

Employment matters

John McMullen discusses unfair dismissal & reasonableness

IN BRIEF

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When examining an employer's decision to dismiss, a number of well established principles come into play for the purposes of the test of fairness in s 98(4) of the Employment Rights Act 1996 (ERA 1996).

First, in relation to alleged conduct, the test for establishing a fair reason for dismissal is laid down by *British Home Stores Limited v Burchell* [1978] IRLR 379, [1980] ICR 303n. The employer must genuinely believe the employee is guilty of the conduct and hold that belief on reasonable grounds following a reasonable investigation. The employment tribunal then has to consider whether the employer's decision to dismiss on the ground of that conduct fell within the range of reasonable responses available to a reasonable employer (*Iceland Frozen Foods v Jones* [1982] IRLR 439, [1983] ICR 17). An employment tribunal must not substitute its own view for that of a dismissing employer. In other words it must avoid a "substitution mind set" (*London Ambulance Service NHS Trust v Small* [2009] IRLR 563, [2009] All ER (D) 179 (Mar)).

Second, following the House of Lords decision in *West Midlands Co-operative Society Ltd v Tipton* [1986] ICR 192, [1986] 1 All ER 513 in determining the question of fairness, the employment tribunal must consider both the original dismissal decision and any subsequent appeal.

Facebook comments & the reasonable employer

In *British Waterways Board v Smith* (UKEATS/0014/15/SM) the Employment Appeal Tribunal (EAT) considered the first of this set of principles

Mr Smith was a manual worker for British Waterways Board. British Waterways' disciplinary procedure classed drinking alcohol while on standby as gross misconduct. It also had a social media policy prohibiting action on the internet which might "embarrass or discredit" British Waterways. Mr Smith worked with a group

of individuals described by the employment tribunal as "not a happy team". There was a history of employees complaining about health and safety and how they were spoken to by team leaders and supervisors. Mr Smith raised a formal grievance complaining about another employee. He followed this with a further complaint about others including a Ms McMillan. There was an attempt at mediation but then this was halted. The reason was that Ms McMillan had checked out Mr Smith's Facebook account. This search was unfavourable to Mr Smith. There was a raft of posted comments (some of which dating two years before) derogatory of the employer including comments such as: "hard to sleep when the joys of another week at work are looming NOT"; "going to be a long day I hate my work". There was more of the same, punctuated with expletives. Of significance was one particular post which stated "on standby tonight so only going to get half pissed lol".

Mr Smith was suspended, then summarily dismissed, for gross misconduct on the ground of these comments, including, in particular, the comment which suggested he had been drinking alcohol while on a standby shift contrary to the rules of the employer.

The employment tribunal held the dismissal was unfair as falling outside the band of reasonable responses. It found that no reasonable employer would have dismissed in these circumstances given the historic nature of the comments, that in the two years since the comments had been made the public had not been at risk and that there was no evidence of Mr Smith actually being drunk on standby. On appeal, the EAT was not impressed.

The employment tribunal had reclassified Mr Smith's behaviour as "misconduct" as opposed to "gross misconduct" and had clearly substituted its own views when it made findings about the employer's actual lack of problems with employees drinking while on standby and thereby the lack of risk to the public. In other words it fell exactly into the "substitution mind set" counselled against by the Court of Appeal in *London Ambulance Service NHS Trust v Small*. The EAT substituted a finding that the dismissal was fair and found that the decision by the employer to dismiss had been within the



band of reasonable responses.

Cases on employees' Facebook misdemeanours are now commonplace. The EAT confirmed there is no need for special rules in social media misuse cases. Such cases fall to be determined in accordance with the ordinary principles of the law applied in all cases, the EAT on this point agreeing with a similar opinion expressed in *Game Retail Limited v Laws* (UKEAT0188/14/DA).

The band of reasonable responses is not unlimited

On the other hand, in *Newbound v Thames Water Utilities Limited* [2015] EWCA Civ 677, [2015] All ER (D) 62 (Jul), the Court of Appeal has held that the band of reasonable responses is not infinitely wide, and applying the band of reasonable responses test is not merely a tick-box exercise for employers.

In this case Mr Newbound was summarily dismissed by Thames Water Utilities Limited after 30 years unblemished service. He was a penstock co-ordinator and responsible for annual inspections. The penstock regulates water flow in sewers. A penstock in Albert Road, East London was to be inspected. Mr Newbound and his manager discussed the equipment needed and whether a contractor would be able to use Thames Water's breathing apparatus. Mr Newbound's manager went through safety requirements for the exercise, including a relatively new safe system of work form (SHE4). It made it clear that breathing apparatus was to be used.

Mr Newbound and the contractor went to Albert Road. They put on protective equipment and discussed whether it was safe to enter the sewer without breathing apparatus. The checking of the gas monitor by Mr Andrews, the health and safety manager in charge, indicated that



it was safe to do so. Mr Newbound and the contractor went in wearing respiratory dust masks and taking a gas monitor with them but they did not wear breathing apparatus. Mr Gunn, a field service manager, arrived on site and noticed that the two were not wearing breathing apparatus. This was in breach of the SHE4 form that had been issued. Mr Gunn did not speak to Mr Newbound. But he considered that Mr Newbound should be subject to gross misconduct proceedings.

At those proceedings Mr Newbound acknowledged that he had signed the SHE4 document but admitted that he had not read it fully. He had not seen it before, had not been trained on its use, and thought it was simply a method statement. He made a decision not to use breathing apparatus based on his experience.

Mr Newbound was summarily dismissed for gross misconduct on the ground of committing a serious breach of health and safety policy. His appeal was rejected. An employment tribunal held however that in the circumstances no reasonable employer would have dismissed Mr Newbound and the dismissal was therefore *outside* the band of reasonable responses. In particular, the employment judge found that the SHE4 form had been introduced comparatively recently and employees had not been trained in its significance. The regional manager had not explained that failure to wear breathing apparatus could lead to disciplinary action. Mr Newbound genuinely believed the SHE4 was a method statement and Thames Water had previously been prepared to rely on his experience in deciding whether to use breathing apparatus. Thames Water had not taken into account Mr Newbound's contrition and his offer to be retrained. Finally, his length of service and clean disciplinary record had not been given sufficient weight. The

dismissal was therefore unfair (albeit with employee contributory fault).

The EAT overturned the decision on the merits, considering that the employment tribunal had substituted its own view of whether Thames Water acted unreasonably. In its view, the dismissal fell within the band of reasonable responses. But the Court of Appeal overturned the EAT and restored the employment tribunal decision. The employment judge was entitled to reach the conclusion that no reasonable employer would have dismissed Mr Newbound in the circumstances.

The court disagreed with Thames Water's submission that an employment tribunal should give very wide margin of appreciation to employers on health and safety. There was no special rule about assessing the reasonableness of a dismissal on conduct grounds where the alleged misconduct involved a breach of health and safety requirements.

“A procedurally defective dismissal can be put right by proper treatment of the employee during the appeal process”

While the band of reasonable responses test was very well established, there are limits. In every case, an employment tribunal must consider whether, on the facts, the employer acted reasonably or unreasonably in deciding to dismiss. Parliament did not intend a tribunal's consideration of the test to be a matter of procedural tick-boxing. Thames Water was attempting to stretch the band of reasonable responses to “an infinite width”. Finally, Mr Newbound had been treated unfairly compared with the treatment of Mr Andrews, who was the competent person in charge and who had only been given a final warning.

Procedurally defective dismissals & appeals

In *Biggin Hill Airport Limited v Derwich* (UKEAT/0043/15/DM), Ms Derwich was employed as a handling agent at Biggin Hill Airport. There was a promotion opportunity. Ms Derwich's friend, Ms King, applied for the job. Before taking up her new post Ms King took the step of “un-friending” Ms Derwich and her colleagues on Facebook. That did not go down well. From that point Ms King was cold-shouldered by colleagues. Someone put a “Witch” image on Ms King's computer

as a screen saver. Ms Derwich and others were interviewed. Ms Derwich admitted choosing the Witch image and using it as a screen saver on Ms King's computer. She did not deny making obscene gestures behind Ms King's back. Her case was that she was upset that Ms King had unfriended her on Facebook.

Ms Derwich was suspended and invited to a disciplinary hearing, the charges being her behaviour towards Ms King, the “Witch” screen saver, and searching Google for offensive expressions for use in connection with Ms King. Before the disciplinary hearing the employer did not disclose the results of interviews of colleagues to Ms Derwich before summarily dismissing her. Ms Derwich then exercised her right of appeal. All witness statements taken during the investigation were now disclosed to Ms Derwich and, following this, her appeal was dismissed. It was common ground that Ms Derwich had no complaint regarding the manner in which the appeal hearing was conducted.

The employment tribunal found that there was an unfair dismissal on the ground of the procedural defect (not disclosing the statements) at the dismissal stage.

The employer appealed on the basis that the employment judge should have taken into account what happened at the appeal hearing and considered whether it cured the original defect. The EAT allowed the appeal. It is a settled principle in unfair dismissal law that, in determining fairness for the purposes of ERA 1996, the tribunal must consider both the original dismissal decision and any subsequent appeal. Here, the employment judge should have considered whether, as a matter of fact, the appeal in this case cured any procedural deficiency. The matter was remitted to a fresh employment tribunal for this properly to be considered.

The case illustrates that, on occasion, a procedurally defective dismissal can be put right by proper treatment of the employee during the appeal process. Therefore, if an appeal chairman looks at a case and considers that the first stage disciplinary process was not properly conducted, he would be well advised to reopen the case and look into the matter again in the same detail as should have been undertaken at the dismissal stage, allowing the tribunal to look at whether “the disciplinary process as a whole” (per Lady Justice Smith in *Taylor v OCS* [2006] EWCA Civ 702, [2006] All ER (D) 51 (Aug)) was fair.

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