



## Employment alert

### Bondage - is it any of your employer's business!?

Employers are entitled to dismiss employees for misconduct, even for misconduct outside work, as long as it has some bearing on the employee's suitability for carrying out his duties.

For example, a crime of dishonesty committed by a cashier outside work calls into question the trust and confidence which his employer has in him as a cashier, whereas a driving offence would not. For a chauffeur the opposite might be true.

Following the interesting case of *Pay v Probation Service*, this Employment alert looks at cases where employees have been dismissed for their activities outside work in order to see what lessons can be learnt from them.

#### ***Pay v Probation Service***

In a recent case [reported in the media](#), a Probation Service employee, Mr Pay, had a sideline business making bondage and sadomasochism equipment and organising sex "performances". He had to disclose outside interests but merely told his employer that he was involved in a business, the coyly-named Roissy Workshops Ltd.

An anonymous fax was sent to his employer explaining what type of products Roissy Workshops Ltd produced. It contained a picture of Mr Pay wearing a gimp mask, standing next to two semi-naked women. It gave the address of the company's website. To spare your blushes we shall depart from our usual practice of providing a hyperlink to websites referred to in Employment alerts.

The employer considered that Mr Pay's private activities were incompatible with the role of a probation officer working with sex offenders and that the activities might bring the Probation Service into disrepute. Although several witnesses testified to Mr Pay's expertise and professionalism he was dismissed. He brought an unfair dismissal claim.

The Tribunal found that his activities raised the "possibility" of damaging the employer's reputation (there was no evidence of any actual damage). It found for the employer. So did the Employment Appeal Tribunal. So too did the Court of Appeal.

At this point many employees would have given up. However Mr Pay appealed to the European Court of Human Rights (ECHR) in Strasbourg. He claimed that his activities were private and so he should be protected by the European Convention on Human Rights, which protects the right to respect for individuals' family and private lives.

Overriding the right to a family and private life can be justified for reasons of:

- national security
- public safety
- the economic well-being of the country
- the protection of health or morals
- the prevention of disorder or crime
- the protection of the rights and freedoms of others

It is this last reason that the employer relied on. It argued that the dismissal was justified given the importance of being able to perform its public functions effectively and uphold its reputation.

The ECHR did not actually decide whether Mr Pay's activities were private or not. It ventured an opinion that they were not. Because he had blanked out his face on his website and used a pseudonym on the website the ECHR was prepared to give him the benefit of the doubt that his activities were private and move onto the question of whether the employer's interference in his private life was justified, given its interest in protecting its reputation.

As probation officers need to maintain the respect and confidence of the public, especially victims of sex crime, the ECHR agreed with the employer that it had not been a breach of his human rights to dismiss him.

### **X v Y**

In *X v Y* the Court of Appeal decided that the right to respect for private life did not apply to sex in a public toilet. An employee, working with young offenders, was fairly dismissed when the employer found he had been cautioned for "*cottaging*".

Unsurprisingly the Court of Appeal decided that a public toilet was not a private place.

### ***Barcelos v London Borough of Hammersmith***

In this case a home help working with vulnerable people was disciplined for failing to inform her manager about a relationship she had had with a client outside work, contrary to the employer's policy.

The EAT said this was a matter which went to the employer's trust and confidence in the employee necessary for a continuing employment relationship and found for the employer.

### ***Liddiard v Post Office***

Mr Liddiard was dismissed for involvement in football hooliganism when England played Tunisia in the 1998 World Cup. He was named and shamed by the Daily Mirror which also identified him as a postman. He admitted throwing bottles at the Tunisian fans and given 40 days in prison for attacking a police officer.

The employer charged him with bringing his employer into disrepute by actions which questioned his suitability for continued employment. It obtained a copy of the French court transcript and had it translated for use in the disciplinary proceedings.

Mr Liddiard lost his unfair dismissal claim.

### ***P v Nottinghamshire County Council***

An employee was dismissed from his post as a groundsman at a girls' school after pleading guilty to indecently assaulting his daughter, a pupil at the school.

The education authority took the view that his offence called into question his suitability for employment at a school. The employee complained that this was not the case because he did not work directly with children. A Tribunal agreed with him.

The education authority appealed to the EAT and won. The Court of Appeal confirmed the victory saying that "*Mr P could not continue in an employment which brought him into even casual contact with young girls*".

### ***R v Securicor***

A security guard was charged with sexual offences against children and denied the offences to his employer.

However he was dismissed on the grounds that the employer did not believe him and if it became common knowledge its reputation might be damaged, especially with the customer at whose premises he was based.

The employer lost the unfair dismissal case as it failed to contact the customer in question or consider any alternatives such as suspension until the criminal trial.

These failures meant that the employer had not taken the steps which it should have done and the employee was held to have been unfairly dismissed.

## **Conclusions from these cases**

To avoid a finding of unfair dismissal a dismissal must be for a fair reason and fair in all the circumstances.

It sometimes does happen that an employer wants to dismiss for conduct (a potentially fair reason) that happens outside work. It is commonly known that the Tribunal uses its own "*industrial experience*" in deciding whether an employee's conduct is such that it is fair to treat it as a reason for dismissing.

What is less commonly known is that the Tribunal must also take the Human Rights Act and European Convention on Human Rights into account where the conduct occurred in the context of the employee's private life.

Factors to consider in such cases include:

Whether the employee had a reasonable expectation of privacy (eg did the conduct take place on private premises)

How directly the conduct affects the employment (eg drugs where driving or machinery is part of the job)

Whether the employer has a high public profile

Whether the employee has contact with members of the public, especially vulnerable people

Whether redeployment is possible (subject to the nature of the conduct and the size and administrative resources of the employer)

Whether the public/press is likely to find out about the conduct

Whether employee is willing to stop the activities if given merely a warning

Whether the activity is increasingly being viewed by the mainstream as acceptable (as the Court described bondage in the case of *Pay v Probation Service*)

How likely the employee is to redeploy his skills elsewhere

The acceptability of the conduct to colleagues

Fighting is taken extremely seriously by Tribunals

Criminal conduct raises its own issues, of which these are a few of the main ones:

You may need to consider whether to await the outcome of a police investigation. Delaying may prejudice the disciplinary proceedings because witnesses' memories may become hazy. The police may take a long time to investigate whilst the employee is suspended on full pay. If this looks likely you may be justified in pressing ahead.

Consider whether the employee has been arrested, charged or convicted. Merely being charged does not entitle you to conclude that an offence has been committed – you must show a reasonable belief in guilt from doing some sort of investigation.

If an employee remains silent during the disciplinary process (perhaps on legal advice from his criminal lawyer) you may nonetheless proceed to discipline if you have persuasive evidence. If you have no evidence apart from the fact of arrest and there may be a possible explanation it is safest to wait until an explanation surfaces. Where an employee is caught in the act or confesses to the police, less caution is necessary.

Evidence collected by the police and given to you may be used in the employee's disciplinary hearing.

An employee absent from work because of being remanded in custody should not be dismissed automatically.

## **Finally**

If you would like to participate in the following topical BSDR survey, please contact us\*

BSDR bedroom Survey

**What happens in the privacy of your bedroom?**

Mainly work-related activities

Mainly unspeakable acts. Please inform my line manager by e-mail

Its none of your business

\*not really



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