condition, far less a preventable one. Whatever resources the doctor's organisation contains—counsellors, health visitors, community clubs, or whatever—much help still rests with the sensitivity and awareness for the people concerned. There are no experts. The forces of evasion are very powerful and pull all of us away from recognising the needs of others, particularly if that recognition requires us to face some pain ourselves. The extent of the doctor's network may have its drawbacks, making it too easy for the patient to get lost. The doctor may suggest another member of his team for the patient to see just at the point when the patient still needs the doctor, who has been more closely concerned already. He must be aware of the dangers of referral at a time when the patient is particularly sensitive to rejection.

"A widower, who hardly ever consults, came to see me two years after the death of his wife. Margaret had been a frequent attendee and a great talker. He was dressed in dull clothes, near Christmas, and came with a croaky cold." At that moment he seemed to need this particular doctor who had known the whole situation, to understand his croaky (terrible) cold (and) the lack of warmth he had felt in his life since his wife's death. "Simple treatment was necessary for his cold and a few minutes of time, tears, and shared memories of the unexpectedness of her death and the shock. . . . No prescription, no organised follow up; a simple but complete piece of general practice."

OTHER EMOTIONS

Death doesn't result only in feelings of loss and grief. There are many much less acceptable emotions—hated, guilt, relief, or what seems like a shameful lack of feeling, and regret about secrets or other important things that were never shared. The doctor mustn't make assumptions about how a survivor feels. He has to try and be aware of the difference between how he feels about the death of his patient and how the surviving partner might feel.

Deep grievances may be held towards the doctor, particularly where management has seemed to go wrong; the doctor may become "dead" to the surviving spouse for many years, causing her to switch to one of the other doctors in the practice. Such a profound reaction must be recognised and the doctor's subsequent trivial consultation may break the silence and have much

importance for both the widow and the doctor. If this is handled sensitively it may help to accelerate her reintegration.

There are paradoxes. Too often we encourage the bereaved, through counselling, to give and give up the memories of the dead spouse; we see it as treatment with an aim of freeing the survivor. Instead we should respect the strength of the need to "hang on" and "keep alive" the dead person, which if recognised may facilitate a more natural process of "letting go," and living again.

The doctor must have a respect for privacy, a belief in the natural timing of things, and an awareness of what's being said when it's being said and not everything into a condition "requiring appropriate treatment." He must also recognise the truth of another paradox. In any difficult emotional transition the patient is only helped to emerge from it and gain more independence by the doctor accepting the patient's need to be dependent for a time. The bereaved, particularly, may need their symptoms in order to remain in contact with the doctor, while they slowly come to terms with their loss. The doctor may have become an important person during the terminal illness of the patient. If the contact has been close, or lengthy, and there is the family of the doctor and the events connected with him may in part, or by association, help to keep the memory of the dead person alive in the survivor's mind.

If the doctor is aware of his understanding of the patient's feelings may accompany his management of the various aches and pains and illnesses that the patient brings. The danger is that the doctor, sympathetically, tries to rid the patient of his or her symptoms too avidly; he feels charged with the need to cure the illness and treat the symptoms and becomes irritated by the patient's wish to keep them (as they may also wish to keep their grief). In trying too hard to "do things" for the patient he deprives him or her of his most valuable service—being who he is and what he represents, someone who stays around, is available if needed, and was intimately concerned in events of great personal importance.

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Diary of Urban Marks: 1880-1949

I have already mentioned that during the war Reg and I were chairman and secretary of the Medical War Committee whose duty was to select doctors for service. The war came as a welcome break to my secretarial duties. I arrived in Mesopotamia on 18 August 1917 and was drafted to Number 2 British General Hospital at Amara. I was having quite a good time when towards the Christmas day of that year I had a command from the colonel to attend at his office. Wondering what was going to happen, I made my appearance at the trying place and being admitted I duly sat down. The colonel asked me to sit down. Said he "I am going to ask you to do something which I cannot command you to do." This promised to be interesting and I asked him to proceed. Quoth the colonel: "As you are aware, Ashleigh, the most exemplary, is leaving us for other duties and I find that the mess is in debt to the tune of £2200 rupees."

I quickly calculated this to be in the neighbourhood of £200. Through my calculations came the colonel's droning voice informing me that Ashleigh had mixed his own accounts with the mess accounts and although the CO did not impute any dishonesty to Ashleigh, he

wished me to take charge of the mess and try to liquidate the debt. I felt flattered at the request, thinking that my fame had travelled East. No one in the mess could possibly know of my secretarial work. I asked him whether the reason was that I was a doctor and the colonel who I had been singled out, to which he replied that at a meeting of the senior officers it was felt that I should be a suitable person. I asked him whether the reason was that I was a doctor and he said that he thought I was a few and therefore must have a fair for finance. Now colonels do not blush as a rule. In fact this particular one was the only one I ever saw even flush. He admitted that my guess was right and when I informed him that I was only an apology for a few, nevertheless insisted that I should take the position of mess secretary. I did so joyfully more because it was something to do in a country where no one does anything. I continued in this capacity during the rest of my time in the army which was until 1 February 1919, by which time the mess was out of debt and had money in hand.

GPs and Their Staff

Dismissal: fair or unfair?

NORMAN ELLIS

Mere mention of "dismissal" strikes a note of fear in the hearts of many employers, and general practitioners are no exception. It conjures up a vision of the unpleasant task of sacking an employee and the ensuing risk of defending your action in public at an industrial tribunal. This article seeks to offer reassurance on a vexatious subject.

Questions general practitioners ask

There is no better point to start from than the anxieties often expressed by general practitioners. Firstly, some doctors believe that the provisions of employment law have so tied their hands that it is not only difficult, but virtually impossible, to sack an employee. Secondly, some doctors are so reluctant to contemplate dismissal, even when this is clearly necessary, that they compound their problems by delay and a failure to follow a proper procedure. Indeed, some doctors are so reticent that they are unwilling to dismiss a newly recruited employee who (even after adequate training and supervision) is quite unsuited to the job. Reluctance to dismiss may be associated with a failure to give proper notice of the dismissal and to follow the required procedure. These omissions almost always create greater difficulties and may so easily lead to a successful claim for compensation for unfair dismissal. Other problems arise if doctors try to use redundancy as the grounds for dismissal when the actual reasons are to do with misconduct or inability to do the job.

Sometimes a general practitioner fails to consult his partners before taking action, even though the decision should be taken (or at the very least confirmed) by the partnership as a whole. A more unusual (almost bizarre) problem occurs when a general practitioner tries to dismiss someone who is not even his employee; the most common example is an attempted dismissal of a health authority employee attached to a practice.

The content and quantity of work is always changing; your employees change through normal wastage, and their own domestic circumstances, health, and capabilities will also alter. More generally, there will be changes in the way in which a practice is run; practices may combine or divide, premises may be acquired or closed, and new work may be taken on. All these changes may lead to a position where an employee is either unwilling to do the work that is required or incapable of doing it.

The need for change and for your employees to accept and adapt to it inevitably creates many "grey areas" which do not seem to fit easily into the formalities of the unfair dismissal legislation. Other articles discuss ways of handling this continual

process of change and adaptation, in particular those on "How to change a contract of employment" and "Absence from work." The crucial guiding principle is that you should ensure that your staff are aware that change is an inevitable feature of practice and that you are willing to ask you to do something which I cannot command you to do. If they fall short in either of these respects then the procedures outlined below may have to be applied.

What is dismissal?

In most circumstances it is clear to both the employee and the employer when a dismissal takes place. But note that a dismissal may also occur when: (a) An employee's fixed term contract expires and is not renewed. (It is not normally advisable to work with fixed term contracts, particularly if these are extended on a year by year basis.) (b) An employer does not allow an employee who has qualified for reinstatement to return to work after pregnancy. (c) An employee resigns for reasons that relate to certain conduct by the employer—this is known as "constructive dismissal." (d) An employer does not make his intentions clear—for example, if his language or expression is unclear. Although a dismissal may not be intended, certain phrases—such as "You know what you can do!"—in fact may reasonably be interpreted as notice of dismissal.

Fair reasons for dismissal

There are several aspects to any dismissal that determine whether it is fair or unfair: (a) Is the reason for the dismissal valid? (b) Has the employer acted reasonably in treating that reason as sufficient grounds for dismissing the employee? (c) Is the procedure followed by the employer fair?

The legislation refers to five specific types of reason that may justify dismissal.

Conduct—This is the most usual reason for dismissal and the one that is most likely to lead to a complaint of unfair dismissal.

Capability—The employee cannot satisfactorily do the job. Additional problems that may arise when illness has led to an employee being unable to do the job are discussed below. **Redundancy**—Normally an employer has no grounds for claiming unfair dismissal if the dismissal was because of redundancy—that is, because the employer has no work (or insufficient work) for the employee to do and is unable to provide suitable alternative work. It is not uncommon, however, for redundancy to be used improperly as an easier alternative to "misconduct" or "incapacity" to effect a dismissal.

A statutory requirement—The most obvious example is when the loss of a driving licence prevents an employee from doing the job and there is no suitable alternative job available.

Some other substantial reason—This may sound like a Catch 22 option, but in fact it applies to the specific and important range of circumstances described below.

Grounds for dismissal

MISCONDUCT

If you dismiss a member of your staff on the grounds of misconduct this will usually be the final stage of your disciplinary procedure. When contemplating or taking this action you need to consider the following:

(1) Did your employee know an offence was being committed? Your disciplinary rules should be sensible and clear and your staff should be aware of them. It is essential that they should know of any conduct which constitutes *gross misconduct* because this could result in suspension from work on full pay, pending an investigation that may precede summary dismissal—that is, without notice. Obviously, anything you label as *gross misconduct* must be serious enough to warrant summary dismissal. For general practitioners' staff a serious breach of confidentiality, an act of theft, or an abuse of drugs are examples of *gross misconduct*. It is advisable to give examples of these in your written code of employment.

(2) It is quite unreasonable for someone to be dismissed for a first offence, except where there has been *gross misconduct*. If you are considering dismissal your employee should have been warned on a previous occasion when misconduct occurred that further offences might lead to dismissal. It is advisable to give written warnings to an employee in line with the ACAS code which is mentioned below. These may have an impact, particularly if it is made clear that it is a final written warning and that a further repetition will lead to dismissal. You may wish to ask your employee to confirm in writing his receipt of your letter. It is certainly advisable to keep a written record of all your warnings not only for your own use but also as evidence if you should be faced with an industrial tribunal hearing. (It is normal for written warnings to be kept "on record" for only a specified period—say, for 12 months.)

(3) You must investigate all the facts of the case thoroughly, particularly if it is likely to lead to a summary dismissal.

(4) Finally, if your procedures are reasonable your employees should have an opportunity to put their side of the case. There might be an acceptable explanation for the behaviour. The Advisory, Conciliation and Arbitration Service (ACAS) has produced a code on disciplinary practice and procedures, and industrial tribunals have to take this into account when deciding whether a dismissal was fair or unfair. It is recognised that the small employer cannot be expected to follow this code to the letter. If your approach to a dismissal takes account of the issues discussed above, the main points of the ACAS code will have been covered.

INABILITY TO DO THE JOB

There are various grounds on which an employee might be considered unable to do the job—ill health, lack of skill or qualifications, poor standard of performance.

Before you contemplate dismissing an employee on grounds of inability you should consider the following: (a) Have you provided adequate training, including guidance on how the work should be done and the standards you expect? (b) Has your employee been properly supervised? Have you provided regular opportunities to discuss and review progress? (c) Has your employee been told of any shortcomings as soon as these became evident? Has there been an opportunity to improve? (It is important not to allow matters to drift on.) (d) Is the employee in the right job? If not, within the limited opportunities available for redeployment, could you offer something else suitable? (e) Have you given a final warning, stating that if there is no improvement the employee will be dismissed?

Most difficult problems arise when employees are absent through ill health. An employee with few employees may find it hard to cope with frequent or prolonged absences. The employer may be unable to keep the job open indefinitely.

(4) Employees who have already reached the normal retiring age for their employment or, if there is no normal retiring age, men who have reached age 65 or women who have reached age 60.

Unfair dismissal in perspective

It should be the aim of any employer to act in a fair and reasonable way in all his dealings with staff. This is in the interests of good management, and employment legislation is designed to encourage and support it.

Note these three features of the legislation:

(1) An employee cannot normally bring an unfair dismissal claim to an industrial tribunal until she has been with you for one year, or, if you have 20 employees or fewer, for two years.

(2) Industrial tribunals must take into account the size and administrative resources of the employer when considering whether a dismissal is fair to reduce the burden on small employers.

(3) Although rare in general practice, an dismissal based on discrimination against trade union activities, or concerning action against someone who has made a claim of sexual or racial discrimination, will be judged automatically unfair.

Some recent statistics offer reassurance. Less than a tenth of all dismissals in any year lead to unfair dismissal claims, only 3% of all dismissals actually lead to a tribunal hearing, and less than 1% are found to be unfair. Some two thirds of unfair dismissal claims are settled before any tribunal hearings, many are withdrawn, and the rest are settled by agreed compensation, often by using the services of an independent ACAS conciliation officer.

Where cases went forward to a tribunal hearing, in only about a quarter of these was the dismissal found to be unfair. The most recent statistics show that in 1982 the amount of compensation awarded by tribunals was less than £750 in over one third of the unfair "cases," and less than £1500 in over half of them. In only 4% of cases was the award over £6000.

Although these figures are reassuring, a tribunal hearing may be a harrowing experience and the work required to prepare your defence and attend the hearings is both costly and time consuming to you and the practice. Thus it is advisable to take some simple precautionary steps, particularly since these may also help you to manage your practice more effectively.

Preventive measures

Dismissal should be a rare event if you have already followed the steps below, which have been described in previous articles.¹

(1) Make sure that your selection procedures are adequate so that you find the right person to fill your vacancy. Ensure that your practice manager fully participates in selecting a new member of staff.

(2) Relations with a new employee should be put on a proper footing from the outset. You are legally obliged to issue a written statement of the main terms and conditions of their employment within 13 weeks of the employee starting work in your practice. This statement should specify any disciplinary rules (or refer to another document containing these) and state to whom the employee should go if she is dissatisfied with any disciplinary decision affecting her, or if she has a grievance about the job. The importance of having adequate disciplinary and grievance procedures has been emphasised in a previous article.²

(3) Try to ensure that your training arrangements are satis-

REDUNDANCY

Fortunately, redundancy is a rare occurrence in general practice, although it has been known to happen. Although it may be fair to dismiss an employee on these grounds because you need fewer people to do your work, you must be in a position to show that your method of selecting who should go was fair. This is vital. You should decide on the criteria of selection—for example, length of service, skill, an objective assessment of work performance, attendance, disciplinary warnings, or some combination of these; you should then consider whether there is any other job available for the person who is being made redundant; and finally you should try to give as much warning as possible.

LEGAL IMPEDIMENTS TO CONTINUED EMPLOYMENT

An employee may be fairly dismissed if continued employment would result in a breach of the law. The obvious example is when someone who is employed to drive loses his or her licence. Nevertheless, even though this case may seem straightforward, it is still necessary for you to be able to show that you have acted reasonably. In particular, you would need to consider whether driving was essential to the job and whether alternative work would be available, albeit on a short term basis, until the licence is restored.

OTHER SUBSTANTIAL REASONS

There are other grounds that justify dismissal not covered by the headings above. It is difficult to specify these with precision but industrial tribunals have accepted the following as "some other substantial reason" for fair dismissal: (i) difficult relationships with other staff; (ii) changes of duties or conditions that were not anticipated by the employee; (iii) false information (which has importance) on an application form; (iv) reorganisation of a business; (v) when a temporary replacement for another employee—for example, during maternity leave—is no longer required.

In all these circumstances you should ensure that the dismissal is carried out in a reasonable manner, giving a proper explanation and due warning. Your reasons for the dismissal should be put in writing, and you should make some provision in your disciplinary procedure for your employee to appeal against your decision.

Who may not complain of unfair dismissal?

The main circumstances where someone cannot complain of unfair dismissal are:

(1) Anyone who is not an employee—for example, an independent contractor. It should be noted that there have been recent industrial tribunal cases where a general practitioner has been able to lodge a claim for unfair dismissal (following the termination of a partnership) because the contractual agreement between the partners did not meet the criteria of a partnership as defined in the law of partnership. In such circumstances the consequences may be more far reaching and serious than just the risk of a successful claim for compensation on the grounds of unfair dismissal.

(2) Employees who have not completed one year's continuous employment by the date on which dismissal takes place. But any employee working in a practice that has employed 20 or fewer employees cannot complain of unfair dismissal if the employee has not completed two years of continuous employment.

(3) Employees who normally work fewer than 16 hours a week, unless they have been employed continuously for at least eight hours a week for at least five years.

factory. It is important to act without delay if the standard of work falls below what you require. Difficult and almost intractable problems may arise if you allow unsatisfactory working practices to persist simply because you are reluctant to take corrective action. Your employees will assume acceptance of unsatisfactory performance if no action is required to improve it.

(4) Written records are most important. You should keep notes of any disciplinary warnings (oral or written warnings) since these may be required as evidence if your actions ultimately lead to dismissal and a subsequent tribunal hearing.

If these steps are followed you are unlikely to face problems over dismissal. Nevertheless, even the most conscientious employer may have to consider a dismissal if such a step happens. It cannot be emphasised too often that if you employ 20 or fewer staff there is a two year qualifying period before a claim of unfair dismissal may be made. This should provide ample time for you to assess someone's capabilities. Even if your staff numbers more than 20, and the qualifying period is one year, this still allows enough time for your assessment to be made. A new employee will serve a specified probationary period, but you have at least 12 months to monitor performance before the statutory rights are acquired. Your employee should be given the chance to improve before and after the qualifying period, whether this is 12 months or two years.

Reassurance

As I have stated above, unfair dismissal is a rare occurrence. When it does happen it is often a consequence of an ill considered approach to the necessary disciplinary action that must precede dismissal. This in turn usually arises from the general practitioner's reluctance to act decisively (but reasonably) when this is necessary. Indeed, it may have been the doctor's own kindness and unwillingness to upset one of his staff which has subsequently led to serious legal difficulties and even a tribunal hearing. Preventive action is crucial, not only because it is a necessary part of good management, but also because it will avoid the trauma of a claim of unfair dismissal.

Remember that your handling of any dismissal has both "procedural" and "substantive" aspects. It is necessary to show that your approach to it has been fair and reasonable and that the reasons for the dismissal are reasonable, and therefore defensible, if you should be required to justify your actions. Lastly, if you have the misfortune of being the subject of an industrial tribunal application (and hearing) you should seek advice from your local BMA regional office without delay. Whether you win or lose the case, it is advisable to consider whether any lessons may be learnt from the episode. Was your selection procedure lacking in some respect? Is your disciplinary procedure effective, especially your arrangements to give an early warning of unsatisfactory performance or behaviour?

I am most grateful to Dr John Ball, Dr Ewen Bramwell, and Mr Peter Sykes and his colleagues of ACAS for their comments on this paper. I am, of course, responsible for any omissions or errors. This article can only provide a general guide to the provisions of existing legislation. It does not offer a definitive statement of law.

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