

Dismissing an employee who is not at fault

At some point in time, most employers will have had to discipline or even dismiss employees for unacceptable behaviour. The concepts are familiar - gross misconduct, final warnings, and summary dismissal - as is the now well-established ACAS Code of Practice.

But how should employers deal with a potential dismissal situation where an employee is not at fault in any way? This was the question put to the Employment Appeal Tribunal (EAT) in a recent case.

The facts of the case were unusual and it is not necessary to understand the whole history. It concerned a nurse (Mrs S) who worked for Barts Health NHS Trust (the Trust). The Home Office revoked her British Citizenship because of concerns about her true identity but she retained the legal right to work in the UK.

Mrs S disputed the Home Office's position and maintained that the allegations about her identity had been made by her ex-husband and were motivated by malice. She commenced judicial review proceedings against the Home Office, which were likely to take some time to resolve. In the meantime, the Trust took the decision to dismiss her with immediate effect following its own investigation into the matter, which included correspondence with the Home Office.

When Mrs S brought an unfair dismissal claim, the Employment Tribunal concluded that the principal reason for her dismissal had been the fact that the Trust could not be satisfied that Mrs S was who she said she was, in light of the Home Office's decision. It was not a case of gross misconduct but of dismissal for 'some other substantial reason' (SOSR) and it had been fair in all the circumstances.

Mrs S appealed, arguing that the notion of fairness requires a more careful evaluation in cases where the employee is not at fault. The EAT rejected this suggestion. Although it had a lot of sympathy for Mrs S's situation, the EAT also had regard to the nature of the Trust and of Mrs S's role as a nurse caring for vulnerable patients. In this context, the EAT recognised the importance of the Trust being able to verify Mrs S's identity in order to conduct proper background checks and agreed with the Tribunal that it had been reasonable to dismiss Mrs S on the basis of the Home Office's decision; there was no need for the Trust to go any further in its investigation.

While the facts of this case are unusual, the guidance offered by the EAT may be welcomed by many charitable organisations, particularly those employing people who work with children and vulnerable adults. Nevertheless, dismissals for SOSR should always be carefully considered and need to be fully justified as they will be subject to close scrutiny by employment tribunals. It is always advisable to take legal advice before making a final decision – it could be the difference between a fair and unfair dismissal.

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