



SOME OTHER SUBSTANTIAL REASON

It is necessary for an employer when fairly dismissing an employee to identify the reason for dismissal. S 98(1)(b) Employment Rights Act 1996 identifies one potentially fair reason as some other substantial reason (SOSR).

In some cases what starts off as a conduct case morphs into something else. This is what happened in the case of [L v K \[2021\] CSIH 35](#) as what started off as a potential conduct case turned into an SOSR. Key in such a case is whether the employee understood the nature of the allegation being made against him and that dismissal was a possible outcome.

My first brief reading of the Inner House Court of Session decision was that it was wrong and the Employment Appeal Tribunal had been correct to find the dismissal to be unfair. However once I read the decision a second time I realised that I had fallen into the same error as the Employment Appeal Tribunal.

What was it about?

The employee, a teacher, had been arrested after Police visited his property and found a laptop on which were indecent images of children. He was subsequently charged however the Police did not proceed against

the employee because the Police could not prove he had sole access to the laptop.

The employee reported the matter to his employer and at a subsequent investigatory meeting the teacher stated the following:

- He could not recall where he had purchased the computer.
- His son had access to it.
- The police had told him that it contained illegal material.
- After he was charged he was told that a report would be sent to COPFS, which in due course sent him a letter stating that he was not being prosecuted, but the right to do so was reserved. His solicitor had advised that the letter was in standard terms.
- His son received a similar communication.
- When asked whether a computer with indecent child images had been in his possession within his household, he answered "Obviously yes."

A disciplinary hearing followed at which the facts as stated at the investigatory hearing were not substantially in dispute. Little, if any, discussion took place around reputational damage and the decision maker did not make a finding that the employee had downloaded the images. The decision maker could only say that he could not confirm that the employee had not downloaded the images.

On the face of it might have been expected that the allegation was not proved and so the employee would not be dismissed. However the employer made a decision to dismiss for an SOSR. The dismissal was held to be fair by the Employment Tribunal. It was reversed by the Employment Appeal Tribunal.

What did the Inner House Court of Session think?

Central to the decision to reinstate the finding of a fair dismissal was the actual allegation which the employee was having to meet. He was not alleged to have downloaded the images (conduct) rather it was alleged that there had been a Police investigation into illegal child images found in his home on his computer and this was relevant to his continued employment as a teacher.

This was not a conduct dismissal at all, rather it was about a set of facts which placed the employer in the position of having to balance the interests of a potentially blameless employee against the fundamental requirement of trust & confidence it must have in its employee in his position as a teacher.

The employer could not be sure that the employee was not involved. The employer being an education authority was conscious of its statutory responsibility to protect the children entrusted to it. It decided that it could no longer place the necessary trust and confidence in him, not because it was satisfied that he was guilty, but because there was a real possibility that he was an offender. In short the employer was not prepared to take the risk that the teacher was responsible for the images.

Such a conclusion may undoubtedly give rise to a risk of injustice and the Courts have been alive to this issue when considering the appropriateness of dismissing for an SOSR which is in reality about conduct. However where that reason is a substantial one (as was found in this case) and was in fact the reason for the dismissal the only issue which remains is whether the response was reasonable in the circumstances of the case.

As Lord Malcolm pointed out (see para 25), other employers might have dealt with the matter differently however the question which the

Employment Tribunal correctly addressed was whether the response fell within the band of reasonable responses.

What can we take away?

There was as significant amount of argument during the appeal about the way the allegation had been worded. For instance there had been no mention of reputational damage and it was silent on whether the matter amounted to gross misconduct. In the end neither of these matters impacted the outcome however I believe the following are worth remembering:

- First make sure you are clear what is being alleged.
- Second if you are alleging conduct then you cannot simply fall back on an SOSR. The employee must know the case which has to be met.
- Last if you are going to pursue an SOSR dismissal based on the breakdown of trust and confidence it is helpful to spell out what the facts of the SOSR are and why it has that impact on the contractual relationship.

Sometimes that which appears to be unfair from a layman's perspective is nevertheless a fair dismissal in an Employment Tribunal. Key in such cases is ensuring clarity in the allegation and the consequences if it is proved.

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