



## Employment Law Brief

*with*

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**We tend to think of an unfair dismissal claim as being simply a question of whether the employer has behaved reasonably in dismissing the employee.**

The employer must first of all prove the reason for dismissal – and then show that that reason falls within one of a number of specific categories – conduct, capability, redundancy, ‘statutory ban’ or ‘some other substantial reason (SOSR)’.

In most cases this stage of the case is a formality – there is simply no dispute that the employee was made redundant, for example, or dismissed for gross misconduct. However, the category into which the dismissal falls may have important implications for how the tribunal goes on to assess fairness. Take for example the distinction between conduct and capability. An employee guilty of misconduct may be warned not to do it again or dismissed if warnings are ignored or the conduct is sufficiently serious. In a case of capability however a warning must usually be followed by a reasonable opportunity to improve performance – usually with appropriate support from the employer. Categorising an issue as one of misconduct when it should properly be treated as capability may lead the employer to take the wrong approach in deciding whether it is appropriate to dismiss.

That at any rate was the argument made by the employee in the case of **Burdis v Dorset County Council**. Mr Burdis was a Director of the Dorset Waste Partnership (DWP) – this was an entity sitting within Dorset County Council and bringing together a number of district and borough councils within the county to run their waste management services. Problems started to arise with

procurement procedures in 2013 – and towards the end of 2014 a significant overspend was discovered. An investigation revealed serious weakness in financial management processes, and press reports started to call on senior management figures to step down over the ‘fiasco’.

At that time an independent report commissioned by the council described the financial management processes within the partnership as ‘very poor’. A further independent report found that there was very little evidence of robust processes to manage finances within DWP. As a result, disciplinary action was taken against Mr Burdis and the disciplinary panel concluded that he had failed to initiate rigorous financial management and put in place an effective financial framework. They concluded that this amounted to serious misconduct and he was dismissed with notice.

He claimed that his dismissal was unfair. Essentially his argument was that he was being made the scapegoat for an organisational failure. It was wrong of the employer to categorise what had happened as misconduct on his part. He had not done anything deliberately wrong and if there were problems with the systems that he had put in



place then that should have been dealt with as a capability rather than a conduct issue.

The Tribunal found that the dismissal was fair and the EAT agreed. Misconduct was not just a question of deliberate wrongdoing – it also encompassed behaviour that was grossly negligent or irresponsible. The employer had been entitled to place his failures into this category and act accordingly. His dismissal was therefore fair even though he was not personally guilty of wrongdoing in relation to the procurement failures or overspend that had occurred. It was enough that he was culpable in relation to the systems that he had failed to put in place to prevent such problems from occurring.

This case makes the important point that ‘conduct’ is not confined to deliberate wrongdoing. In relation to manual roles ‘poor workmanship’ has always been regarded as a conduct issue. Indeed, in the 2017 Court of Appeal decision in *Adesokan v Sainsbury’s Supermarkets Ltd* it was held that a senior manager was found to have committed gross misconduct by failing to step in when a more junior manager tried to manipulate the results of an employee engagement survey. His failure was found to be a ‘dereliction of duty’ justifying dismissal without notice.

It has to be said that the dismissal of Mr Burdis would not necessarily have been unfair even if the issue was one of capability rather than misconduct. While an opportunity to improve is normally essential before an employee is dismissed for poor performance, there are exceptions. There may well be circumstances in which the consequences of poor performance are so serious that an employer cannot reasonably be expected to allow the employee to continue in post in the hope that things improve.

Crucial to this case is of course the seniority of the employee involved. As the Director of the

service, Mr Burdis was in a senior leadership role. As such he could be expected to be capable of putting the right systems in place to ensure that public money was properly spent and accounted for. Even if his failings had been categorised as a lack of capability rather than gross negligence, the Tribunal might well have concluded that dismissal was a reasonable outcome in the circumstances.

You could also make a good argument that the dismissal was for ‘some other substantial reason’. Mr Burdis had argued that he had been made a scapegoat- but another way of looking at it is to say that where there have been serious failings in the handling of public money then it is important that senior leaders are seen to be held accountable. Holding the director of a service responsible for the effective delivery of that service might mean that it would be fair to dismiss if serious failings are uncovered – even if these cannot be attributed to the specific actions of the individual concerned. Such dismissals are not without legal risk – and each case will depend on its own particular facts – but it is entirely plausible that the Tribunal would uphold a dismissal in such circumstances.

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