
Hearing problems: employer's refusal to postpone meant unfair dismissal

An employee is facing disciplinary action due to misconduct. Due to holidays and ill health the hearing's delayed. It's rescheduled, but the employee asks for a further 2-week adjournment as her chosen union representative is unavailable. Must you postpone?

Almost certainly – and in a recent case, not postponing resulted in unfair dismissal.

For a dismissal to be fair, it must be for a potentially fair reason (e.g. misconduct) and follow a fair procedure. Among other things, you must invite them to a disciplinary meeting at which they're entitled to be accompanied by a colleague or a union representative of their choice.

In this case, in an email to a customer, the employee insulted a colleague. The employer said that that could bring the business into disrepute and was against its harassment and bullying policy. This was a first offence after 22 years' employment.

She was suspended on 29 July; they investigated the facts and then invited her to a disciplinary meeting. It was scheduled for 5 September, but she was ill and then had 5 days' annual leave booked. On 19 September she was invited to a rescheduled meeting on 29 September.

The employee's chosen union representative wasn't available on 29 September, and suggested 3 alternative dates, the first 2 being within 2 weeks.

The employer decided they couldn't wait that long - they said the strain on the business and other employees was too great and that they (in accordance with its policy) were entitled to reject the request because the union representative couldn't attend within 5 days.

The employee didn't attend the meeting, at which the employer decided to dismiss her summarily, i.e. without prior warnings and without notice.

The Employment Tribunal decided that not postponing the hearing was unfair, and therefore the dismissal was procedurally unfair. It also decided that the original misconduct alone was not a fair reason for dismissal.

What this means for you

You should take all reasonable steps to ensure it's possible for your employee and their chosen companion to attend a disciplinary meeting.

The Employment Tribunal outlined 2 types of circumstances where it might be reasonable to hold a disciplinary meeting in the employee's absence:

1. If the employee had been difficult and tried to inconvenience the employer (presumably as a delaying tactic);
2. If sometimes, through the fault of no one in particular, things go on for too long and a decision has to be taken. The situation here was nowhere near the threshold required for not postponing – a 2-week postponement pales in comparison with the permanence of dismissal.

How we can help

A number of our documents include disciplinary procedures, including our **Employee handbook** and **Employment agreement**. These procedures set out a standard policy for you to adopt and provide guidance. We also have 9 letters covering the various stages and potential outcomes for a disciplinary process, including an **Employee disciplinary meeting letter** that outlines the right to be accompanied. Each letter includes guidance about the best procedure to follow.

Dismissal of bullying victim ruled fair

One of your employees bullied another. You give that employee a final written warning: she appeared to have changed her ways and was keen to fix the relationship, so dismissal seemed too harsh. But the bullied employee has suffered stress and depression as a result of the bullying and refuses to work with the other employee. You appoint an external investigator to assist, who concludes there's been an irretrievable breakdown in the working relationship. You try mediation, but the bullied employee wants no contact at all with her colleague. You can't continue like this, but what can you do?

A recent case has facts like this. The employer dismissed the *bullied* employee because of the breakdown in working relations and the Employment Tribunal dismissed her claim for unfair dismissal.

This is not an easy situation: any response would have wronged someone. The former bully was certainly in the wrong to begin with, but had been disciplined in the way the employer thought appropriate – dismissal may have been unfair. Doing nothing wasn't an option as the employment relationship had broken down and the situation was unsustainable. The Employment Tribunal decided that the dismissal wasn't unfair, and this decision was upheld on appeal.

It appears that the Court of the Appeal accepted that some employers would have decided to dismiss the former bully in this decision, but the employer's decision wasn't beyond the range of what a reasonable employer could do.

What this means for you

If relationships breakdown irretrievably, it could be necessary to dismiss someone to bring harmony back to the workplace.

As with any dismissal, you must follow a fair procedure, which includes establishing the facts and considering the best possible course of action. This employer tried separating the 2 employees and tried mediation, but nothing worked. Most judgments on this issue have stressed that the employer must investigate who's at fault in causing the breakdown; it's rarely fair to dismiss an employee who's not at fault. But this case shows that occasionally it is fair.

Does assigning staff to other businesses make them agency workers?

Your business posts security guards to work with hiring businesses under their supervision. Those workers then work for the hiring businesses for extended periods of time, say a couple of years. You're aware that the Agency Worker Regulations 2010 (AWR) protect agency workers. But you don't see your business as a recruitment business; you see it as a security business.

Are these security guards agency workers, and protected by the AWR?

They probably are agency workers. And so, because of the AWR, their terms of employment shouldn't be worse than for the security guards working directly for the other security business.

A recent case addressed this situation, and highlights 2 issues:

1. The AWR only apply to employees who work *temporarily* for another company. If an employee is *permanently* assigned to another company, you'll escape the regulations.
2. Whether the assignment is temporary or permanent ultimately depends on the nature of the work, not the words of the contract – though the contract is relevant to the extent that it reflects the parties' intentions.

The claimant was employed on a zero-hours contract and the assignment ended up being only 21 months, but this didn't necessarily prevent the assignment from being permanent. What did, however, was that he was always considered to be a 'cover security guard', supplied to fill in as and when required. This meant he could not be considered to have been assigned indefinitely to the other business. That doesn't mean that the work has to last *forever* to be permanent – after all, all employment contracts include notice clauses and end eventually. But, as a cover position, this assignment had the nature of being temporary.

For these reasons, the security guard was an agency worker and was entitled to the same pay and other 'basic working conditions' as equivalent permanent staff.

What this means for you

If you assign staff to other businesses for more than 12 weeks, then unless the assignment really is understood to be permanent, you may have to assess their working conditions relative to permanent employees in the hiring business.

In brief – consultations

You may be interested in commenting on 2 consultations from the Law Commission:

- Electronic signatures. The deadline for consultation is 23 November 2018.
- Reforming Employment Tribunals. For example, should the time limit for most claims be extended from 3 months to 6 months? The deadline for consultation is 11 January 2019.