

## Muzzling employers' power to dismiss

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Earlier this week an employment tribunal handed down a decision that serves to remind employers that when it comes to dismissing employees, process is king. [Richard Walker](#) and [Andrew Carruthers](#) discuss.

Almost exactly a year on from Luis Suarez infamously biting Giorgio Chiellini at the 2014 football World Cup, it was clearly about time for another biting incident. Guernsey Chef James Harvey has duly obliged, resulting in an employment tribunal decision, reported by the [Times](#) on 30 June that is sure to be greeted with consternation by many employers after the tribunal awarded Harvey £11,000 for unfair dismissal.

Harvey was summarily dismissed from his job at the Fermain Valley Hotel in Guernsey after he was convicted of assaulting two police officers. The officers were called to the hotel to intervene in an altercation involving Harvey, his girlfriend and other hotel staff. During the course of the intervention Harvey bit the finger of one police officer and the leg of another and spat blood at the officers. He was sentenced to 18 months' imprisonment by a Guernsey Court for grievous bodily harm.

His employer branded the employment tribunal's judgment 'ridiculous'. But whilst the judgment itself is not yet available, the case presents an opportune moment to consider some of the basics when it comes to dismissing someone accused or convicted of a serious crime. In assessing whether such a dismissal is fair, it is not the Tribunal's job to put itself in the employer's shoes and ask what decision *it* would have come to were *it* making the decision. Instead the Tribunal must ask whether the employer's decision to dismiss fell within the 'band of reasonable responses', taking into account the reason for the dismissal and the procedure followed by the employer.

In this case it seems the Tribunal's criticisms were directed not so much at the reason for the dismissal as at the employer's failure to follow any process whatsoever, and in particular for failing to let Harvey respond to the case against him. The employer was also criticised for failing tell Harvey that he had been dismissed until some six months after the decision was taken, and for the fact that Harvey received no right of appeal.

That those facts make for an unfair dismissal is a conclusion that most employment tribunals are likely to reach, however serious the misconduct. This may come as a surprise to employers as many people assume that criminal conduct gives an employer an automatic right to dismiss. Not so – the employee should be given the opportunity to put his or her side of the story to help ensure the employer's procedure meets the minimum standards of fairness, guidance on which is set out in the [Acas Code of Practice](#). The employer must also act reasonably in deciding whether to dismiss at all – dismissal may not be appropriate if the sentence is short and for something that will not in practice affect the employee's work.

This case suggests that, unlike dismissals for redundancy, where it is possible in exceptional circumstances for an employer to show that following a dismissal procedure would have been futile, the same does not seem to apply in the realms of dismissals relating to conduct.

That said there are some crumbs of comfort for employers faced with these situations.

1. A Tribunal may reduce the compensation awarded if it considers that the employee could have been fairly dismissed had a fair procedure been adopted.
2. In addition, compensation can be reduced further by up to 100 per cent to reflect any conduct on the employee's part that has contributed to the dismissal.

It is not clear how, in this case, the tribunal arrived at the £11,000 figure, nor the extent to which the Tribunal considered the above points. What is clear is that an employer will always be in a much better position to defend an unfair dismissal claim if they have given the employee a chance to explain his/her actions and have given thought to such explanations before reaching a decision to dismiss.

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