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Cautionary Tales on Handling Disciplinary and Grievance Issues

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A couple of cases caught our attention this month – one cautions employers against jumping to conclusions when handling gross misconduct dismissals and the other acts as a reminder that workers have an absolute right to choose their companion when attending a disciplinary and grievance hearing. Neither case is earth shattering, but they both contain useful practical guidance for employers when handling day-to-day disciplinary and grievance issues.

In ***Brito-Babapulle v Ealing Hospital NHS Trust***, B, a consultant haematologist at Ealing Hospital was found to be working for her private patients whilst she was certified sick and receiving sick pay from her NHS employer. Like many organisations, Ealing Hospital took a dim view of B's actions (especially as she had previously been notified that if certified sick she should not be working for her private patients) and dismissed her for gross misconduct, describing her behaviour as fraudulent. B's appeal against dismissal was unsuccessful and she brought a claim of unfair dismissal.

The Employment Tribunal dismissed her claim, concluding that Ealing Hospital had a potentially fair reason for dismissal (misconduct) and that it had carried out a fair process, including a reasonable investigation. When it came to deciding whether the decision to dismiss B fell within the range of reasonable responses, the Tribunal said: "Once gross misconduct is found, dismissal must always fall within the range of reasonable responses….".

And this, according to the EAT, is where the Tribunal fell into error. The EAT said that when considering the fairness of a dismissal, and in particular whether the decision to dismiss falls within the band of reasonable responses open to a reasonable employer, a Tribunal should not jump straight from a finding of gross misconduct to a conclusion that dismissal was within the range of reasonable responses. It said the Tribunal should have considered any mitigating factors, such as the length of B's otherwise exemplary service and the consequences of dismissal from the NHS. As it had not done so, the EAT remitted the case back to the Tribunal to consider this point. Clearly one suspects that, given the chance to have a second bite at the cherry, the Tribunal will reach the same conclusion!

In this case it was the Tribunal's failure to stop and take into account potentially mitigating factors that was subject to criticism, but the EAT's observations would apply equally to employers dealing with a similar situation. It means that employers should also not assume that a finding of gross misconduct will necessarily justify instant dismissal. They too should stop and be seen to consider any potentially mitigating factors, such as an employee's length of service, any provocation, prior clean disciplinary record, etc., before reaching any conclusion. Ultimately it might not make any difference to the final outcome, but at least they cannot then be subject to any criticism. As always, a written record of any such deliberations should be made.

The other thing to be careful of is that working for one employer whilst signed off sick from another is not necessarily a sackable offence anyway. As highlighted in ***Perry v Imperial College Healthcare*** (featured in our September 2011 newsletter) the fact that an employee is unfit to do one job does not necessarily mean s/he is unfit to do another. In ***Perry***, the employee's two jobs were quite different. One was sedentary, the other was mobile. The hours of work obviously did not clash and at no stage was the employee working for her second employer when she should have been working for her first employer. The decision to dismiss her for working in a second job while on sick leave from the first was therefore held to be unfair. Clearly the position will be different, as in ***Brito-Babapulle***, where the two jobs are similar and there is evidence of malingering and/or misrepresentations as to the employee's actual state of health.

Our second case, ***Toal & anor v GB Oils Ltd***, concerns a worker's right to be accompanied at a disciplinary or grievance hearing.

Under section 10 of the Employment Relations Act 1999, workers have a statutory right to be accompanied at a disciplinary or grievance hearing by a trade union official (either employed by a trade union or certified to act by a trade union as a companion) or a fellow worker. To trigger the right, a worker must "reasonably request" to be accompanied at the hearing. Question – does the word "reasonably" apply to the choice of representative as well as the request itself?

No, according to the EAT in ***Toal.*** In its view the word "reasonably" does not apply to the choice of representative. In other words, provided a worker has asked to be accompanied by a trade union official or a fellow worker then it is not open to his employer to reject the request to be accompanied, even if it has concerns about the chosen representative. In the EAT's view, workers have an absolute right to choose their companion, subject only to the safeguards set out in the legislation, namely that the companion is a trade union official or a fellow worker.

But what about the guidance contained in Acas's Code of Practice on disciplinary and grievance procedures? This says: "*To exercise the right to be accompanied a worker must first make a reasonable request. What is reasonable will depend on the circumstances of each individual case. However, it would not normally be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing nor would it be reasonable for a worker to ask to be accompanied by a companion from a remote geographical location if someone suitable and willing was available on site*". Unfortunately the EAT gave short shift to the Code and said that it was not an aid for construing the meaning of the statute which, in its view, "is perfectly clear".

On a positive note, the EAT said that the amount of compensation that workers should receive in respect of any breach of section 10 (which is capped in any event at 2 weeks' pay) should be nominal if they have not suffered any detriment or loss as a result of their employer's actions, "*either in the traditional sum now replacing 40 shillings - £2 – or in some other small sum of that order*". Well worth taking the point all the way to the EAT, then!

The EAT's comments are not helpful, as clearly in some circumstances an employer may have legitimate concerns about a worker's chosen companion, as evidenced by the observations in the Acas Code, which one supposes will now have to be revisited, however sensible the paragraph in question appears to be. It seems, however, that there is no requirement for a worker's companion to be reasonable. Any employer that rejects a request to be accompanied on this basis will be acting unlawfully. Mind you, the number of workers who may be inclined to take the point is likely to be limited, given that it will now cost them £250 in Tribunal fees to bring the claim in the Tribunal in the first place.

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