

Loss of confidence and breakdown in relationships – a reason for dismissal?

Recent cases, *Ezias v North Glamorgan NHS Trust*¹ [2011] IRLR 550 and *R (Shoesmith) v OFSTED and Ors*² [2011] IRLR 679), have raised the following issue: may an employer dismiss an employee because it no longer has any trust and confidence in the employee: or because trust and confidence between fellow employees has broken down. These arguments have the potential for providing SOSR as an alternative to a dismissal for misconduct or incapability thereby evading otherwise applicable procedural protections and/or the payment of notice monies.

In the former case, the argument is particularly likely to surface in the case of a senior figure such as Sharon Shoesmith whose team has been shown to be deficient but against whom no gross misconduct can credibly be alleged personally. The loss of trust and confidence argument implies that such a figure must nevertheless fall or be pushed onto her sword. The underlying concept is akin to that of ministerial responsibility for the failings of a department. However the argument failed decisively in the recent case of *R. v Ofsted & Haringey Ex partes Shoesmith*.

¹ UKEAT/0399/09/CEA, UKEAT/0400/09/CEA, UKEAT/0401/09/CEA.

² [2011] EWCA Civ 642.

Haringey alleged that the reason for her dismissal was breakdown in trust and confidence. Kay LJ rejected this formulation³ as a potentially fair reason for dismissal and said it was based on a misunderstanding of the implied term of trust and confidence. The latter occurred only when the employee is guilty of gross misconduct such as would amount to breach of the implied term. Subjective loss of confidence on the part of the employer was not enough to justify summary dismissal though it might be the basis of a dismissal with notice on the grounds of incapability. The procedural protections applicable to a dismissal on the grounds of incapability could not be evaded in this way. The Courts view overall was similar to that of Sedley LJ in *Gibb v. Maidstone* where he began his judgment by quoting Voltaire

As a bystander at the execution of Admiral Byng explained to Candide:

'Dans ce pays-ci, il est bon de tuer un amiral de temps en temps pour encourager les autres.'

It seems that the making of a public sacrifice to deflect press and political obloquy, which is what happened to the appellant, remains an accepted expedient of public administration in this country⁴

³ . para 121.

⁴ [2010] IRLR 786 at par 42.

A related issue or issues is where trust has broken down between employees. The employer then wishes to dismiss for this very reason arguing that this amounts to SOSR for the dismissal. As a consequence the procedural protections for a misconduct dismissal do not apply. The argument succeeded in the EAT in the case of *Ezias*⁵ a position which sits uneasily with that in *Shoemith* and the EAT took pains to guard against the argument being abused. A fine distinction must be made: an employee is dismissed because of the breakdown in relationships – with other employees/colleagues in Mr *Ezias*' case and that of an employee whose conduct has led to a breakdown in relationships in the workplace. Judge Serota QC said this in granting permission to appeal: “an employer should not be able to avoid implementation of the disciplinary and investigatory procedures by relying on [some other substantial reason] as grounds for dismissal, when the employee's conduct is blamed for the breakdown.” After endorsing this position the EAT said that: “We have no reason to think that employment tribunals will not be on the lookout, in cases of this kind, to see whether an employer is using the rubric of “some other substantial reason” as a pretext to conceal the real reason for the employee's dismissal”.

⁵ This is not the first time this issue has been raised – see *Perkin v St George's Healthcare NHS Trust* [2006] ICR 617. The Court of Appeal classified the reason for Mr Perkin's dismissal as coming within the category of “some other substantial reason”, even though it was his manner and management style which had led to the breakdown of relationships.

Nevertheless there is a real tension between Ezsias and Shoemith. Most employers are institutions. Therefore in Shoemith her relationship with certain key senior individuals had broken down case...? some individual or individuals had broken down. The only difference between Shoemith and Ezsias is that the breakdown in the latter case was between employee of the same seniority. It is not clear why a breakdown of relationship between individual at different levels in the hierarchy (Shoemith) should not amount to SOSR whereas a breakdown between individuals of equal hierarchical position does.