SQUIRE SANDERS

MISCONDUCT DISMISSALS

– do not overlook relevant previous warnings

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Take the following scenario: an employee is invited to a disciplinary hearing in connection with an alleged act of gross misconduct. He already has live disciplinary warnings on his file. Should the employer take these warnings into account when deciding whether to dismiss him? Possibly not - if the employee has committed a genuine act of gross misconduct then it does not need to do so. But what if it does not and a Tribunal subsequently finds that the act in question did not constitute gross misconduct – would the employer be able to rely on the employee's previous disciplinary record (plus this additional act of misconduct) to justify its decision to dismiss him? No, according to the EAT in ***Nejjary v Aramark Ltd***. Unless the employer took these warnings into consideration at the time of dismissal, it cannot rely on them retrospectively.

N was a Hospitality Manager for A Ltd, which provided hospitality services to Goldman Sachs. He was invited to attend a disciplinary hearing in connection with two separate complaints from GS that he had failed to follow the relevant procedure for booking events. Prior to the disciplinary hearing, A Ltd became aware that GS had also earlier asked for R to be removed from certain events because of his attitude and behaviour.

At the disciplinary hearing A Ltd took the decision to dismiss N, concluding that each of the three complaints constituted an act of gross misconduct. In reaching its decision A Ltd did not take into account N's eventful disciplinary record (even though this included a live warning for a similar offence, plus a second unrelated warning), presumably on the basis that it did not feel it was necessary to do so in light of its finding that N had committed repeated gross misconduct. Interestingly, at N's subsequent appeal hearing A Ltd discounted two of the complaints against N because of facts that came to light as part of the appeal officer's investigation. Nonetheless it upheld the decision to dismiss N on the basis that the first incident alone was sufficient to warrant summary dismissal.

N brought a claim of unfair dismissal but was initially unsuccessful. The Tribunal said that if N had had an unblemished disciplinary record or a record of minor but unrelated issues then A Ltd's decision to dismiss would clearly have been outside the band of reasonable responses, as no reasonable employer would have dismissed for what had boiled down to a one-off incident of failing to check a booking form.

In this case, however, N had been given an earlier warning for the same issue and he also had another warning on his file. In these circumstances the Tribunal took the view that A Ltd's decision to dismiss was fair. Furthermore, in a transparent but doomed attempt to forestall any appeal, it said that as N's conduct "inexorably led to his own dismissal" it would not be just and equitable to award him any compensation in any event. You get the impression that the Tribunal took rather a dislike to N at the hearing!

The EAT has now overturned this decision. It said the Tribunal should not have taken N's previous disciplinary record into account in circumstances where A Ltd had made it very clear that it had not relied on these previous incidents when deciding to dismiss N. It accepted that A Ltd may have been entitled to rely on these earlier warnings to justify its decision to dismiss N, but it clearly did not in fact do so. The Tribunal had therefore erred in substituting its own decision for that of the employer. The EAT also went on to say that N, having been dismissed by reason (on the face of it) of a single instance of misconduct, could not have been said to have contributed to his own dismissal by other matters of conduct which were not actually in play in the employer's decision to dismiss at all. Therefore, the EAT 'reluctantly' (presumably because it also thought he should have been dismissed) allowed N's appeal and remitted the question of remedy to the Tribunal for further consideration.

This case is a useful reminder for employers that when considering the fairness of a dismissal, Tribunals will not take into account an employee's previous disciplinary record if this did not form part of the original decision to dismiss. Employers should therefore always give careful consideration to the reasons for dismissal, and make sure they document them accordingly. This does not mean throwing everything at the employee in the hope that something will stick, but if there are relevant previous disciplinary warnings these should be taken into account and spelt out in the dismissal letter. This will be of most relevance where an employee has a final written warning on his file and then goes on to commit a further act of misconduct. Unless this further offence constitutes a very clear case of gross misconduct, it will always be advisable to refer to the employee's previous final written warning as a factor in your decision to dismiss. However, to preserve the gross misconduct argument, you should also make it clear that you did not in your view need to rely on it. At least you can then point to this should it get as far as a Tribunal.

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