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# Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal

PHILIPPA M. COLLINS\*

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## ABSTRACT

The question of whether an Employment Tribunal should accept the employer's reason for a dismissal has received little attention in studies of the law of unfair dismissal. This shortage of analysis continues even though this stage holds the potential to decide the outcome of the case. The current approach to the interpretation of the five potentially fair reasons for a dismissal is to leave them undefined, allowing employers broad scope to rely upon almost any reason to justify their decision to dismiss an employee. This piece demonstrates how the established view of this stage of the fairness process is a missed opportunity and fails to deliver the full potential of the law of unfair dismissal as it was drafted. In order to protect the fundamental right not to be unjustifiably dismissed, a threshold of substantiality should run throughout the reasons for dismissal—assessed objectively by the Tribunal judge. The assertion of such a threshold is particularly necessary under the open-ended 'some other substantial reason' category. The piece turns then to disciplinary dismissals, arguing that the current approach results in fair dismissals, first, for minor misconduct and, second, because of conduct with no connection to the employment relationship. Two solutions to these particular problems will be put forward: a tailored legislative amendment and a contractual reading of the existing section. Both approaches would introduce an element of substantive fairness that is currently absent and place some confines on the scope of the employer's managerial prerogative by restraining the reasons for which they may fairly dismiss.

## 1. INTRODUCTION

In the law of unfair dismissal, the first hurdle for the employer is to present a legitimate reason for their decision to dismiss their employee. Section 98 of the Employment Rights Act 1996 ('the ERA') lists the possibilities

\*University of Bristol, UK, [philippa.collins@bristol.ac.uk](mailto:philippa.collins@bristol.ac.uk). The author would like to thank Stephen Skinner, Hugh Collins, Severine Saintier, Tonia Novitz, Michael Ford QC and the Journal's reviewers for their comments. Any errors are the author's own.

available to them, such as the employee's conduct or their capabilities.<sup>1</sup> If the employer fails to convince the Employment Tribunal that the reason for the dismissal fell within the scope of the enumerated 'potentially fair reasons for dismissal', then the dismissal will be considered unfair and the claimant succeeds in their case.<sup>2</sup> We can see that the process of examining the reason for a dismissal has the potential to be a pivotal moment in any unfair dismissal case, particularly in the light of the lax standard of scrutiny—in the form of the fairness assessment—that follows it. Despite the decisive role that the assessment of an employer's reason for dismissal could play,<sup>3</sup> limited scholarly and judicial attention has been paid to the details of this process and its challenges.

Although the right against unfair dismissal was intended to place a check on managerial prerogative, the current interpretation of section 98(1)–(2) has failed to impose any real restraint upon employers at this crucial stage. Both the listed reasons, such as conduct, and the catch-all category of 'some other substantial reason' which is of a kind that could justify the dismissal have been interpreted broadly, excluding only the most trivial of reasons. The enquiry into the employer's reason is therefore very brief. The requirement that a valid reason should be produced for a dismissal, protected as one aspect of an individual's fundamental right not to be unjustifiably dismissed,<sup>4</sup> is almost non-existent in practice.

Difficulties have particularly been noted in relation to economic dismissals or 'quasi-redundancies',<sup>5</sup> which currently fall to be considered under the wide banner of 'some other substantial reason' for a dismissal. Dismissals for economic reasons is an area of employment law that is likely to have unfortunate prominence as the UK goes into recession as a result of the global COVID-19 pandemic.<sup>6</sup> The Leader of the Opposition, Sir Keir Starmer QC, recently criticised business practices that are used to force a reduction in the contractual terms and conditions enjoyed by staff. One such practice he referred to as 'fire and re-hire', where large scale contract terminations are

<sup>1</sup>Employment Rights Act 1996, s 98(1) and (2).

<sup>2</sup>See, for example, the outcome in *Kuzel v Roche* [2008] IRLR 530.

<sup>3</sup>Automatically unfair reasons for a dismissal, set out in ss 98B–105 of the ERA 1996, are also a key part of this inquiry but are beyond the scope of this paper.

<sup>4</sup>See the Revised European Social Charter, Art 24 and the Charter of Fundamental Rights of the European Union [2016] OJ C202/389, Art 30.

<sup>5</sup>J. Bowers and A. Clarke, 'Unfair Dismissal and Managerial Prerogative: A Study of Other Substantial Reason' (1981) 10 *ILJ* 34.

<sup>6</sup>D. Strauss, 'UK Economy Suffers Worst Slump in Europe in Second Quarter', *Financial Times* (London, 14 September 2020).

followed with an offer of a new, probably less desirable contract.<sup>7</sup> The current approach of unfair dismissal law restricts the Employment Judge's capacity to examine the reason produced by the employer, to assess its urgency upon the evidence presented and to ask whether it is sufficient to justify the termination of an employment relationship.<sup>8</sup> In Section 3, I argue for a new interpretation of this stage of the unfair dismissal enquiry, which would provide the tribunals with a tool to examine such practices where they have been deployed and find them to be unfair if they lack an adequate justification.

In Section 4, I turn to the listed reason of the employee's 'conduct'. The statute, as it was originally drafted, set out no qualifications upon this potentially fair reason and it has been interpreted broadly by the judges. This approach has led to a number of difficulties, particularly in relation to trivial misconduct and conduct that bears no connection to the employment relationship being admitted as fair reasons for a dismissal. In Section 5, I propose two potential solutions—one, a statutory reform option and second, a contractual definition of misconduct. The former would explicitly delimit the range of conduct for which employees could be fairly dismissed and the alternative would require an employer to demonstrate that a term of the contract had been breached in order to rely on the misconduct ground. Both would raise the threshold of severity before an employee should be disciplined and attempt to ensure that the employee enjoys time away from work where they are free of the employer's influence and regulations. The initial, reason-based stage of an unfair dismissal case would assume more prominence, providing a substantive component of scrutiny before the procedural review that is undertaken under the fairness test. The scales would be rebalanced after many years of being tilted in the employer's favour within the law of unfair dismissal.

## 2. THE REGULATION OF THE EMPLOYER'S POWER TO DISMISS

The right not to be unfairly dismissed is contained in section 94 of the ERA 1996. Only employees working under a contract of employment are entitled

<sup>7</sup>K. Starmer, *Speech to TUC Conference 2020* (Tuesday, 15 September 2020) text, available at <https://labour.org.uk/press/keir-starmer-speech-to-tuc-conference-2020/>.

<sup>8</sup>For an outline of other difficulties in this area and reform recommendations that complement those offered here, see A. Bogg, 'Firing and Rehiring: An Agenda for Reform' (Institute of Employment Rights blog, 9 October 2020), <https://www.ier.org.uk/comments/firing-and-rehiring-an-agenda-for-reform/> (accessed 14 October 2020).

to make a claim, and in most cases, they must satisfy a two-year service period to qualify for protection.<sup>9</sup> Once a dismissal has been proved, the examination of whether the dismissal was fair in the circumstances proceeds in two stages. The first stage is the reason-setting element. Here, the employer is required to produce the principal reason for their decision to dismiss the claimant. If the employer fails to produce a reason that is acceptable under the statute, the dismissal will be held to be unfair for lack of a justification.<sup>10</sup>

There are two groups of reasons: potentially fair reasons and automatically unfair reasons for a dismissal. Included in the latter category is dismissal for reasons of pregnancy, whistleblowing and trade union membership, among others,<sup>11</sup> and the outcome will be a finding in favour of the claimant. A potentially fair reason is either enumerated in section 98(2) or ‘some other substantial reason’ of a kind that could justify a dismissal under section 98(1)(b). The listed reasons that could potentially justify a dismissal are: the conduct of the employee, their capability, a statutory requirement or redundancy.<sup>12</sup> The tribunal should seek the principal, subjective reason that operated upon the employer’s mind in deciding to dismiss.<sup>13</sup> Nevertheless, the tribunal may disagree with the label given to the reasons for dismissal, for example where the employer misunderstood the legal meaning of redundancy, but any incorrect label can be corrected by the tribunal.<sup>14</sup> The focus of this piece is particularly upon dismissals where the reason cited by the employer is the employee’s conduct or ‘some other substantial reason’.

The general test of fairness is applied at the second stage: was it reasonable to treat the reason as sufficient to dismiss?<sup>15</sup> The statutory test of fairness has been loosened to a ‘range of reasonable responses’ (RORR) test through judicial interpretation. If the tribunal can be satisfied that the dismissal was within the range of reasonable responses that a reasonable employer could have made in the circumstances, then the dismissal will be fair.<sup>16</sup> The review is applied to both the substance of the reason for the dismissal and the procedure that proceeded it. Together with the prohibition on the ‘substitution

<sup>9</sup>See ERA 1996, s 108.

<sup>10</sup>See *Kuzel v Roche*, above n.2.

<sup>11</sup>ERA 1996, ss 98B–105.

<sup>12</sup>ERA 1996, s 98(2).

<sup>13</sup>*Taylor v Alidair Ltd* [1978] IRLR 82, [19].

<sup>14</sup>*Abernethy v Mott, Hay and Anderson* [1974] IRLR 213, [9].

<sup>15</sup>ERA 1996, s 98(4).

<sup>16</sup>*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439, 442.

mindset', the RORR test has been criticised for operating much closer to a perversity standard.<sup>17</sup> The tribunal is unable to set standards of conduct to guide employers in dismissing their staff and it is very rare for a case to be found to be substantively unfair. It will be considered within the 'range of reasonable responses' to dismiss for all but the most absurd reasons, as will be seen further below. The reality of the law of unfair dismissal is that the employee receives a poor standard of job security under the statute.

To give a full picture of the protection of employees in dismissal, we must turn to the common law. The employee may wish to argue that the employer has dismissed them in breach of contract in order to claim damages or an injunction. For many years, however, the courts have been reluctant to place any limit on the employer's inherent right to terminate the contract by giving a reasonable period of notice. Combined with the principles of contract law, the right to give notice means that the remedies in most cases are limited to wages for a brief notice period. The statutory right was introduced in part to counteract the inadequate standard of protection offered by the common law of wrongful dismissal.<sup>18</sup>

Although unfair dismissal law took the leading role after its introduction in 1971, the statutory right prompted the common law to evolve to be more protective of the employee's expectations. The emergence of the implied term of mutual trust and confidence was a major milestone. The term placed a limit on the employer's prerogative, but its application to the manner of an employee's dismissal was rejected by the House of Lords in *Johnson v Unisys*.<sup>19</sup> The opportunity to offer generalised safeguards to an employee through the common law was closed off. This denial was taken a step further in *Edwards v Chesterfield NHS Trust*,<sup>20</sup> in which the UK Supreme Court held by a majority that a breach of a contractual disciplinary procedure will not give rise to contractual damages at the common law. Lord Dyson, in the leading opinion, argued that '[Parliament] has specified the consequences of a failure to comply with such provisions in unfair dismissal proceedings'.<sup>21</sup> This statement indicates an understanding that, if this contractual form of job security is to be enforced, it must be through the statutory route. Overall,

<sup>17</sup>Most recently, see A. Baker, 'The "Range of Reasonable Responses" Test: A Poor Substitution for the Statutory Language' (2021) 50 *ILJ* 226.

<sup>18</sup>M. Freedland, 'Constructing Fairness in Employment Contracts' (2007) 36 *ILJ* 136, 137.

<sup>19</sup>*Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518.

<sup>20</sup>*Edwards v Chesterfield Royal Hospital NHS Foundation Trust, Botham v Ministry of Defence* [2011] UKSC 58, [2012] 2 AC 22.

<sup>21</sup>*Ibid* [39].

it would be reasonable to conclude that both the statutory and common law routes have failed to offer substantial protection from the employer's exercise of their managerial powers.

### 3. THE NEED FOR A *SUBSTANTIAL* REASON FOR DISMISSAL

When one looks at section 98 as a whole, the phrasing indicates that the reason for a dismissal must be a *substantial* one, rather than a trivial one. This proposition has found support in the work of several commentators,<sup>22</sup> and it would also permit a level of judicial scrutiny of the reason produced that is currently absent. Given the absence of substantive review under the 'range of reasonable responses' test, the introduction of a more stringent analysis at the stage of examining the legitimacy of the reason would be welcome. It would act as an important countermeasure to the breadth of manoeuvre permitted to managers by the operation of the fairness inquiry. If the employer could not provide some evidence that they had a substantial reason to dismiss their employee, the employee would receive a ruling in their favour. This proposition will be defended on the basis that it would increase the scrutiny of employer's decisions to dismiss and align better with the statute as it was originally drafted.

The correct interpretation of section 98(1)(b) was never heavily contested in the early case-law of unfair dismissal. In *RS Components v Irwin*,<sup>23</sup> the National Industrial Relations Court discussed how the 'some other substantial reasons' provision should be interpreted. The employee faced dismissal if he did not sign a new contract containing a restrictive covenant. The representatives on behalf of Mr Irwin did not contest the NIRC's conclusion that tribunal's construction of section 98(1) (then section 24(1) of the Industrial Relations Act 1971) as a genus of reasons was incorrect. The court stated that there were 'legal' and 'practical objections' to interpreting the potentially fair reasons as a genus to be added to.<sup>24</sup> These were not expounded upon at any length: the court settled upon a hypothetical example regarding a likely 'other substantial reason' which, I would argue, did not

<sup>22</sup>S. Deakin and G. S. Morris, *Labour Law*, 6th edn (Oxford: Hart Publishing, 2012) 526; H. Collins, *Justice in Dismissal: The Law of Termination of Employment* (Oxford: Clarendon Press, 1992) 45–46, and see also H. Beale, *Chitty on Contracts*, 33rd edn (London: Sweet & Maxwell, 2020) [40–225].

<sup>23</sup>*RS Components v Irwin* [1973] ICR 535.

<sup>24</sup>*Ibid* 540.

take the general argument much further. It is perhaps unfortunate that this point was not argued more thoroughly and that it was posed as an issue of *eiusdem generis* (where a general class is limited to the same type of things as those listed), rather than examining what the most appropriate role for the tribunal was in examining the reason produced by the employer. The thrust of the Industrial Tribunal's reasoning had been that there was no substantial reason for dismissal, and the NIRC disagreed with them on this point. The disagreement on the facts, however, did not resolve the issue of the appropriate threshold for a reason for dismissal or the correct interpretation of the SOSR provision.

The courts were, and remain, reluctant to accept the full force of the restriction placed upon managerial prerogative by the reason-finding process. For example, the court in *RS Components v Irwin* could not comprehend that Parliament may have intended to limit justified dismissals in reorganisation situations to only those regulated by the statute's redundancy provisions.<sup>25</sup> The limit that such a legal position would place upon an employer's room to manoeuvre could not be countenanced. The only requirement that must be established on the facts is that the *employer believes* that there was a sound business reason for the dismissal:<sup>26</sup> it must not be a 'trivial or unworthy' reason.<sup>27</sup> This standard of examination places a low threshold for employers' reasons for dismissal and overall provides an inadequate standard of protection for the employee's fundamental social right not to be unjustifiably dismissed.

John Bowers and Andrew Clarke noted that, in the years following *RS Components*, '[t]he case law under the head of "some other substantial reason" has become too friendly to managerial prerogative in a statute explicitly proclaiming itself to provide a "right" to protection against unfair dismissal.'<sup>28</sup> The established approach entails no objective element, whereby the judge would assess whether the reason is sufficiently pressing and serious to potentially justify a dismissal, with all of the negative consequences that it entails. Bowers and Clarke point to a second consequence of the courts' interpretation of section 98(1)(b): the employee is presented with very limited opportunity to challenge the reason for dismissal. The approach here is far

<sup>25</sup> *Ibid* 540.

<sup>26</sup> *Hollister v National Farmers' Union* [1978] ICR 713, 722 per Arnold J.

<sup>27</sup> *Kent County Council v Gilham* [1985] IRLR 18, [18].

<sup>28</sup> S. Anderman, *The Law of Unfair Dismissal*, 3rd edn (London: Butterworths Tolley, 2001) 277.



from the even-handed assessment based on the judge's perception of the circumstances that appeared to be envisaged by the statute. As they argue,

The reasons put forward by the employer may be challenged only on the basis of a lack of evidence. This approach...undermines the principle that the statutory provisions are designed to ensure that the dismissed employee receive a proper assessment by the tribunal of the reasons advanced by the employer for the dismissal. Instead, the judgment of the employer is set up as that *prima facie* to be applied.<sup>29</sup>

In addition to the objection that the current approach fails to safeguard the employee adequately, there are several other reasons to favour a re-assertion of a substantiality threshold under section 98. First, one must consider the phrasing of the statutory provision. The statutory design is unusual. In section 98(1)(b), the ERA states that the employer must demonstrate that their reason for the dismissal 'is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee [SOSR]...'.<sup>30</sup> The next subsection then lists conduct, capability and so forth. This phrasing appears to group together the enumerated reasons and the SOSR category under the banner of reasons sufficiently substantial that they could justify the termination of an employee's job. This straightforward interpretation led Simon Deakin and Gillian Morris to interpret the group of reasons that may justify dismissal as an *ejusdem generis*:<sup>31</sup> any additional reason accepted under the catch-all SOSR provision must reach the same threshold of seriousness as the others that were listed by Parliament. As those authors observe, if 'the category of SOSR is capable of extending to *any* substantial reason, what was the point of enacting section 98(2)?'<sup>32</sup>

Beyond the statutory phrasing, there is also a benefit from the perspective of consistency between the different reasons for dismissal. John Bowers and Andrew Clarke in their study of the SOSR category observed that one of the problems in the early case law was the open-ended provision being used to subvert the other gateways.<sup>33</sup> This creates an injustice for the claimant, who has been dismissed in circumstances where the employer cannot demonstrate one of the potentially fair reasons for dismissal. The

<sup>29</sup>Bowers and Clarke, above n.5, 36.

<sup>30</sup>ERA 1996, s 98(1).

<sup>31</sup>Deakin and Morris, above n.22, 526

<sup>32</sup>Ibid.

<sup>33</sup>Bowers and Clarke, above n.5, 41.

tribunal permits them to circumvent the list through an expansive interpretation of the SOSR provision, rather than reinforcing the gateways set out by Parliament and refusing attempts by employers to subvert them.

One example of this problem has occurred in relation to employers who believe that an employee is working illegally. Under section 98(2)(d), one potentially fair reason for dismissal is that the continued employment of the individual would amount to a breach of statutory duty or enactment. This would permit the dismissal of a person who did not have the necessary permission to work in the UK. ‘Some other substantial reason’, however, has been used by Employment Tribunals to rescue employers who dismissed on the basis of a mistaken belief that their employee lacked the requisite work permissions.<sup>34</sup> For example, in *Baker v Abellio London Ltd*,<sup>35</sup> the claimant had a right to live and work in the UK, but his employer asked for further evidence of this fact. When Mr Baker failed to produce evidence beyond his passport, the employer dismissed him. The Employment Tribunal found that Mr Baker was not subject to immigration control therefore the employer could not rely upon section 98(2)(d). Instead, the employer’s genuine belief that it would be unlawful to continue to employ the claimant amounted to ‘some other substantial reason’, according to both the tribunal and the Employment Appeal Tribunal.<sup>36</sup> Mr Baker’s case seems like a straightforward example where the employer had failed to demonstrate a potentially fair reason for the dismissal. The tribunals should have found that the dismissal was without a reason, and therefore unfair, instead of permitting the employer to use the SOSR loophole to avoid responsibility for their error. Mr Baker could even have been re-instated in his employment, given there was no fault on his behalf.

A similar problem has occurred in cases of business reorganisations, with the tribunals showing a particularly lax attitude towards examining the substance of the reason underpinning the employer’s actions. Redundancy situations entail a degree of regulation and processes beyond that which would apply to fault-based dismissals. We have seen in the cases, however, that where the employer is not able to convince a tribunal that the businesses’ circumstances constitute a genuine redundancy situation by reason of closure of part of the business or a reduced need for the employee’s

<sup>34</sup>See *Bouchaala v Trusthouse Forte Hotels Ltd* [1980] IRLR 382 and *Hounslow London Borough Council v Klusova* [2008] ICR 396.

<sup>35</sup>*Baker v Abellio London Ltd* [2018] IRLR 186.

<sup>36</sup>*Ibid* [27].

particular skills, the reorganisation will be considered under the ‘other substantial reason’ heading.<sup>37</sup> The employer need only produce a ‘sound good business reason’<sup>38</sup> or point to discernible advantages to the organisation<sup>39</sup> in order to pass through this gateway, a low threshold given that multiple jobs will be lost as a result. The latter route is rather preferable for the employer, in fact, in avoiding redundancy pay-outs and engaging in protracted consultation and selection processes. An inconsistency is thereby generated, with very similar cases being considered under the redundancy route – with the additional measures as drafted by Parliament – while others are heard under ‘some other substantial reason’.

The difficulty of permitting the circumvention of the gateways to fairness specified by Parliament could be resolved by reference to a threshold of substantiality. A belief that is mistaken regarding a person’s migration status should not be accepted as a sufficiently substantial reason for dismissal: the provisions drafted by Parliament indicate that only *actual* breach of statutory duties should be enough to justify the termination of an employment relationship. Mistaken, if genuine, beliefs as to this issue were not considered sufficiently serious to add alongside it. An objective examination of the substance of the reason produced by the employer would ensure that employees can only ever be found to have been fairly dismissed for a valid and pressing reason.

I advocate for a return to the natural meaning of the statute, which establishes a general threshold of substantiality before a reason is accepted as one which may justify a dismissal in any circumstances. As argued by Deakin and Morris, a reason accepted as substantial should be ‘closely analogous to those listed’.<sup>40</sup> The employer’s belief that there was a ‘sound business reason’ to dismiss should not be sufficient. The reason’s sufficiency or otherwise must be judged by the tribunal. This approach would better reflect the purpose of the statute and give a higher standard of protection to the right not to be unjustifiably dismissed.

There is an additional reason why the introduction of a substantiality threshold would be timely. The COVID pandemic has generated a significant degree of economic uncertainty, to which many employers may

<sup>37</sup>See *Lesney Products & Co v Nolan* [1977] ICR 235, *Hollister v National Farmers’ Union*, above n.26, and *Richmond Precision Engineering Ltd v Pearce* [1985] IRLR 179.

<sup>38</sup>*Hollister v National Farmers’ Union*, above n.26, [12].

<sup>39</sup>*Banerjee v City and East London Area Health Authority* [1979] IRLR 147, [19].

<sup>40</sup>Deakin and Morris, above n.22, 526.

respond with attempts to reorganise their workforces and conditions to increase profitability. For example, there is currently a high-profile dispute between British Gas and a group of engineers regarding the company's insistence that employees work longer hours on a new contract or be dismissed.<sup>41</sup> This 'fire and rehire' strategy puts immense pressure upon workers to accept poorer working conditions or lose their income altogether. Any perception that the contract of employment and its terms are truly a voluntary and consensual choice of both parties are thoroughly undermined.<sup>42</sup> These kinds of schemes may become more prevalent in the aftermath of the pandemic: how does unfair dismissal law respond to them?

When tested by the unfair dismissal framework, Darren Newman observes that the law of unfair dismissal and the requirement to engage in collective consultation provide little more than 'procedural hoops' that an employer must jump through.<sup>43</sup> Reorganisations or quasi-redundancies are examined on the basis of their procedure but under the current approach of unfair dismissal law, the tribunals have very limited capacity to scrutinise the substance of the 'business case' underpinning the strategy. Alan Bogg has suggested one response under the 'fairness' inquiry whereby a dismissal would be unfair 'where the employer had reasonable economic alternatives open to it such that it could have avoided the result'.<sup>44</sup> An alternative, or additional, way of approaching these situations would be to use the assessment of the reason to unpick the employer's assertion that the strategy is needed. If the requirement of a *substantial* reason for dismissal is asserted, as I have advocated here, the judge would have grounds to assess the basis of the employer's plans and question whether there was an urgent need to diminish the conditions of work. Given the severe consequences of these policies for the workers affected, a substantial reason must be demonstrated to justify them.

<sup>41</sup>'British Gas Staff Start Five-Day Strike in "Fire and Rehire" Row' (*BBC News*, 7 January 2021) and J. Ambrose, "'A Kick in the Teeth": British Gas Engineers Face Losing Their Jobs or Longer Working Hours' (*The Guardian*, 28 March 2021).

<sup>42</sup>Bowers and Clarke, above n.5, 40, and D. Newman, 'Should We Ban "Firing and Re-hiring?"' (*A Range of Reasonable Responses*, 15 September 2020), <https://rangeofreasonableresponses.com/2020/09/15/should-we-ban-firing-and-re-hiring/> (accessed 24 September 2020).

<sup>43</sup>Newman, *ibid.*

<sup>44</sup>Bogg, above n.8.

#### 4. THE CURRENT APPROACH TO EMPLOYEE CONDUCT AND ITS CONSEQUENCES

At the stage of fixing a potentially fair reason for dismissal under section 98(2), the interpretation of the reference to the employee's 'conduct' has been left open with no qualification. The employer need only demonstrate that the reason for dismissal related to the employee's conduct. It does not need to prove that the conduct breached the terms of the contract of employment or constituted gross misconduct that would justify summary dismissal at common law.<sup>45</sup> The statute's phrasing and the tribunals' approach to the question of employee misconduct has led to two specific issues that will be elaborated upon below. The first difficulty is that minor misconduct is accepted as sufficient to—in principle—justify a dismissal, which can then easily be found to be within the 'band of reasonable responses' if an appropriate procedure is followed. Second, the conduct relied upon to discipline and dismiss an employee often occurs well outside the scope of the employee's duties under the contract of employment. In principle, the employer's influence should only reach so far; there should be some connection between the conduct cited and the operation of the employment relationship. Yet the current approach to the scope of employee conduct relied upon by the employer under section 98(1)(b) incorporates no limits of this kind.

##### A. Disproportionate Dismissals for Minor Misconduct

Insignificant instances of misconduct or breaches of the company's procedures that have no consequences, damaging or otherwise, for the employer have been held repeatedly to be capable of justifying a dismissal. This situation is troubling and certainly runs contrary to the protective aims of the statute in introducing a right not to be unfairly dismissed: giving employees some legal protection of their job security and appearing to curtail sharply the employer's managerial prerogative to respond to misconduct as they see fit. Given these purposes, one would be disappointed to learn that instances of minor misconduct are sufficient to deprive the individual of their job and that disproportionate managerial responses to such occurrences are left unchecked at this stage. This disappointment is compounded when it is

<sup>45</sup> *Farrant v The Woodroffe School* [1998] ICR 184, 194.

recalled that, in many cases, the ‘range of reasonable responses’ is elastic enough to allow such dismissals to be categorised as fair.

In *Robert Bates Wrekin Landscaping v Knight*,<sup>46</sup> Mr Knight was a gardener with an unblemished service record and worked for several years at the site of a third party, Babcock. He forgot to return a bag of bolts that he had found on the site before he left for the evening. The bag was left in his work van on the site overnight. Before the tribunal, Mr Knight’s intention to return the bag was corroborated by a statement given by one of his colleagues. It was also in evidence that the bag of bolts was worth £1 or £2. Mr Knight was summarily dismissed after the investigation. The Employment Tribunal concluded that this was a case of a dismissal relating to Mr Knight’s conduct. It held that the employer’s conclusion that the claimant had taken the bolts for personal gain was a genuine belief based upon reasonable grounds. Although admittedly a harsh decision, the decision’s substance was within the ‘range of reasonable responses.’<sup>47</sup> The dismissal was held to be unfair only on procedural grounds, because Mr Knight was not given a proper opportunity to represent himself in the meetings or a proper opportunity to appeal. The decision was upheld upon appeal.

This case is an example of a very minor instance of misconduct, with an entirely reasonable explanation, being accepted as an adequate basis for a fair dismissal. It is very difficult to accept that, from any perspective, Mr Knight’s dismissal could be justified in these circumstances. In fact, the decision to dismiss was driven by the policy of the client who owned the site, Babcock, that had a ‘no tolerance’ policy towards any kind of theft. Thus, the classification of Mr Knight’s conduct as a disciplinary offence was based on the most subjective factor: the employer’s willingness to dismiss an employee to appease a third-party client.<sup>48</sup> The tribunal’s finding that the dismissal was substantively justified shows how the current approach permits the dominance of the employer’s subjective view of the situation, even where it was influenced by a party outside the employment relationship.

In *Quintiles Commercial v Barongo*,<sup>49</sup> Mr Barongo was a medical sales representative and had been employed by the company for four years

<sup>46</sup>*Robert Bates Wrekin Landscaping v Knight* (2014) UKEAT/0164/13/GE.

<sup>47</sup>*Ibid* [34].

<sup>48</sup>Direct pressure from Babcock to dismiss Mr Knight may amount to ‘some other substantial reason’ for the dismissal, although the courts admit that this reasoning may result in significant unfairness for the employee: see *Henderson v Connect (South Tyneside) Ltd* [2010] IRLR 466, [14].

<sup>49</sup>*Quintiles Commercial UK Ltd v Barongo* (2018) UKEAT/0255/17/JOJ.

before his dismissal. The misconduct alleged by the defendant was that Mr Barongo had failed to complete two training modules within the timeframe set out by the company. In his defence, the claimant explained that this oversight was not deliberate. He had prioritised other tasks and had been under stress at the time, focusing on the performance of his core duties in line with his Performance Improvement Plan. His line manager initially classified this failure as gross misconduct warranting summary dismissal, but this was adjusted on appeal to misconduct leading to dismissal with notice. The Employment Tribunal found Mr Barongo's dismissal to be unfair, which was appealed by Quintiles Commercial.

The EAT clearly reiterated the established approach to the statutory phrase 'relates to the conduct of the employee': 'it is capable of being a fair dismissal provided simply it is for a reason relating to the employee's conduct'.<sup>50</sup> The reason clearly related to the claimant's conduct, so no further examination of the finding that the reason was potentially fair was necessary. The EAT ultimately took issue with the rigid approach taken by the tribunal in stating that, for misconduct, it was a rule that dismissal should not follow a first offence.<sup>51</sup> It is interesting, in the context of this argument, that the initial tribunal clearly felt strongly that this was not a case where dismissal was an appropriate sanction. The lapse was trivial - there was no sufficiently substantial reason to dismiss. Other cases can also be found where minor breaches of procedure—failing to wear the correct equipment<sup>52</sup> or failing to report immediately that an inhaler had been taken from the hospital supplies to resolve an asthma attack<sup>53</sup>—are accepted as misconduct that could justify a dismissal. In the light of the very limited review that the current standard of fairness introduces under section 98(4), an objective analysis of the reason for the dismissal would be one way to do justice to the claimant who has been dismissed.

In these cases, the employer's response of dismissal appears to be entirely disproportionate to the conduct of the employee. Considering an oft-quoted phrase of Sir John Donaldson with regard to this stage of the enquiry, the tribunal under section 98(1) and (2) is searching for a reason 'which *can* justify the dismissal, not which *does* justify the dismissal'.<sup>54</sup> In circumstances such as those set out above, I would argue that the issue at the heart of

<sup>50</sup>Ibid [19].

<sup>51</sup>Ultimately, the case was remitted to a second tribunal hearing.

<sup>52</sup>*Newbound v Thames Water Utilities Ltd* [2015] EWCA Civ 677, [2015] IRLR 734.

<sup>53</sup>*Connolly v Western Health and Social Care Trust* [2016] NICA 4.

<sup>54</sup>*Mercia Rubber Mouldings v Lingwood* [1974] IRLR 82, 83.



the case is so trivial that it should not be accepted as one that *could potentially* justify a dismissal. Following the employer's view on whether the employee's conduct warranted dismissal weakens the protection available to the employee. Instead, a tribunal could offer an objective assessment of the conduct and examine whether the conduct has passed over a minimum threshold of seriousness such that it *could*—subject to a review of procedural fairness—justify a dismissal.

## B. Conduct Outside the Scope of the Employment Relationship

A second consequence of the inclusive approach to section 98(2)(b) is that conduct with no connection or effect upon the relationship between the employer and employee is deemed a potentially fair reason to dismiss an individual. As with dismissals for minor misconduct, it is sufficient that the employer considers the reason an adequate one to trigger dismissal. The tribunal's only role is to ascertain that the real reason for dismissal related to some employee conduct, before the enquiry moves on to questions of fairness under section 98(4) and an essentially procedural standard of review is applied. This approach leaves employees exposed to managerial prerogative well beyond the (notional) limits of working time and at risk of dismissal for conduct that bears no relation to their role at work.

A limited exception has been carved out of this general rule that any conduct can be relied upon in the case of criminal convictions which are unconnected to the employment and could not be said to taint the relationship between the parties.<sup>55</sup> This exception may not, however, prevent the employer relying on the conviction under the alternative route of 'some other substantial reason'.<sup>56</sup> Furthermore, this principle is not universally applied, for example, the dismissal of a bus driver for using a stolen chequebook was permitted<sup>57</sup> or that of a cleaner who was guilty of breaching bail conditions relating to a domestic dispute.<sup>58</sup> In the well-known case of *X v Y*,<sup>59</sup> the employee accepted a police caution after having sex in a public place (a lavatory). He was dismissed for gross misconduct and in the tribunal's considerations of the applicability of section 98(2)(b), there was

<sup>55</sup> *Creffield v BBC* [1975] IRLR 23 and *CJD v Royal Bank of Scotland* [2014] IRLR 25.

<sup>56</sup> See *Creffield*, *ibid.*

<sup>57</sup> *Singh v London Country Bus Services Ltd* [1976] IRLR 175.

<sup>58</sup> *Edgar v South Lanarkshire Council* (2017) ET SJ/4105559/2016.

<sup>59</sup> *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634.



no consideration of whether this caution affected his capacity to perform his role. These cases demonstrate that the tribunal does not consistently consider whether the criminal allegations or incidents are genuinely connected to the role performed by the employee or whether they taint the relationship between employee and employer.

Outside the context of criminality, a common area where this issue arises relates to expression or communication of the employee's thoughts or opinions outside of working time that the employer becomes aware of and relies upon in order to dismiss the employee. This group of cases invokes human rights issues, particularly regarding the right to exercise one's freedom of expression outside the workplace without facing the penalty of dismissal by one's employer. This case-law provokes a criticism that, outside of work, employees should be able to act free of the confines and influence of their employer's preferences and regulations.

In *Gosden v Lifeline Project Limited*, Mr Gosden worked for a private company in the rehabilitation of prisoners.<sup>60</sup> Outside of work, he used his private email account to forward a message to an ex-colleague on his private email account. The email, while an attempt at humour, was offensive and contained images of naked women. This interaction was not connected to his employment and did not cause any difficulties for his employer, private as it was. The issue arose when the email was passed on further and ultimately it was sent to a work email address of a member of the prison service and was drawn to the attention of senior staff. Mr Gosden was dismissed for gross misconduct on the ground that he had been an earlier participant in the email chain. He appealed particularly on the ground that he had been dismissed for conduct that took place out of work, but his internal appeal was rejected on the basis that the content of the email was contrary to the inclusivity policies of the employer.

The tribunal, upon Mr Gosden's complaint of unfair dismissal, did not question the legitimacy of Lifeline relying upon this incident as conduct within section 98(2)(b) and therefore a potentially fair reason. Further, the tribunal found that the dismissal was fair in both its substantive and procedural elements. This conclusion was reached despite Mr Gosden's explicit argument that his right to privacy attached to the email.<sup>61</sup> With regard to the classification of this 'conduct of the employee', we can see that Mr Gosden was acting in a purely private capacity, using only personal email addresses

<sup>60</sup> *Gosden v Lifeline Project Limited* (2010) ET 2802731/2009.

<sup>61</sup> *Ibid* [11.3.1].

in his correspondence, and it was acknowledged by the employer that the interaction only came to light because of the actions of a third party over which Mr Gosden had no control. It did not relate to his capacity to perform his role or to his relationship with his colleagues or the company's clients. We could therefore question why it was thought—by the employer or the tribunal—that this was conduct that the employer had any legitimate interest in and indeed could form the basis for the termination of his contract.

Two further examples pick up on the theme of third-party intervention bringing outside-of-work behaviour to the attention of the employer are *Keable v Hammersmith and Fulham Borough Council*<sup>62</sup> and *Gibbins v The British Council*.<sup>63</sup> Mr Keable worked for 17 years for the Borough with an excellent record of service. He attended a protest in which he had an exchange with a counter-protester in relation to the role of anti-Semitism in the Holocaust. The discussion was filmed without the claimant's permission and later was distributed by a Newsnight journalist via Twitter. The claimant remained calm and non-threatening throughout the clip. The claimant was dismissed on the basis of his conduct after an investigation. The tribunal accepted that the reason for dismissal fell within section 98(2)(b). At the next stage of analysing the reasonableness of the dismissal under section 98(4), the dismissal procedure was found to be flawed and the tribunal was concerned at the fairness stage that the reason related to his lawful expression outside the workplace.

Ms Gibbins' case relates to the ever more relevant context of social media and employers using disciplinary powers to censure employees' online expression. In *Gibbins v The British Council*, the claimant found herself at the centre of a media storm in relation to comments that she made on Facebook about Prince George. A significant part of the controversy was in fact caused by the misreporting by tabloid media of Ms Gibbins' comments, which made it appear that her posts were more offensive than they had in fact been. The claimant held strong republican views and was critical of the Royal Family. She observed that Prince George appeared spoiled and enjoyed a great deal of wealth when compared to the poverty suffered elsewhere in the world. Somewhat hastily, the British Council decided to dismiss Ms Gibbins. The tribunal held that it was for a reason related to her conduct,<sup>64</sup> despite the fact that the media attention was based on a statement that Ms Gibbins had

<sup>62</sup> *Keable v Hammersmith and Fulham Borough Council* (2019) ET 2205904/2018.

<sup>63</sup> *Gibbins v British Council* (2017) ET 2200088/2017.

<sup>64</sup> *Ibid* [134].

never actually made and that the employer failed to correct that error in order to possibly mitigate some of the damaging consequences. The tribunal noted a concern that the employer had decided to ‘throw Ms Gibbins to the wolves’ in order to calm the furore but concluded that the dismissal was nonetheless fair.

We can see that there was no connection between Ms Gibbins’ expression and her work for the Council and she endeavoured to keep her Facebook profile as private as possible. I would argue that in these circumstances, it was not legitimate to permit the employer to rely on her conduct. As observed by Virginia Mantouvalou, Ms Gibbins was fired for statements that she did not, in fact, make but ‘[a]lthough the allegations were false, the embarrassment of the employer was enough reason to dismiss her.’<sup>65</sup> A more confined definition of ‘conduct’ under section 98(2)(b) could have provided Ms Gibbins with some protection, notably ensuring that the conduct was an area in which the employer had an appropriate interest and which is connected in some way to the employment relationship.

These cases demonstrate how the lack of examination at this preliminary, reason-finding stage of the section 98 process, combined with a minimal standard of review at section 98(4), leads to findings of fair dismissals for conduct well outside the bounds of the employment relationship. In narrowly defined circumstances, the tribunal will examine the connection between a criminal conviction and the relationship between employee and employer, but this approach is far from consistent and does not extend beyond the context of convictions. Conduct so distant from the workplace that it is only discovered as a result of publication by third parties over whom the claimant had no control is currently a legitimate basis for a dismissal. No regard is shown to the need for individuals to be free from the constraints of their employer’s wishes or the regulations of the workplace rulebook. This issue also has a human rights dimension, an area where the practice of the tribunals has been criticised.<sup>66</sup> Several of the examples invoke concerns regarding employees facing disciplinary actions after exercising their right to freedom of expression, particularly on social media where employees may

<sup>65</sup>V. Mantouvalou, ‘“I Lost My Job over a Facebook Post: Was that Fair?” Discipline and Dismissal for Social Media Activity’ (2019) 35 *International Journal of Comparative Labour Law and Industrial Relations* 101, 107.

<sup>66</sup>P. Collins, ‘The Inadequate Protection of Human Rights in Unfair Dismissal Law’ (2018) 47 *ILJ* 504 and P. Collins, ‘Square Peg vs a Round Hole? The Necessity of a Bill of Rights for Workers’ (2020) 11 *European Labour Law Journal* 199.

not be at their most circumspect and some allowance may be warranted in light of the spontaneous nature of their comments.<sup>67</sup>

The expansion of the employer's purview into the employee's time outside work also has clear and concerning consequences for the right to a private life of the employee. As pointed out by Astrid Sanders, the starting point of employment law should be that employers cannot maintain an interest in their employees' home lives and private choices.<sup>68</sup> Employers pay a wage in return for the individual's obedience *during working hours* and this realm should be the extent of their influence.<sup>69</sup> Employees need time away from their boss's gaze to develop interests that fulfil them, to make private choices and experiment in the pursuit of their own development and to express their identity. The current approach to the question of conduct that the employer can regulate and penalise an employee for fails to recognise these concerns and the individual's right to a private life unencumbered by reference to the employer's inclinations.

## 5. A PROPOSAL FOR LEGISLATIVE REFORM AND A 'SELF-HELP' SOLUTION

This section suggests two alternative methods by which these two key problems that arise from the current approach could be resolved. The first is a legislative amendment which would add further detail to section 98(2)(b), narrowing the scope of conduct that employers can rely upon as a reason to terminate a contract of employment and inserting a threshold of seriousness which must be satisfied before misconduct can potentially justify a dismissal. This suggestion coheres well with the argument made in Section II that a threshold of substantiality should run throughout the potentially fair reasons for dismissal, whether enumerated or under the SOSR category. Given the wide 'range of reasonable responses' that are open to employers under section 98(4), such a statutory reformulation would rebalance the scales between employer and employee in unfair dismissal proceedings.

The difficulty with presenting this legislative option alone as a solution is the lack of likelihood that Parliament opts to make this change—particularly when we consider the many years over which commentators have

<sup>67</sup>See the European Court of Human Rights' discussion of spontaneous comments made on live radio in *Fuentes Bobo v Spain* (2001) 31 EHRR 50.

<sup>68</sup>A. Sanders, 'The Law of Unfair Dismissal and Behaviour Outside Work' (2014) 34 *Legal Studies* 328.

<sup>69</sup>*Ibid* 333.

decried the inadequacy of the ‘range of reasonable responses’ test without precipitating Parliamentary reform. As with the re-interpretation of the SOSR category mentioned above, it would be useful to be able to boost the protection of the right not to be unjustifiably dismissed without the need to rely on Parliament for action. To this end, I will also chart a method by which the courts could tackle the problems raised above. I suggest that the definition of conduct that is substantial enough to justify a dismissal should be defined as conduct which breaches the terms of the contract of employment. The benefits and potential disadvantages to this alternative will be outlined below.

A likely objection to both methods of defining misconduct is that they would overtake the role of section 98(4), the fairness assessment. They would undoubtedly, for example, require more evidence to be produced by the employer at this earlier stage in order to satisfy the tribunal that either a breach of contract had been committed or that the terms of the statute, as amended, were met. Furthermore, both alternatives would raise the threshold substantially before the employee’s conduct is accepted as valid reason to dismiss. It may be argued that this change would blur the lines between the first (reasons) and second (fairness) stages of the unfair dismissal process. I would argue, however, that due to the operation of the ‘range of reasonable responses’, there is currently no substantive scrutiny at the second stage of the reason for dismissal. The ‘range of reasonable responses’ creates a downward pressure, reflecting the poorest standard of treatment that employers could mete out: the ‘lowest common denominator of current employer practice’.<sup>70</sup> Although the statute directs the tribunal to examine whether the employer was reasonable to treat the reason as sufficient to dismiss, the tribunals’ practice under section 98(4) does not comply with this direction. Until there is an overhaul of the standard of fairness sufficient to protect fully the employees’ fundamental right not to be unjustifiably dismissed, the proposed alternatives for the analysis of the employer’s reason for dismissal would fill a significant gap in the law of unfair dismissal.

### **A. A Reformulation of Section 98(2)(b) ERA 1996**

Above, two issues with the current scope of ‘employee conduct’ under section 98(2)(b) were noted: the lack of any threshold of seriousness of the

<sup>70</sup>Collins, ‘The Inadequate Protection of Human Rights in Unfair Dismissal Law’, above n 66, 524.

conduct leading to disproportionate dismissals being held to be fair under the statute and employers disciplining employees for conduct that lacks any connection to their employment or capacity to perform their job. One reason that these consequences have come about is the open phrasing of the statute and the lack of any qualifications therein regarding the types of conduct that should constitute a potentially fair reason for dismissal. For this reason, the courts have interpreted section 98(2)(b) broadly for many years—*RS Components v Irwin* was decided in 1974—and so the judicial re-interpretation suggested below would undoubtedly face resistance on this basis.

Two adjustments to the statutory phrasing would be needed to limit the range of misconduct that employers can rely upon. The first amendment that is necessary is the addition of ‘serious misconduct’ to the phrasing of section 98(2)(b). This amendment would prevent dismissals, such as that of Mr Barongo and Mr Knight, which were entirely disproportionate to the misconduct relied upon. It would also introduce a role for the Employment Tribunal judge in engaging in a qualitative assessment of the employer’s reasoning for the dismissal, testing whether the misconduct was indeed sufficiently serious to terminate the contract and avoiding the current situation whereby the employer’s subjective belief that termination was an appropriate sanction is broadly unchallenged by the tribunal.

The phraseology of the second qualification is more difficult to express, as it tackles a more complex problem than that of the triviality of some reasons for dismissal. It must express the idea that the serious misconduct must negatively affect the quality of the relationship between the employer and the employee and the employee’s ability to perform their role. For example, Mr Keable worked in the local council’s Environmental Health Department. The content of his discussions during the protest bore no relation to his job, but the employer felt that its interest in his behaviour outside of work was justified, as well as the disciplinary measures that followed. This case indicates that there should be some check on the employer’s perspective and whether their interpretation of the situation was sound. I would suggest a reformulation of the conduct ground as follows: ‘serious misconduct that affects the employee’s performance of their duties and that the employer reasonably believes undermines the relationship between the employer and the employee.’

This phrasing would ensure a connection between the conduct alleged and the work of the employee, meaning that the employee would be freer to conduct themselves as they choose outside of working time. It would also

introduce an objective check on the employer's impression that the conduct affected the relationship between them and warranted dismissal by the inclusion of the 'reasonable belief' component. Beyond these implicit methods of circumscribing the reasons for which an employee can be dismissed in order to provide some protection for their life outside work, any legislative amendment would also be read in accordance with section 3 of the Human Rights Act 1998. This section requires that any provision must be read compatibly with the rights contained in the European Convention on Human Rights 'so far as it is possible to do so'.<sup>71</sup> It should follow from this interpretive obligation that where the reason for a dismissal relates to an employee's private life or an exercise of their right to freedom of expression, the need to protect their ECHR rights should exert an influence upon how the provision is applied. For example, the tribunal may examine more carefully whether the employer's belief that the employment relationship is undermined is truly reasonable. Thus, through both indirect and more direct means, the employee's right to exercise their human rights is more thoroughly guaranteed under this reform.

## B. A Contractual Definition of Conduct

Given the probable lack of appetite to legislate in order to increase the strength of employee's rights in the near future, this section focuses on a judicial alternative to correcting the problems outlined above. To demonstrate that an employee had committed misconduct, the re-interpretation would require that the employer show that either an express or implied term of the contract had been breached. An express term might, for example, be a term setting out examples of gross misconduct, which would clearly also constitute misconduct for the purposes of unfair dismissal law, or alternatively that the employee had breached the duty of mutual trust and confidence that is implied into all contracts of employment.

The possibility that the definition of conduct should be contractual was highlighted by Lady Hale in *obiter* comments in a case called *Reilly v Sandwell Metropolitan Borough Council*.<sup>72</sup> A headteacher had been dismissed because she failed to disclose her personal relationship with a person who had been added to the sex offenders register. One point of dispute was

<sup>71</sup>Human Rights Act 1998, s 3.

<sup>72</sup>*Reilly v Sandwell Metropolitan Borough Council* [2018] UKSC 16, [2018] IRLR 558.



whether the employee was under a duty to disclose this information to her employer. Although this question was resolved in the employer's favour by the Supreme Court, it prompted Lady Hale to consider whether:

...whether a dismissal based on an employee's "conduct" can ever be fair if that conduct is not in breach of the employee's contract of employment. Can there be 'conduct' within the meaning of s 98(2)(b) which is not contractual misconduct?<sup>73</sup>

Without further argument on the point, the question was left open but her Ladyship noted that she could see arguments on either side of the issue. As will be noted below, there are certainly potential advantages to adopting a 'contractual misconduct' approach but there is equally the possibility that the protection of the employee that is hoped for would not come to fruition.

#### (i) The Potential of 'Contractual Misconduct'

At the time of the introduction of the right not to be unfairly dismissed, there was a concern that the insertion of a contractual element at this stage would strongly disadvantage the employee and damage the standard of protection that the statute offered. The protection available to employees at common law was so miserly that scholars could not imagine a constructive and positive role for that set of ideas in unfair dismissal law. This view is represented well by Hugh Collins who argued that drawing on the morality and norms of the common law within the statutory unfair dismissal regime 'would be a perverse exercise, one which would deliberately ignore the aim of the statute to replace those earlier moral standards'.<sup>74</sup> The common law duties imposed upon the employee were ones that entrenched their subordination and loyalty to the employer.<sup>75</sup> It is understandable that an independent definition of 'conduct' under section 98(2)(b) was desired, as the common law approach that could have been transplanted appeared deeply unfit for purpose.

There are undoubtedly some difficulties in defining conduct contractually, which will be expanded upon below. One major development in the intervening time has been the application, to a wide variety of circumstances,

<sup>73</sup>Ibid [32].

<sup>74</sup>Collins, *Justice in Dismissal*, above n.22, 71.

<sup>75</sup>H. Collins, 'Is the Contract of Employment Illiberal?' in H. Collins, G. Lester and V. Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018) 52.



of the implied obligation of mutual trust and confidence. This implied duty has certainly rebalanced the duties and obligations of the parties to the employment relationship and has been important to the protection of employees in unfair dismissal law, permitting them to resign and claim constructive dismissal in response to their employer's unreasonable conduct.<sup>76</sup> Given that employers are unlikely to regulate expressly for every possible form of misconduct, the implied obligation would assume a significant role in the proposed process for examining conduct under section 98(2)(b). Below, I will note several likely benefits of a contractual approach.

In the absence of any express contract term that the employee has breached, the employer would need to rely upon a breach of the implied term of mutual trust and confidence. It reads as follows:

Either party shall not 'without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.<sup>77</sup>

The need to rely upon this term would introduce a threshold of seriousness before the conduct is accepted by the tribunal as breaching the implied duty. We have been reminded recently of the high threshold of severity before the mutual trust and confidence will be broken by the Employment Appeal Tribunal.<sup>78</sup> We must not 'let the familiarity of the language blur what a breach of that term really entails'.<sup>79</sup> To constitute a breach of term, there must be serious damage done to the relationship without any proper cause. Failing to complete two training modules during an allocated time frame, forgetting to report a bag of bolts before leaving work or taking an inhaler during an asthma attack—the examples given above—could not be considered to have seriously damaged the quality of trust and confidence between the parties. In these cases, once conduct is contractually framed, the employers would not be able to rely on the implied term in these cases to demonstrate misconduct and their disproportionate response to an employee's errors would be rendered unfair for lack of a potentially fair reason for dismissal.

In addition, the question of whether the mutual trust and confidence term has been broken is an objective one, applied from the tribunal's perspective rather than one party's view of whether it has been breached. Currently, the

<sup>76</sup>See, for example, *Palmanor Ltd v Cedron* [1978] IRLR 303, *Watson v University of Strathclyde* [2011] IRLR 458 and *Weathersfield Ltd v Sargent* [1998] ICR 198.

<sup>77</sup>*Malik v Bank of Credit and Commerce International S.A.* [1998] AC 20, 45.

<sup>78</sup>*Amnesty International v Ahmed* [2009] ICR 1450, [72].

<sup>79</sup>*Ibid* [72].

employer's view of whether the conduct was serious enough to warrant dismissal cannot be challenged, due to the open and unqualified phrasing of the provision. Under a contractual misconduct approach, one question for the judge would be whether the conduct in question had—when viewed objectively—seriously damaged the trust and confidence between the employer and employee and whether there was a reasonable and proper cause for the behaviour, if so.<sup>80</sup> Given that the fairness standard under section 98(4) has failed to provide a thorough, objective standard of review, the introduction of objectivity in conduct cases at the earlier stage would be welcome.

The assertion of an objective review of the conduct relied upon by the employer would assist in tackling cases where the connection between the conduct and the employment relationship was tenuous. It would be for the tribunal to test that connection and decide whether the employee's conduct outside the workplace was such that it was capable of seriously damaging the relationship between the parties. Only where there were clear implications for the employer as a result of the conduct should this be accepted. For example, in Mr Keable's case relating to his calm and reasoned discussion during a protest,<sup>81</sup> the implied term could not be said to be breached by his conduct. His lawful expression was not aggressive, nor would it cause damage to his employer's reputation or operations. Given that there was no express regulation of his behaviour in his contract, the employer would be hard pressed to argue through the application of the implied term that he had committed contractual misconduct.

#### (ii) The Relationship between a Contractual Approach and Express Terms

Now we must consider a weakness in this contractually focused approach. The difficulty of linking any employee safeguards to the terms of an employment contract is the inequality of bargaining power implicit in that relationship. The drafting of a contract of employment is often unilateral and driven mostly by the employer's desires, although this characteristic is tempered in cases of collectively negotiated contracts or where particular individuals possess stronger bargaining power. In the context of this argument, the

<sup>80</sup>In rare cases, the objective standard could introduce difficulties where evidence subsequently comes to light proving the employee innocent of a breach of the implied term. For this reason, the legislative amendment—which refers to the employer's 'reasonable belief' is the preferred option.

<sup>81</sup>*Keable v Hammersmith*, above n.62.

effectiveness of the contractual threshold of misconduct could be severely compromised if the employer uses its power to draft express terms of the contract that classify almost any potentially undesirable behaviour as misconduct liable to lead to dismissal.

From the employee's perspective, a more desirable approach would be to require a breach of the implied duty of mutual trust and confidence to be demonstrated as a minimum before conduct is accepted as potentially justifying a dismissal. This suggestion places before us the question of the primacy of express terms. There is authority in the case-law for the proposition that express powers can be limited by implied duties to exercise those powers in particular ways.<sup>82</sup> In the case of giving notice to terminate, however, the senior courts are unwilling to accept any limitation on the inherent power of the employer to dismiss upon notice.<sup>83</sup> Instead, in cases of contractual manipulation by the employer, we must rely on two alternative ways to tackle the issue. First, the reason-finding process is only the first stage of fairness, and although the 'range of reasonable responses' has rightly been criticised for failing to challenge employers, it may tackle cases where the dismissal was entirely disproportionate.<sup>84</sup>

A second option is the judge's role in interpreting whatever express terms or rules are set out by the employer. For example, in *Austin v AIM Retro Classics*,<sup>85</sup> Mr Austin was dismissed after a discussion on Facebook. That day, Mr Austin had had a heated discussion with his manager during which the manager criticised Mr Austin and the way he performed his duties. After work, Mr Austin commented on his personal Facebook page that he was feeling very low. The crux of the issue were comments from his Facebook friends in response to Mr Austin's post, sharing sympathy but also criticising his boss and making some disparaging remarks. Mr Austin did not comment upon these or encourage them. Mr Austin was dismissed because he had failed to take down the comments promptly and failed to prevent his acquaintances from making comments about the company. Although the

<sup>82</sup>*United Bank Ltd v Akhtar* [1989] IRLR 507 and *Johnstone v Bloomsbury HA* [1992] QB 333.

<sup>83</sup>See *Johnson v Unisys*, above n.19, [42]. This position appears to maintain despite the interesting case of *Braganza v BP Shipping Ltd* [2015 UKSC 17, [2015] 1 WLR 1661: see D. Cabrelli, 'The Effect of Termination upon Post-employment Obligations' in M. Freedland (eds), *The Contract of Employment* (Oxford: Oxford University Press, 2016) 564.

<sup>84</sup>See, for example, *North West London Hospitals NHS Trust v Bowater* [2011] EWCA Civ 63, [2011] IRLR 331.

<sup>85</sup>*Austin v AIM Retro Classics Limited* [2020] ET 2500934/2020.

Employment Tribunal ultimately found the dismissal to be unfair because of the irrational and confused approach taken by the employer, a contractual approach to misconduct would also have prevented the employer from producing a valid reason for dismissal. The social media policy which the employee had allegedly breached stated only that: '*You must not make any comments or engage in discussions which could adversely affect us or our reputation or that of our customers or suppliers.*' As Mr Austin had no active part in the discussions that the employer objected to, it would not have been able to prove that this directive had been breached. Furthermore, his conduct was nowhere near that required to breach the mutual trust and confidence term. If the judge adopted a straightforward reading of the employer's policy, there would have been no legitimate ground to dismiss Mr Austin.

The potential point of weakness in relation to express terms could also be perceived as one of the recommended approach's strengths. One of the underlying difficulties in relation to the existing definition of misconduct is that it fails to give expression to the employee's expectations regarding circumstances in which their contract of employment may be terminated. This failure is particularly noticeable where there is a contractual disciplinary procedure (CDP) in place. Many CDPs explain clearly what constitutes conduct liable to lead to disciplinary action. Where there is an express term to this effect, the employer's hands would be bound, and their arguments restricted to asserting that the employee's behaviour fell into a category of conduct regulated by the contractual disciplinary procedure. This contractual focus would thus enforce the employee's expectations derived from the express terms of their contract in relation to discipline.

Within the current statutory framework for dismissal, expectations derived from contractual disciplinary procedures are only protected via the fairness assessment. Adherence to a contractual disciplinary procedure will be relevant to the procedural fairness of a dismissal.<sup>86</sup> The employer does not have to make reference to the CDP in demonstrating that misconduct has been committed. At that essential, definitional stage, therefore, the employer does not have to act in compliance with the CDP and there is no way to enforce the employee's expectation that they should do so. On the common law side, the Supreme Court in *Edwards v Chesterfield* shied away from enforcing a contractual disciplinary procedure through an award of damages, holding that a breach of the CDP falls within the *Johnson*

<sup>86</sup>See *Stoker v Lancashire County Council* [1992] IRLR 75.

exclusion zone.’ The majority of the court argued that contractual disciplinary procedures are not intended by the parties to be independently actionable and that, instead, a breach of a CDP should be enforced through the statutory jurisdiction of unfair dismissal law.<sup>87</sup>

Currently, then, we are left in a lacuna of enforceability: at common law, the courts will not award damages and under the statute, the employee cannot demand that the employer demonstrate how the situation adheres to the terms of the CDP. A requirement that the employer show contractual misconduct before the section 94(2)(b) threshold is reached would resolve this issue of unenforceability. The employee’s expectations founded upon their express contractual terms would be highly relevant to the reason-finding stage and an employer could not avoid abiding by its own terms if it wishes to dismiss lawfully.

## 6. CONCLUSION

The proposals made here would correct a number of deficiencies in this potentially decisive part of the unfair dismissal inquiry. The lack of substantiality and objectivity across conduct and the ‘some other substantial reason’ category is a serious issue where the question being answered is whether the employer has a legitimate reason to terminate an employment relationship. The scope of the statutory reason of conduct could be limited either via an express Parliamentary amendment or by a re-interpretation along contractual lines. In order to avoid the prospect that the ‘other substantial reason’ category would continue to be used to subvert the more specific listed reasons, a threshold of substantiality could be judicially asserted on the basis of the existing statutory language. The recommendations here would counterbalance the employer-centric assessment that is undertaken under section 98(4) in the form of the ‘range of reasonable responses’ and place important limits on the scope of the managerial prerogative to dismiss. Overall, the proposals align with the overarching purpose of the statute: to provide the employee with a thorough review of whether the severe sanction of dismissal was justified in their case.

<sup>87</sup> *Edwards v Chesterfield*, above n.20, [39]–[40] per Lord Dyson.