

**CIVIL LITIGATION DEPARTMENT  
EMPLOYMENT LAW  
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UPDATE ON UNFAIR DISMISSAL**

**THE WIND IS BLOWING IN FAVOUR OF EMPLOYERS**

An employer who dismisses an employee without good reason and without following a fair procedure lays itself open to a claim for unfair dismissal. When such a claim is brought, the employer has to establish the reason for the dismissal. Potentially fair reasons include: lack of capability, misconduct, redundancy and 'some other substantial reason' (usually a reorganisation). Where the employer has shown a fair reason, the determination of the question whether the dismissal is fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

Unfair dismissal is a statutory right and the case law adds 'meat to the bones' of the statutory framework. Recent cases have been decided in ways favourable to employers and have established the following:

- It is often difficult to distinguish between instances of misconduct and cases where the misconduct has led to a breakdown of relationships. Often, after an investigation, an employer is faced with the option to initiate disciplinary proceedings for misconduct or to consider terminating an employee's employment on the ground of the breakdown of relationships. If they proceed with the latter option, any dismissal will be on the ground of 'some other substantial reason' and any disciplinary rules applicable to misconduct cases will not apply. This can allow employers to simply ignore certain contractual disciplinary rules.
- A tribunal cannot substitute its own finding on the truth or not of the evidence of a witness, even if that witness admits that he lied to the employer at the time of dismissal so as to cast doubt on the reasonableness of the dismissal. The tribunal cannot act with hindsight, but must focus on the information available to the employer at the time of dismissal. This can be very harsh on an employee if they were dismissed on the back of the witness's false evidence.
- The Courts have confirmed that the consideration of "equity and the substantial merits of the case" is not a separate consideration by an Employment Tribunal. It is simply an indication that the employer's "reasonableness" is to be loosely interpreted. The statutory language would appear to suggest that the tribunal should apply the test of 'equity and substantial merits' to the question of whether the dismissal is fair or unfair, not just to the question of the employer's reasonableness. The courts disagree with this approach and this limits the ability of the employee to claim that his dismissal was unfair.

It will be interesting to see whether the tribunals continue to interpret the statute in ways that are favourable to employers.

**If you require any advice or assistance about an employment matter,  
please contact Julie Granger or Daniel Crook in our Civil Litigation  
Department.**

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