

**Henderson v Connect (South Tyneside) Ltd [2010] IRLR 466**

Mr Henderson was employed as a school bus driver on a contract between Connect and South Tyneside Metropolitan Borough Council. The contract provided the Council with an absolute right to veto the employment of any individual providing the service.

Mr Henderson had initially been cleared to work with children after mandatory Criminal Record Bureau checks, but subsequently the council brought to the employer's attention information that it had received alleging that the claimant had been involved in the sexual abuse of his two young nieces. The employer's general manager put those allegations to the claimant, who said that they related to a period several years back, that he had done nothing wrong, and that the matter had been investigated by the police in 2004, who had decided not to prosecute.

The South Tyneside Safeguarding Children Board convened a meeting, attended by representatives of the school, the social services and legal departments of the Council and a police officer. Mr Henderson, however, was not invited and had no opportunity to put his case. It was decided that Mr Henderson could no longer work with children and the Council exercised its contractual right to veto his employment. The employers made representations to the council, but to no avail. As the employers had no alternative work for Mr Henderson, he was dismissed.

An employment tribunal found the dismissal for some other substantial reason, due to third party pressure, was fair. The EAT rejected Mr Henderson's appeal.

Where an employee is dismissed at the request of a third party, the fact that the third party may have acted unfairly, and the employee therefore suffers an injustice, does not mean that the dismissal is unfair within the meaning of the unfair dismissal legislation. That is because the focus is squarely on the question of whether it was reasonable for the employer to dismiss.

If the employer has done everything that he reasonably can to avoid or mitigate the injustice brought about by the stance of the client – most obviously by trying to get the client to change his mind and, if that is impossible, by trying to find alternative work for the employee – but has failed, any eventual dismissal will be fair. That may seem a harsh conclusion; but it would of course be equally harsh for the employer to have to bear the consequences of the client's behaviour.

The tribunal had been very conscious that the claimant was being dismissed because of concerns based on allegations of misconduct which he had had no chance to rebut and for which he had never been charged, but it found that the employer had done all it could reasonably be expected to do to assist the claimant and prevent him from losing his job.

**Keeping You One Step Ahead**

**Makbool Javaid**  
Partner  
Head of Employment Law

Tel: 020 3206 2745  
Mob: 07817 805315

[makbool.javaid@smab.co.uk](mailto:makbool.javaid@smab.co.uk)



**Ewan Keen**  
Partner  
Employment Law Group

Tel: 020 3206 2724  
Mob: 07870 942622

[ewan.keen@smab.co.uk](mailto:ewan.keen@smab.co.uk)



### **Samuel Smith Old Brewery (Tadcaster) v Marshall and anor IDS 903**

M and his wife managed one of the brewery's public houses. The area manager told M to reduce his employees' working time from 84 to 45 hours per week, for economic reasons. The brewery had a power to reduce hours in accordance with the management agreement that M and his wife had entered into.

The couple believed that such a reduction in hours would lead to their having to work much longer. Consequently, they refused to carry out the instruction. They raised a grievance but this was not upheld.

An appeal meeting was scheduled, but before that date, the employer decided to take disciplinary action against the couple for their continued recalcitrance. M and his wife refused to participate in the disciplinary procedure following advice from their solicitor. But the hearing went ahead in their absence and they were dismissed for gross misconduct.

An employment tribunal rejected their argument that the employer's instruction was unreasonable and that they could justifiably ignore it. However, the dismissal was unfair as the disciplinary hearing took place in the employees' absence and before their grievance appeal had taken place. The EAT upheld the employer's appeal.

There is no authority for the proposition that a grievance procedure should be completed in full before a disciplinary hearing can take place. It can only be in the rarest of cases that it would be outside the range of reasonable responses for an employer to proceed with a disciplinary process before hearing a grievance appeal, at least in the absence of some clear evidence of unfairness or uncompensatable prejudice. It followed that the tribunal had erred in that it had substituted its own decision for that of the reasonable employer. As a consequence the EAT substituted a decision that the dismissals were fair.

### **Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol IDS 902**

The Landes-Vertragsbedienstetengesetz ('the LVBG') provides public servants in the Austrian Province of Tyrol with various employment rights. Paragraph 55(5) L-VBG provides that, in the event of a change in working hours, any annual leave not yet been taken is adjusted in proportion to the number of hours in the new contract. The body representing hospital employees in Tyrol sought a declaration before the Regional Court that Paragraph 55(5) L-VBG was incompatible with the EU framework agreement on part-time work. The Austrian Court referred the question to the ECJ.

The ECJ ruled that a right to paid annual leave accumulated during a period of full-time employment, and which the worker has not yet had the opportunity to exercise, could not be reduced pro rata upon the worker changing to part-time employment as such a rule was incompatible with Clause 4.2 of the framework agreement on part-time work.

The Court acknowledged that under Clause 4.2, the amount of leave may be reduced pro rata in respect of part-time workers, and domestic legislation may provide for the loss of the leave at the end of a leave year or carry-over period, provided the worker had the opportunity to exercise that right. But that principle could not be applied 'after the fact' to reduce leave entitlement accrued during a period of full-time work.

The taking of annual leave in a period after that in which it accrued should not be connected to the hours that the individual works in that later period. The ECJ therefore held that Clause 4.2 of the framework agreement on part-time work and the Working Time Directive preclude the partial loss of the right to leave accrued over a reference period, where the worker has not had the opportunity to exercise that right. Nor was it compatible with EU law to oblige such a worker to take that leave on a reduced level of holiday pay.