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Review

Employment

DISMISSAL OF EMPLOYEE FOR WORKING IN SECOND JOB WHILE ON SICK LEAVE WAS UNFAIR. *WHAT*?

The Employment Appeal Tribunal (EAT) has ruled that an employer's dismissal of an employee for working in a second job while on sick leave from the first was unfair (***Perry v Imperial College Healthcare NHS Trust***). A hard concept to grasp at first blush, but one which contains a salutary lesson for employers.

Ms Perry had two part-time jobs. She worked 19 hours per week as a community midwife for Imperial College Healthcare NHS Trust which involved her visiting patients in their own homes, and six hours per week as a family planning nurse for Ealing Primary Care Trust.

In December 2007 Ms Perry became unable to perform her duties as a midwife because a chronic knee problem meant that she was unable to do the necessary travelling. She was signed off sick by Imperial and started to receive Statutory Sick Pay. However, unknown to Imperial she continued to work for Ealing, as this role was largely sedentary and the clinic was less than 100 yards from her home.

Towards the end of 2008 Imperial discovered that Ms Perry had been working for Ealing during her sick leave and summarily dismissed her for gross misconduct. It argued that she had committed gross misconduct by "fraudulently claiming sick pay" from Imperial despite being fit enough to work for another employer at the same time.

At the appeal stage it became clear that Imperial did not have grounds to dismiss Ms Perry for fraud, as there was nothing dishonest in her claiming sick pay from Imperial while continuing to work for Ealing. Her entitlement to Imperial sick pay depended on her being medically unable to do her Imperial job. That she was, and her role at Ealing had no bearing on this. Indeed, HMRC Guidance makes it clear that it is possible for an employee to qualify for SSP from one employer while continuing to work for another. Undeterred, Imperial upheld the decision to dismiss but now on different grounds, i.e. Ms Perry's failure to disclose her second job while on sick leave. This was a breach of her contract of employment which said that whilst on sick leave she was not entitled to work elsewhere without prior permission from her manager, which she had not obtained. It said that by failing to disclose her second job she had "deceived" Imperial because if it had known that Ms Perry was fit enough to do her job at Ealing it might have been able to redeploy her to other duties and so avoid the sickness absence.

An Employment Tribunal dismissed Ms Perry's unfair dismissal claim. On appeal the EAT was highly critical of Imperial and its handling of her dismissal. In its view the dismissal was unfair because there was no basis for suggesting that by failing to disclose her continued work in her Ealing job Ms Perry had been seeking to prevent Imperial from redeploying her. The aim of the provision requiring disclosure was to enable Imperial to satisfy itself that its employee was not doing anything inconsistent with her being unfit for her duties, not to furnish it with information with a view to redeployment. In any case, the onus on Imperial to look at redeployment as an alternative to sick leave applied anyway, and was not conditional upon any capability evidence first being received from the employee.

In the EAT's rather cutting terms, this was "no doubt [an] attempt, after the event, to salvage something from what, by that stage, had plainly been an initially misconceived decision to summarily dismiss". It did, however, acknowledge that Ms Perry had contributed to her dismissal by failing to obtain permission from Imperial to carry on with her second job during her sickness and said that any award of compensation should be reduced by 30% for contributory conduct.

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There are a number of lessons that employers can take from this decision:

a) Do employees have to inform you about a second job at all? As a general rule there is nothing to stop employees from working for more than one employer (provided they are not working in competition) and they are under no proactive obligation to inform you about any second job. If employers wish to restrict the activities of their employees outside work they should include an express clause to this effect in their contracts of employment. A standard clause would, for example, prohibit an employee from undertaking any other employment without their employer's consent. This may not be applicable for all staff, for example those working on a part-time basis or in less senior positions. If employees are allowed to carry out other work they should at least be required to disclose their activities, if only so you can ensure that the role poses no conflict or that they are not working more than 48 hours per work on average.

b) In what circumstances can an employee work for another employer while on sick leave? As highlighted in this case, it is not unlawful in itself for an employee to claim SSP in one job while continuing to work in another. It is only where an employee has more than one contract with the same or an associated employer that he must be incapable of work under all the contracts before he can claim SSP. In this case, Ms Perry's two part-time jobs were quite different. One was sedentary, the other was mobile. The hours of work did not clash and at no stage was she working for Ealing when she would ordinarily have been working for Imperial. That she was fit to do one job did not necessarily mean that she was fit to do the other. Clearly the position would have been different if she had been working for Ealing whilst she should have been working for Imperial or the two jobs had been similar and there was evidence of malingering.

c) Changing grounds for dismissal The other key point to take from this case is the need to be very careful about trying to re-invent the reason for dismissal on appeal. When Imperial realised it did not have sufficient grounds to dismiss P for fraud it changed its approach and sought to confirm the termination for another reason instead. As a general rule if an employer realises on appeal that it does not have sufficient grounds to dismiss for X reason, but it might be able to dismiss fairly for Y then it should start things afresh and make a fresh decision after a fresh hearing and investigation in relation to the new ground, and not simply uphold the original decision to dismiss, but on a different basis. Though establishing Y as fact may go to the amount of compensation, as here, it cannot be used to paper over the cracks appearing in X.

See William Bateman's posting this month on "moonlighting" on our **Employment Law Worldview Blog.**

FURTHER INFORMATION

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