EMPLOYMENT LAW NEWSLETTER

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Misconduct Dismissals

2 recent Judgments reiterate the correct approach to misconduct dismissals.

An employer has a duty to properly investigate allegations of gross misconduct. Subject to this and as long as the employee is made fully aware of the allegations and evidence and can answer to them at a disciplinary hearing, the employer can decide who to believe. An Employment Tribunal cannot find the dismissal unfair just because it would have come to a different conclusion itself.

It has long been established since the case of British Home Stores v Burchell in 1980 that in misconduct cases an employer must be able to show that they

- believed the employee was guilty of misconduct
- had in their mind reasonable grounds upon which to sustain that belief, and
- had carried out as much investigation as was reasonable before reaching their conclusion

It is not for a Tribunal to "clear the name" of the employee, but instead to test whether the employer has followed a fair procedure.

In Secretary of State v Mansfield the original Employment Tribunal made the error of deciding that the employer did not have an honest belief in the employee's guilt because the Tribunal made its own judgment on the evidence used to dismiss, rather than deciding if the employer acted fairly and reasonably.

Where there are criminal proceedings relating to the same allegations, it is not unfair to delay the disciplinary until the criminal proceedings are concluded, even though there is no need for employers to do so. In practice, given the fact that the employee is likely to be suspended on full pay, and the Court proceedings are likely to take many months to conclude, few employers will delay disciplinary proceedings.

However, where an employer decides to delay the disciplinary hearing until the conclusion of a criminal prosecution it advisable to carry out internal investigations as promptly as possible before witness's memories fade. In the reported case the witnesses had been interviewed promptly in the course of the police investigation and these statements were available in the internal disciplinary investigation, so it was held that the delay did not prejudice a fair investigation.

The case report is at
http://www.employmentappeals.gov.uk/Public/Upload/09_0539wwfhSBRN.doc

In the case of Salford Royal NHS Trust v Roldan, the Employment Tribunal decided that the investigation had been inadequate. The Court of Appeal made the point that the more serious the consequences of the dismissal, the more careful an investigation is required. It also said that there is no need for an employer to make a definite finding that where there is a conflict of evidence between 2 employees, if the employer cannot decide who is telling the truth, it can give the employee the benefit of the doubt.

It is difficult to see in practice many instances where an employer would investigate an allegation of misconduct without coming to a final decision, although this case makes it clear that "I don't know" is a permissible conclusion! As long as the employer has a genuine belief in the employee's guilt based on reasonable belief following a full investigation, the decision of the employer cannot be regarded as unfair. The case report is at http://www.bailii.org/ew/cases/EWCA/Civ/2010/522.html

For employers dealing with misconduct issues, they should not only bear in mind the guidelines explained above, but they should also always follow the ACAS Code of practice which is at http://www.acas.org.uk/CHttpHandler.ashx?id=1047&p=0

Redundancy or Reorganisation?

Faced with the need to cut costs by saving on the payroll, an employer may choose to make redundancies or restructure.

There are 3 ways of achieving this as follows:-

1. Straight redundancies.

2. Offering alternative roles to existing staff and making redundancies

3. Making a whole group of staff redundant and giving everyone the chance to apply for positions in the new structure.

1. Straight Redundancies

This involves identifying the jobs no longer required and carrying out proper consultation and selection.

Retained staff may take on new responsibilities if the employment contract is flexible enough. If changes are required to the work going beyond the employment contract, the employee must agree the changes to avoid any risk of a breach of contract or constructive dismissal claim.

Employees should be consulted first and the proposed changes outlined and explained. If an employee refuses to agree to the changes, and if their job is to continue (ie their position is not to be made redundant) then their employment can then be terminated on notice and a new job offered to start immediately from the end of the notice period on the new terms and conditions. If the employer has acted reasonably and can justify the changes, then the dismissal will be fair.

2. Offering alternative roles and making redundancies

As an alternative, the employer may wish to treat the changes to retained employees positions as new roles and offer these to the retained staff. The employer must check carefully that there are not other employees at risk of redundancy whose roles are similar enough to put them into a selection pool to be considered for the new roles.

Where more than one employee could be suitable for a position in the new structure a fair selection procedure should be adopted to select who is retained and who is to be made redundant.

3. Making everyone redundant and allow applications for new roles

This is one way of avoiding problems where there is a risk of a redundant employee claiming unfair dismissal for failure to offer a vacancy.

The disadvantage is that employees who might expect to be retained are unsettled by being put at risk of redundancy, and any employee may choose to take redundancy instead.

By initially making 20 or more roles redundant, even if some employees will be retained the requirements for collective consultation take effect, and there is a minimum 30 day consultation period and a requirement to consult with representatives, with the potential sanction of a protective award of 90 days pay for each employee where proper consultation is not carried out.

In all cases the employer will need to consult with all individuals affected, provide job descriptions for the new roles and allow them to apply for the vacancies. Only employees whose roles have been made redundant can apply unless none of them are suitable for the job. If in doubt a statutory trial period enables the job to be given on a trial period and the offer of employment withdrawn within 4 weeks if the employee proves unsuitable.

Traditionally selection for redundancy must be done using objectively verifiable criteria. However, the strict requirements of objectivity can be relaxed where selection is being made for new positions.

A selection process which relies on interviews or assessments may be held to be fair even though the assessment or interview is one which would be considered too subjective to be a fair redundancy selection tool.

However, the overall process must be found to be fair, so an employer should make the process as fair as possible, ensuring that assessments are carried out without risk of bias, or interviews are held by a panel rather than a single individual, and candidates asked the same questions and pre determined marking criteria used. These will reduce the risk of the process being deemed unfair.