

**Aberdeen City Council v McNeill [2010] IRLR 374**

The principle that an employee who is in repudiatory breach of contract is precluded from relying on any subsequent breach by an employer was established in the case of *RDF Media Group v Clements*. In this case, the EAT applied the principle to a claim of constructive dismissal, holding that an employee who has already breached the contract is not entitled to terminate their contract of employment by reason of the employer's conduct and claim constructive dismissal.

The case concerned the Council's sport and recreation manager. He resigned during an investigation into his misconduct and claimed constructive dismissal. During the investigation, it emerged that the claimant had been guilty of misconduct in several respects, including calling a junior female employee "big boobs" or "big tits" at senior management meetings when she was present. The employment tribunal regarded this as merely "sexual banter" amongst friends, but the EAT did not share this view. The EAT held that even if there are friendships which involve sexual banter, that does not make verbal sexual harassment in the workplace any less serious. Nor does the fact that the victim does not complain at the time.

Nor, did the fact that a victim herself engaged in the banter where the employee perpetrating it was a senior manager who ought to be able to be relied on to set appropriate behavioural standards.

The tribunal also found that the claimant was entitled to claim constructive dismissal because the Council's investigatory procedure was oppressive and in breach of the implied term of trust and confidence. But the EAT upheld the appeal and dismissed the claim. If the claimant was, at the time he resigned, in breach of that implied term, he was in repudiatory breach and not entitled to terminate the contract on the basis that the employer had breached the implied term.

This is the first case where this principle has been extended to the unfair dismissal jurisdiction. It means that employees who are contemplating resigning, and those who have brought proceedings, will have to bear in mind the possibility that their constructive dismissal claim will be invalidated by a finding that they themselves had previously committed an act of misconduct sufficiently serious as to amount to a repudiatory breach of contract.

**Keeping You One Step Ahead**

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### **Sarkar v West London Mental Health NHS Trust IDS Brief 900**

The Trust received several complaints from staff about S, a consultant psychiatrist, alleging his conduct was 'harassing and distressing' and left them 'vulnerable and intimidated'. The Trust decided to deal with the allegations under its 'Fair Blame Policy' (FBP), an informal type of mediation procedure designed for conduct which does not constitute a serious or gross misconduct offence. Further conflict arose during the FBP. As a result, S withdrew from the FBP to be dealt with via an ordinary disciplinary hearing. The outcome was his summary dismissal for gross misconduct.

The tribunal found that S had been unfairly dismissed, as dismissal was not reasonable in the circumstances. The Trust had chosen to deal with the matter through the FBP, implying that the misconduct alleged was of a relatively minor nature. The same offences could not then be regarded as matters of such a grave and serious nature as to constitute gross misconduct.

Allowing the appeal, the EAT held that the tribunal had erred in law by focusing on the initial use of the FBP and the breakdown of that procedure. The tribunal had also substituted its view of the seriousness of the incidents for that of the Trust. S appealed.

The Court of Appeal overturned the EAT's decision. The tribunal was entitled to consider that it was inconsistent for the Trust to use the FBP, indicating that it regarded the misconduct to be relatively minor, then to dismiss S for gross misconduct based on much the same matters. This was a factor which it was proper for the tribunal to consider when applying the 'range of reasonable responses' test.

Furthermore, the tribunal had not substituted its own view for that of the Trust in relation to the seriousness of the later incidents of misconduct. It had examined the evidence from a reasonable employer's perspective.

### **BP plc v Elstone and anor IDS Brief 901**

Petrotechnics Ltd oversaw safety processes for clients including BP. Mr Elstone was dismissed for gross misconduct after he told BP about his concerns about safety. Petrotechnics viewed this to be a disclosure of confidential information constituting a breach of contract. Mr Elstone then became a consultant to BP. When he enquired about being provided with further work, BP refused to engage him because they had been made aware that Petrotechnics had dismissed Mr Elstone for disclosing confidential information.

Mr Elstone brought a claim against BP, arguing that the company had subjected him to a detriment on the ground that he had made a protected disclosure. An employment judge decided that protection for making a public disclosure does not require a worker to be working for the employer against whom the whistleblowing claim is made, so his whistleblowing claim against BP could proceed.

BP appealed. It argued that under the legislation a worker has the right not to be subjected to a detriment by "his employer" on the ground that he or she has made a protected disclosure. The employer to whom the protected disclosure was made was Petrotechnics.

The EAT, however, upheld the employment judge's decision that there was jurisdiction to hear the claim. The whistleblowing provisions must be applied purposively to provide protection and their purpose would not be served if protection is lost on the change of employer. The legislation does not require that the person making a disclosure must have a working relationship with the employer that eventually dismisses him or subjects him to a detriment on that ground. The term "his employer" means a worker can pursue a claim against their current employer if a detriment is suffered due to a disclosure made while working for a previous employer.