



QBE

Forum for risk managers

Disciplining
(and dismissal)
on grounds of
health and safety

Inland Revenue		<i>Details of employee leaving work</i>		P45
		Copy for Inland Revenue office		Part 1
		Office number	Reference number	
1 PAYE Reference		<input type="text"/>	<input type="text"/>	
2 Employee's National Insurance number		<input type="text"/>		
3 Surname (in CAPITALS)	<input type="text"/>			
First name(s) (in CAPITALS)	<input type="text"/>			



14 November 2007



Disciplining (and Dismissal) on grounds of health and safety

Kevin Bridges Dip2.OSH, CMIOSH

Senior Associate and Chartered Safety
and Health Practitioner

Dismissal on grounds of health and safety



- Can an employee choose to run health and safety risks?
- Can health and safety risk justify dismissal?

Running the risk?



- The “Withers” Principle – Withers v Perry Chain Co Ltd [1961]
- An employer is not under a duty to refuse employment to or dismiss an employee susceptible to a specific risk of employment
- An employee who is aware of the risk can make his own choice about whether or not to continue to work

Running the risk?

- Sutherland v Hatton [2002]
- Court of Appeal:
 - *“ an employer could not be in breach of duty for failing to dismiss an employee who wanted to continue and master the job despite the advice given to him by his own doctor”*
 - No common law obligation to dismiss.



Running the risk?

- Coxall v Goodyear GB Ltd [2002]
- Court of Appeal:

- The principal consideration was the nature and extent of the risk
- There will be cases where it is an employer's duty to dismiss an otherwise willing employee to protect him from physical danger



Running the risk?



- Brian Farmiloe v Lane Group (1) and N Somerset Council (2) [2004]
- EAT held
 - If no suitable PPE or alternative employment is available then the only option, following proper investigation and consultation, may be to dismiss
 - Where no reasonable adjustments can be made, dismissal is not unlawful as the DDA 1995 is subordinate to H&S obligations

Enforcing health and safety rules



- What if an employee chooses to breach the rules or run the risk? e.g. by refusing to wear PPE

- Issues:



- Does the refusal amount to a breach of internal rules, policies and procedures?
- Is the refusal related to a medical condition?

Enforcing health and safety rules



Does the refusal amount to a breach of internal rules, policies and procedures?

- Blatant and repeated violations should be subject to disciplinary action
- [Martin v Yorkshire Imperial Metals Ltd \[1978\]](#)
 - By-passing a safety device was sufficient grounds for dismissal provided the employee had been properly instructed about the safety measures and of the potential consequences, in terms of dismissal, of not using them
- Otherwise dismissal must be fair – after a series of warnings following a fair grievance and disciplinary procedure
 - From 1 October 2004 there is a statutory disciplinary procedure (SDP) which must be followed otherwise any dismissal is automatically unfair

Enforcing health and safety rules



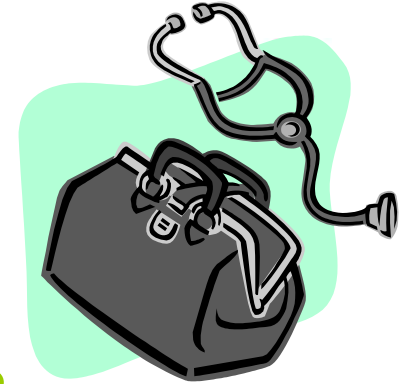
- [Waters v United Biscuits McVities \(August 2007\)](#)
- Dismissed after smelling of alcohol at work
- Gross misconduct – worked in warehouse, a high risk area
- Substance misuse policy – “Incapability through alcohol would be treated as gross misconduct”
- ET said policy was clear. Dismissal was **not** therefore unfair

Enforcing health and safety rules



- Does the refusal amount to a breach of internal rules, policies and procedures?
- Section 100 Employment Rights Act 1996
 - Dismissal automatically unfair if main reason was 1 of 6 specified grounds
 - e.g. taking appropriate steps to protect himself or others from serious and imminent danger; or
 - refusing to work or returning to work because of such dangers
- Employees who breach internal policies and procedures may also be committing a criminal offence under the HSWA 1974 or other Regulations (or both)

Enforcing health and safety rules



Is the refusal related to a medical condition?

- When should an employer dismiss an employee so as to protect him from unacceptable danger?
- Dismissal would be ill advised unless and until all alternative options have been considered and ruled out

Enforcing health and safety rules



Is the refusal related to a medical condition?

- Involve:
 - The employee
 - Occupational Health
 - H&S advisors
 - Line managers
 - HR



Enforcing health and safety rules



Is the refusal related to a medical condition?

- What if no suitable alternative can be found and all options have been exhausted?
- How can the *Withers* principle (and *Sutherland v Hatton*) be reconciled with *Coxall* and *Farmiloe*?

To dismiss or not to dismiss?



- Employers owe a duty to each employee to exercise reasonable care for their safety. An employer must take account of any special weakness or peculiarity of which is he or ought to be aware
 - Paris v Stepney BC [1951]



To dismiss or not to dismiss?



- An employer should consider the range of available options and discuss them with the employee and others (there must be a proper investigation and consultation) i.e. a medical examination and consideration of any adjustments to the work or alternative work
 - Carry out a proper examination of the risks ([Hay v Surrey County Council \[2006\]](#))

To dismiss or not to dismiss?



- [Hay v Surrey County Council \[2006\]](#)
- Knee condition unconnected with employer but aggravated by work;
- Must carry out a proper risk assessment and consider reasonable adjustments to accommodate the disability, although it does not need to be “formal”

Dismissal



- [Royal Bank of Scotland v McAdie \[2006\]](#)
- Mrs A was dismissed due to long term sickness absence caused by stress
- OH Doctor related the condition to RBS, her employer
- EAT held dismissal NOT unfair
 - Employer must act reasonably;
 - Employer's culpability in relation to the ill-health is a relevant factor, but not decisive;
 - An employer should seek alternative employment for the employee, tolerate a longer period of absence or consider paying sick pay for longer than usual;
 - However, if an employee is unable to return to work within a reasonable timeframe, then it will be fair to dismiss

Dismissal



- [Royal Bank of Scotland v McAdie \[2007\]](#)
- Court of Appeal upheld EAT's decision (August 07)
- An employer's culpability in bringing about reason for the incapacity would not render dismissal automatically unfair
- Although a relevant factor to take into account in terms of whether decision was reasonable

Summary - to dismiss or not to dismiss?



- If no suitable and safe alternative is available an employee may be entitled to insist on running the risk provided the risk is a small/trivial one
 - **Withers principle** and **Sutherland**
- If the residual risk is significant then dismissal may be the only sensible alternative, otherwise the employer runs the risk of both criminal and civil liability if he allows a willing employee to continue working
 - **Coxall** and **Farmiloe**
- Dismissal on grounds of **INCAPACITY** will not be unfair provided it has been managed fairly and the SDP have been complied with



Pinsent Masons

Kevin Bridges

Tel: 0117 9705233

[kevin.bridges@
pinsentmasons.com](mailto:kevin.bridges@pinsentmasons.com)