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Some other substantial reason dismissal

A potentially fair reason for an employee's dismissal is 'some other substantial reason' (SOSR). Whilst this is a 'catch all' category it is not always clear whether a proposed reason for dismissal will be caught by this category. Employment lawyers therefore welcome cases such as the EAT case *Ezsias v North Glamorgan NHS Trust* which clarify, if not widen, the scope of 'SOSR'.

In this case, Mr Ezsias was a surgeon with the North Glamorgan NHS Trust. Throughout his employment he expressed concerns about his colleagues and the clinical standards of his department. The colleagues finally complained resulting in an internal inquiry noting Mr Ezsias comments to be "excessively frequent, unacceptably detailed and unrelenting to an extreme degree". Senior members of the department signed a petition stating that there was a complete lack of confidence in, and a total breakdown of the relationship between them and Mr Ezsias.

Following an external investigation it was concluded that there had been an irretrievable breakdown in working relationships between the Mr Ezsias and his colleagues. Mr Ezsias was regarded as a large cause of that breakdown. The Trust went on to conduct disciplinary action and, in turn, dismissed him.

Mr Ezsias' Tribunal proceedings for unfair dismissal were unsuccessful, as was his appeal. He appealed on various grounds, including that the Trust had breached his contract by failing to follow the disciplinary procedures which applied when allegations of misconduct were made.

However, the EAT noted a key difference between the dismissing of Mr Ezsias for his conduct in causing the breakdown of the relationship, and dismissing him for the fact that the relationship had broken down. The latter was a dismissal due to 'some other substantial reason' not due to his conduct. Therefore, the Trust did not have to follow the disciplinary procedures that normally applied upon allegations of misconduct.

You will appreciate this ruling turns on its facts but it will be an encouragement to employers in situations where relationships with employees are seriously strained. Employers will be able to fairly dismiss employees for 'some other substantial reason' on the basis that working relationships have broken down, regardless of whether that employee is or is not responsible for the breakdown.

Wages and Custody

Every so often we are asked questions about whether an employee is entitled to receive their wages if they are willing but unable to or prevented from attending work. This is typically seen in the context of sickness absence.

The case of *Burns v Santander UK plc* concerns a claim for unlawful deductions in wages by Mr Burns, a branch manager at Santander. He claimed he should have been paid his wages whilst remanded in custody for six months pending trial for 13 criminal offences. Mr Burns argued he was entitled to be paid during the period he spent in custody, relying on the principle that an employee who is ready and willing to perform his contract but is unable to do so as a result of an unavoidable impediment, such as sickness, may still be able to claim his wages.

The EAT held that the employment tribunal was correct to dismiss the claim by Mr Burns for unlawful deduction from wages. The EAT held that Mr Burns' remand in custody was not an unavoidable impediment. Although Mr Burns could not avoid custody, it was his own voluntary actions that led to the situation. His conduct was such that he should be deprived of his freedom and therefore his right to attend work. As such, he was not entitled to his contractual pay.

This decision appears to provide an alternative, economically efficient solution for employers dealing with the difficult question of how to deal with an employee on remand. As an alternative to dismissal, it is now possible to maintain employment without paying for time spent in remand. This may be a favourable position, particularly if the employee on remand is found not guilty of the charges against them.

Potential damage and reasonable responses

The case of *Wincanton plc v Atkinson* and another provides helpful authority for employers who dismiss on the basis of 'what might have been'.

A tribunal found that two lorry drivers were unfairly dismissed for continuing to drive after their HGV licences had expired. The EAT overturned this decision noting the tribunal had placed too much emphasis on the fact that no adverse consequences had materialised as a result of the mistake. The EAT noted that "potential" damage was sufficient to justify dismissal provided the dismissal was still within the band of reasonable responses.

In this case the two drivers were dismissed by Wincanton for gross misconduct following routine checks which revealed their HGV licences had expired. Wincanton argued that driving without an up-to-date licence could have had a "potentially serious adverse impact" on the business, not least because it invalidated their insurance, could have seriously damaged their reputation, and could have resulted in the loss of valuable contracts. The EAT, overturning the tribunal's unfair dismissal finding, noted that the tribunal's approach would mean that no employee could ever be fairly dismissed if their negligent actions did not actually lead to a negative outcome for the employer. The main consideration should have been whether the actions taken by the employer were within the band of reasonable responses which an employer would be entitled to adopt in such circumstances. The EAT also noted that there was an existing policy (known to the employees) and set out in a collective agreement stating that a breach of statutory or company rules would lead to dismissal without notice.

This case is good news for employers across a whole range of sectors. Although all cases need to be assessed against their own merits and considered in light of the reasonable band of responses test, this case notes that even if the negligent actions of an employee do not actually lead to serious adverse consequences for the employer, the fact that they had the potential to do so may be sufficient to justify a dismissal.

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