an employer's probationary period and the initial period of employment will need to be considered. Employers do not necessarily need to increase their contractual probationary periods in line with the initial period. On the face of it, there is nothing to prevent an employer dismissing an employee who has already passed their probationary period during the initial period of employment and relying on the modified test. For example, an employee could pass a probationary period of three months, after which time

their conduct or performance declined, or a one-off serious act of misconduct or negligence occurred. In those circumstances, the fact that the employee has passed their probationary period should not make any difference. That said, some employers may wish to consider aligning probationary periods with the initial period of employment.

- Is there any upside for employers in making ordinary unfair dismissal a Day 1 employment right? Conceivably, it could lead to some reduction in claims for automatic unfair dismissal (such as whistleblowing claims) and discriminatory dismissal claims, which are currently the only statutory claims that employees with under two years' service can bring about their dismissal. A decline in those types of claims could be a good thing for employers, not least from a reputational perspective and because the cost and complexity of defending those types of claims is higher. However, compensation is uncapped for certain automatic unfair dismissal claims and for discriminatory dismissal claims, meaning there is still an incentive for claimants to bring such claims. Therefore, in terms of impact on claims, the most likely outcome is that claimants with automatic unfair dismissal or discriminatory dismissal claims (especially if higher paid) will continue to bring those claims but will plead ordinary unfair dismissal as an alternative claim.

**Dismissal during pregnancy and following a period of statutory family leave**

The Bill provides that regulations may be introduced which will provide enhanced protection from dismissal during pregnancy and following return from maternity leave, adoption leave or shared parental leave (it will also apply to return from certain other forms of leave which are not yet in force and so are not discussed in this briefing). It is not known how long the protection will apply following the return from family leave, however, the Government has previously suggested it will be six months. No further details of this proposal are given in the Bill or the Explanatory Notes to the Bill.

*What will these changes mean for employers in practice?*

- We must await the publication of the related regulations to understand the full extent of this proposal. However, it seems likely that the intention is to restrict the circumstances in which an employer may dismiss a pregnant employee or family leave returner fairly.

- It is *already* unlawful to dismiss an employee because of her pregnancy or maternity leave (or for a reason related to it), by reason of redundancy during pregnancy or following the return from maternity leave, adoption leave or shared parental leave where there was a suitable alternative vacancy available. Therefore, this

proposal appears to go further and suggests that even if there is a non-discriminatory and fair reason for dismissal, the dismissal would be unlawful, subject to some exceptions. Common sense would suggest that the exceptions must, at least, permit dismissal for gross misconduct, gross negligence or illegality or also where there is a large-scale redundancy such as where the whole business is closing down.

**Dismissal for failing to agree a variation to a contract**

"Fire and rehire" is a shorthand used to describe the practice of dismissing an employee then offering to re-engage them on inferior terms and conditions. Before the election, the Labour Party had talked about wanting to end fire and rehire practices altogether. This was slightly watered down during the General Election, with a promise to end the practice, save in exceptional circumstances.

The Bill delivers on that promise and proposes that it will be automatically unfair to dismiss an employee:

- for failing to agree to a change to their terms and conditions of employment; or
- in order to re-engage them (or someone else) under varied terms and conditions of employment, but where the role is otherwise substantially the same.

The sole exception will be where the reason for the variation was to eliminate, prevent or significantly reduce or mitigate the effect of any financial difficulties which, at the time of the dismissal, were affecting, or were likely in the *immediate future* to affect, the employer's ability to carry on its business, and there was no way the need to make the variation could reasonably have been avoided.

However, even where the exception does apply, the dismissal could still be *ordinarily* unfair, even if not automatically unfair. The Bill provides that in such cases various matters must be taken into account by an Employment Tribunal when determining whether the dismissal is fair or not, including any consultation with the employee and any trade union or employee representatives about the proposed variation and anything offered to the employee in exchange for agreeing to the variation.

*What will these changes mean for employers in practice?*

- It will be much riskier for employers to impose contract variations on employees by way of fire and rehire practices. Nor can employers escape the risk of automatic unfair dismissal by simply "firing" in these circumstances and not offering to rehire. This is not to say that it will never be right to deploy fire and rehire practices – the practice may still be used but it carries a high risk of Tribunal claims. However, it is possible that the employee may relent and agree to be rehired on the varied terms. If the employee does not go on to bring a claim in time, the employer will have

achieved its aim.

- Once this change comes into force, the current statutory Code of Practice on dismissal and re-engagement (which came into force on 18 July 2024) will need to be replaced.  As it stands, that Code prescribes the process to be followed by employers before dismissing and offering to re-engage in any circumstances.  A breach of that process does not give rise to a legal claim in itself but may lead to an uplift of 25% to any compensation awarded in related claims.

**Collective redundancies**

Currently, collective redundancy consultation is triggered where there is a proposal to dismiss as redundant 20 or more employees assigned to one “establishment” within a 90-day period.  The question of what an “establishment” has been ventilated in litigation – with employees arguing it should mean the business as a whole rather than the local place of work.  This would mean that collective consultation would be triggered more frequently as redundancy numbers would have to be counted across the whole business.  After some to-ing and fro-ing the senior courts concluded that “establishment” meant the local unit where the employee works, *not* the business as a whole.

The Bill proposes to reverse this, so that collective consultation is triggered where there are 20 proposed redundancies within 90 days *across the business* rather than in just one workplace.

*What will this change mean for employers in practice?*

- Collective consultation will be triggered more frequently and multi-site employers will need to have a system in place to ensure that they keep track of proposed redundancies across the whole business.

- The process will be administratively more burdensome as employers will need to have appropriate representatives in place for all affected employees no matter where they are based.

- The consultation itself will potentially be cumbersome and disjointed as employers may be consulting about several small pockets of unrelated redundancies.

- Getting it wrong will be costly: employees may claim a “protective award” capped at 90 days’ gross actual pay.

The Government has also committed to consult on lifting this cap.

**What are the next steps?**

The Bill has just started its passage through Parliament, which will take time. Even when passed, the various dismissal provisions will not come in straight away. Indeed, in the context of dismissals alone, the Government has said it will consult on:

- the length of the initial period of employment for the purposes of unfair dismissal;
- how the initial period of employment interacts with the Acas Code of Practice on Disciplinary and Grievance procedures;
- the appropriate compensation regime for dismissal during the initial period of employment;
- lifting the cap on protective awards where an employer is found to not have properly followed a collective redundancy process; and
- what role interim relief could play in protecting workers in fire and rehire situations.

Regulations will also be needed in relation to the modified unfair dismissal test and the restriction of dismissals during pregnancy and following the return from family leave.

Next Steps to Make Work Pay states that the majority of the reforms will not come into force until 2026, with the unfair dismissal reforms taking effect *"no sooner than Autumn 2026"*.

Stay tuned for our third article in the series, where we will consider the provisions of the Bill affecting equality law.

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# Gross misconduct dismissal of City trader who had applied industry guidance was unfair

**In *Weir v Citigroup Global Markets Ltd*, an Employment Tribunal has held that the dismissal of a City trader for misleading the financial markets was unfair because he had been operating in line with industry guidance and his managers knew of his**

**approach. Further, the employer's lengthy disciplinary process was unacceptable, unreasonable and caused significant stress and worry to the employee.**

**What happened in this case?**

Mr Weir worked for Citigroup as a Sales Trader on its Asia-Pacific High Touch trading desk (the **APAC desk**) in London. His role involved providing professional and large-scale investors with market updates, trade ideas and sourcing buy and sell trade ideas in relevant stock. Part of his role involved the identification and publication of "indications of interest" (**IOIs**). IOIs are indications that a client has an interest in buying or selling particular stock in a particular quantity. The IOIs are published on Bloomberg's financial trading platform with the aim of attracting a counterparty.

Following a regulatory investigation into the activities of the Hong Kong office, Citigroup reviewed the practices of the APAC desk in London. As a result, disciplinary allegations were raised against Mr Weir, chiefly, that he had misled the financial market by publishing certain IOIs without a genuine client interest and that he had failed to tell his line manager that he knew or suspected that misleading IOIs were being published.

Mr Weir maintained that the methodology he used meant that the IOIs he published were supported by a "reasonable expectation of interest" from specific clients, drawn from his own knowledge and experience of those clients and orders already in progress. Mr Weir argued that his approach was in line with industry-wide guidance in place at the time and Citigroup had not provided any training on IOIs, nor issued any internal

policy or guidance to the contrary.

After an extremely lengthy investigation and disciplinary process spanning more than two years, Mr Weir was summarily dismissed for gross misconduct. His appeal against his dismissal was rejected. Mr Weir claimed he had been unfairly dismissed.

**What was decided?**

The Employment Tribunal upheld Mr Weir's unfair dismissal claim. Although Citigroup genuinely believed that Mr Weir had committed acts of misconduct, the Tribunal found that it did not have reasonable grounds for this belief.

As to the allegation that he had published IOIs without a genuine client interest, the Tribunal held that Mr Weir had acted properly in following industry guidance on IOIs at the time, which required the existence of a reasonable expectation of client interest. Further, the methodology Mr Weir had used was legitimate and ensured that there was a reasonable expectation of client interest. The Disciplinary Committee had failed to grapple with the methodology he had used in full. Further, they had misunderstood the industry guidance or, alternatively, had *"unreasonably and unwarrantedly"* sought to apply a higher standard of genuine client interest, something which had never been communicated to Mr Weir.

As to the allegation that he had failed to tell his line manager what was happening, the Tribunal held that it was unreasonable to find that this amounted to misconduct given that Mr Weir had believed he was behaving appropriately and in

line with industry guidance. Further, it was unreasonable in light of the fact that Mr Weir's "matrix" managers based in Hong Kong had been aware of the methodology being used by the APAC desk. Mr Weir's direct line manager in London conceded that she did not know which matters needed to be reported to matrix managers and which to line managers, since no formal policy or guidance on this matter had ever been issued by Citigroup.

The Tribunal also held that Citigroup had failed to carry out a reasonable investigation. The process started in September 2019, when Mr Weir was given just two minutes' notice of an initial "fact-finding" meeting. There was a hiatus until March 2020, when Mr Weir was invited to a same-day investigation meeting. Seven people attended the meeting on behalf of Citigroup, which spanned two days. Mr Weir was questioned for over 10 hours, on top of his usual workload. The Tribunal was critical about this stage of the process, noting that it was an *"…unreasonable way of conducting an investigation and* (Citigroup) *demonstrated inadequate regard for the likely impact upon* (Mr Weir)". The Tribunal said that it was inevitable that a panel interview carried out in such an intensive manner and over a consecutive two-day period would feel hostile and make it more difficult for Mr Weir to explain his actions.

At end of investigation meeting, Mr Weir was told that the investigation process would be completed by the end of March 2020, however, this was not the case. Again, there was a hiatus. Between March and November 2020, Mr Weir asked for updates about the process and was repeatedly told that a resolution was "coming soon". The Tribunal found that the investigation process and lack of information had caused Mr Weir's mental health to deteriorate, leading him to go off sick with work-related stress. By February 2021, Mr Weir felt

better and asked to return to work on a phased basis. Citigroup responded the next day by suspending him and notifying him that a decision had been taken to pursue disciplinary proceedings against him.

The Tribunal had this to say about the investigation process: *"The length of time taken to complete the investigation was unacceptable and unreasonable, causing significant stress and worry for* (Mr Weir)". They also firmly rejected Citigroup's explanation that Covid had contributed to the delays noting that: *"We do not find it credible that a global organisation such as* (Citigroup) *with all its human and technical resources, was unable to progress the…situation in a timely manner or respond to…requests for updates in an accurate or timely manner"*.

The disciplinary process eventually began in April 2021. Before the disciplinary hearing took place, the in-house lawyer who had led the investigation met with the Disciplinary Committee and inaccurately represented Mr Weir's position on the disciplinary allegations. The disciplinary hearing took place on 7 April 2021. The Disciplinary Committee was made up of a four-person panel, contrary to the terms of the Disciplinary Policy that had been given to Mr Weir (which said that two people would attend from Citigroup). The hearing lasted for 90 minutes and focussed on one allegation, which was ultimately not upheld. The hearing was adjourned and reconvened a few days later. It was at this second hearing that the two allegations which went on to be upheld were discussed. That hearing lasted for just 30 minutes.

After the hearing, one of Citigroup's Employee Relations specialists was tasked with undertaking further investigations

on a particular issue. She met with Mr Weir on 21 April 2021, but used the incorrect "script template", with the result that she told him the meeting was a further disciplinary hearing, rather than an investigatory meeting. At the meeting, she failed to probe the particular issue in any detail and later misrepresented Mr Weir's position to the Disciplinary Committee (suggesting he had been definitive when, in fact, he had been equivocal). Mr Weir was dismissed for gross misconduct on 10 June 2021.

An appeal hearing took place on 2 September 2021 but was adjourned for over four months before reconvening on 22 January 2022. On 16 February 2022, the appeal officer upheld the Disciplinary Committee's decision to dismiss. Yet the Tribunal held that the appeal conclusion was at odds with what had been said in the dismissal letter, reached conclusions that were unsupported by evidence and demonstrated an acceptance of the in-house lawyer's inaccurate representations of Mr Weir's position (despite the fact that minutes of meetings which had been available to the appeal officer showed Mr Weir's true and consistent position).

The compensation to be awarded to Mr Weir is yet to be decided. However, the Tribunal held that Mr Weir had complied with industry guidance and had been co-operative throughout the investigation and disciplinary process. Therefore, it could not be said that his conduct had contributed his dismissal, meaning there will be no reduction in his compensation. Nor was there any prospect that Mr Weir would have been dismissed fairly had Citigroup conducted the process in a reasonable manner, again, meaning there will be no reduction to his compensation.

**What are the learning points for employers?**

This decision underlines the importance of employers not allowing disciplinary decisions to be clouded by wider external events, such as regulatory censure. The evidence must be assessed objectively, and employers should look for and consider evidence which supports the employee’s position, and not focus only on evidence which would support the issuing of a disciplinary sanction. This is all the more important where the employee stands to lose their job (and, in regulated professions, potentially their career).

It also illustrates the importance of keeping internal policies and practices under review to ensure that they comply with the law and any regulatory rules and expectations. Such policies and practices should be set down in writing, communicated to staff and training offered as appropriate. Failing to stay on top of this and simply hoping for the best may mean your hands are tied when it comes to disciplinary action later down the line. As seen in this case, trying to change the rules after the event will not justify a disciplinary sanction.

Crucially, this decision reminds employers of the importance of getting the investigation and disciplinary process right. As seen here, Tribunals will have little patience for employers who have plenty of expertise and resources at their disposal but get things wrong. The key takeaways from this case are:

- **Deal with the issues promptly and without unreasonable delay.** This is a core principle set down in the statutory Acas Code of Practice. To the extent that there is a legitimate delay, tell the employee the reason for it and be clear about when the process will

resume. And be prepared to "think outside the box" – could the process be accelerated in a different way? For example, by way of a virtual meeting, conference call, or by allowing the employee to make written representations.

- **Know your own policies and procedures and apply them correctly.** This may seem like an obvious point, but this case demonstrates how even an extremely well-resourced employer can get it wrong. Make sure meetings are labelled accurately and are convened in the right way. Be mindful just how stressful the situation is for the employee. Where appropriate, be flexible about the process, for example, allow the employee to be accompanied by a friend or family member.

- **Conduct the meetings in a reasonable manner.** Give reasonable notice of meetings and keep them to a sensible length. Equally, don't rush through important meetings. The best approach is to try to agree the length of the meeting with employee in advance but, again, stay flexible. If the employee is upset, offer to take a break or adjourn to another day. Do not turn up to meetings "mob-handed" since this is quite likely to intimidate the employee and have a negative impact on their evidence.

- **Make sure all parties involved in the process understand the scope of their role.** Investigators are there to gather evidence in an even-handed way and report it neutrally to the disciplinary panel. It is not their role to construe the information in a certain way or lobby for a particular disciplinary outcome. The decision on outcome is for the disciplinary and appeal panels. Those decision-makers should weigh up the evidence carefully and take care not to adopt a broad-brush approach in order to get to a desired outcome.

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