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PEOPLE & LEADERSHIP SOLUTIONS

HR Bulletin

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The continued importance of following (reasonable) procedures...

In this bulletin we review the case of Coventry University v Mian (2014, EWCA Civ 1275), where it is once again imperative to note that employers take all due care and attention when undertaking disciplinary proceedings. The Court of Appeal in this case was asked to determine if there was a breach of contract towards Mian who suffered a psychiatric injury which she determined was as a result of the way Coventry University had commenced disciplinary proceedings against her.

Background and facts of the case

Dr Mian was employed as a Senior Lecturer at Coventry University (Coventry). During 2006 her colleague Dr Javid was made redundant, having initially been informed he was to be made redundant the previous year. Javid left Coventry in August 2006, having secured a position at Greenwich University (Greenwich). Dr Mian provided Greenwich with a reference for Dr Javid.

In March 2007, Dr Linda Merriman, Dean of the Faculty at Coventry, was contacted by a Professor John Humphries, Pro Vice Chancellor of Greenwich. Humphries stated that he had concerns about Javid's performance when considering it against the reference it had received from Mian. Merriman requested a copy of the reference which was dated 5th December 2005, which was on Coventry headed stationery and was alleged to have been composed and signed by Mian. The reference was extremely detailed and was over three pages long. The reference was deemed, from Greenwich's point of view, to contain significant faults and also had exaggerated Dr Javid's qualifications and qualities. It is not clear on what basis Greenwich had reached this view but it must be assumed that they had conducted some form of internal enquiry.

Merriman informed Humphries that she would begin an internal investigation on the basis of the alleged inaccurate reference.

Merriman appointed a Dr Daly, Associate Dean, to lead the investigation into how the reference was issued and on what basis it was then sent to Greenwich. As part of the initial investigation, Coventry queried with Greenwich on how the request for the reference had been sent to Mian. It was likely, Greenwich stated, that it would have been posted to Mian at the Coventry address given by Javid. Mian had a `pigeonhole` for mail and the address was at a different location to where Javid would have been working at this time. This `fact` appears to have ruled out Javid intercepting the reference request himself and sending it to Greenwich.

Another Coventry academic, Dr Valerie Cox, was shown the reference letter and said that in her opinion the signature on it was not that of Mian. Coventry then decided, after consulting with its HR Department, to undertake a search of Mian's computer, without informing Mian, due to the possibility that information might be deleted by Mian as a result.

Mian's computer revealed three further `draft` references for Javid, all were for separate positions at different organisations, starting in 2004. Daly analysed the three references alongside the one given for Greenwich, and in her view were similar in nature to the Greenwich one. Daly also concluded that all four of them were similarly inaccurate and misleading.

A preliminary meeting was arranged for 27th March 2007 to which Mian was invited and informed that she could be accompanied by a Trade Union representative if she wished, though she attended on her own.

Daly `chaired` the meeting and a note taker was also present. Mian was also supplied with a copy of the reference given to Greenwich for Javid.

During the course of the meeting, which lasted approximately 45 minutes, Mian denied that she had written any of the references found on her computer, including the one sent to Greenwich. Mian stated that whilst she had agreed to Javid's request to be a referee for him, he had in fact produced the context and content of the references themselves which she then saved onto her computer.

Mian contested that she had felt intimidated by Javid and had kept the references *"because he was so irritating"* and *"to keep him quiet".* Mian also stated that she had not raised the issue of feeling intimated by Javid to Cox (her line manager) at any point during her employment at Coventry.

At the conclusion of the meeting Daly asked that Cox explore further some of the issues that Mian had raised during the meeting, these were around whether there were any examples where Mian had made Cox aware of issues between her and any other colleagues, the relationship between Mian and Javid and Cox's own experiences around the behaviour of Javid.

Cox found no evidence of complaints about Javid's behaviour from any colleagues or students and concluded that the relationship between him and Mian was cordial.

Daly recommended that disciplinary proceedings should be instigated to investigate formally the allegation that Mian had been complicit with Javid in the preparation and presentation of false references and that it could equate to gross misconduct.

The letter inviting Mian to a disciplinary hearing suggested alleged complicity in preparing untrue and disingenuous employment references.

Two days after the letter was issued, Mian went absent from work due to illness. The hearing was delayed and in October 2007, at the insistence of a Mr Jon Baxter, Mian's union representative, Daly interviewed Cox again and Drs Heppinstall, Carson and Maddox, presumably to add more weight to Mian's version of events against the allegations made formally in April towards her. Coventry did not feel that the outcomes of these interviews changed its position with regard to their investigation and a further disciplinary hearing was arranged.

In November 2007 a disciplinary hearing took place over two days before an independent assessor, Professor Noon. Baxter was also in attendance over the course of the two days, but Mian did not attend any of the hearing. Baxter presented Mian's written response to the allegations and he also summed up that Mian was *"guilty of stupidity and naivety"* but not complicity. Professor Noon said he had found the case *"not easy",* but still dismissed the allegations against Mian.

At the Employment Tribunal

Mian did not return to work at Coventry and subsequently left the University's employment. She found employment elsewhere and then proceeded to bring a claim against her previous employer, claiming psychiatric injuries because of the allegations made towards her. Mian contended that Coventry was in breach of the implied contractual term of mutual trust and confidence and/or negligence so as to lead to her to suffer work related stress after the commencement of disciplinary proceedings without continuing without further exploration.

Judge Barrie, who heard the case, held that if further such enquiries had been undertaken, after Mian had gone off from work with stress, then proceedings would not have been instigated, as it would have been established that there was an insufficient basis for them. It was also established that there was common ground between the parties that Coventry's contractual and common law duties were `co-extensive`, that is to say `of the same limit or extent. ` In addition, it was also established that a breach would be evident if there was a decision to take a disciplinary option was `unreasonable` in that it could be regarded as being beyond the scope of reasonable options open to an employer in the circumstance.

In conclusion, Barrie was in agreement with Mian in that if there had been further enquiries then disciplinary proceedings would not have commenced, on the basis that there was insufficient evidence to proceed.

The failure, therefore, to continue to make further enquiries constituted a breach in Coventry's duty of care to Mian.

And so to the Court of Appeal

Coventry's appeal was built on whether a reasonable employer could have concluded in the circumstances, that there was a case for Dr Mian to answer on a charge of gross misconduct after its initial disciplinary investigation. The Court of Appeal Judge, Lady Justice Sharp, felt that in her view "*that the case was well-founded on the basis of the concrete evidence available at the time proceedings were instigated and I think the judge was plainly wrong to conclude otherwise. I have in mind in particular the finding of three false references for Dr Javed in Dr Mian's name and saved on her computer on three separate occasions, and the fact that if Dr Mian had no involvement in the production of the false Greenwich reference, then Dr Javed must have contrived somehow to intercept Greenwich's request for a reference from her pigeon hole in a manned office without her knowledge – an occurrence that both Dr Daly and Dr Merriman, regarded as implausible.*"

Justice Sharp found that the ET's judge's conclusion was flawed in that the correct test was whether the decision to instigate disciplinary proceedings by Coventry was unreasonable, in the sense that was it outside the range of reasonable decisions open to an employer in the same circumstances... this required an objective assessment, which was not to be made without the benefit of hindsight.

In addition, Justice Sharp acknowledged that reasonable people could reach different decisions on the same question and considered that Coventry could have accepted Dr Mian's explanation but it was not unreasonable for the matter to proceed to a disciplinary hearing. The investigating manager, Daly, had found some aspects of Mian's version of events implausible, e.g., the references being found on Mian's computer for one, and this was not unreasonable, given the unusual aspects of this case.

Finally, the Court of Appeal did consider whether Mian`s `vulnerability` could be relevant to the manner in which disciplinary proceedings were conducted and what care and support she should have received.

However, it was felt that introducing the vulnerability of the employee into the test for whether the instigation of disciplinary proceedings was reasonable on the facts provided and would be an incorrect determination of law. **Coventry's appeal was therefore successful and the decision in favour of Mian was overturned.**

Conclusions

This case is similar, in principle to the issues raised in *Gogay v Hertfordshire CC (2000 IRLR 703)*. The claimant in that case was a residential care worker and was subject to purported allegations of sexual abuse. The employer decided to undertake a formal investigation and suspended *Gogay.* The investigation found no evidence to support the allegations and she was reinstated. Gogay, however, was unable to resume work due to a depressive illness as a result of the allegations made and brought a contractual claim against her employer, with her argument being that the suspension in itself was a breach of the implied term of trust and confidence.

The Court of Appeal at the time agreed that the suspension decision was a breach of that implied term. The only evidence against Ms Gogay was in the form of remarks made by the complainant liken her to a third party. These remarks were deemed to be "difficult to evaluate" and could not be described as an allegation of sexual abuse. It was held that further enquiries should have been carried out before deciding whether a suspension was correct. The court found that the decision to suspend Gogay was a "knee jerk reaction" made without reasonable thought and sufficient justification.

In contrasting with the present case, the evidence against Mian appeared conclusive, there was a reference signed in her name, further references found on her hard drive, and her explanation was implausible. The employer had carried out a `proper` preliminary investigation before instigating proceedings and the purported allegation against Gogay was more serious in nature than that made in relation to Mian.

What is clear is that both cases reinforce the requirement for employers to ensure they have carried out a thorough investigation, which produces reasonable evidence establishing that there is a case to answer for/to, before they decide whether to instigate proceedings against an employee. This decision should be considered in light of the seriousness of the allegation, as the court may well ultimately take this into account.

A final point to note is that the Court of Appeal applied different tests in the two cases. In Gogay, the court applied the *"reasonable and proper cause"* test, established as the test for breach of the implied term of mutual trust and confidence *in Malik v BCCI [1998] AC 20*. In Coventry, the court seemed to apply the *"range of reasonable responses"* test ordinarily used in unfair dismissal claims. It is unclear why this test was used as it was agreed between the parties and therefore not discussed in the judgment. In any event, the factors considered by the court were the same in both cases, despite different tests being used.

We believe that this decision is helpful and should offer reassurance in cases where disciplinary proceedings for gross misconduct are pursued and either result in a minor sanction or no sanction at all. Such an outcome does not necessarily mean that it was wrong to instigate the disciplinary proceedings in the first place and could be seen as an indicator that processes are working effectively.

The Court of Appeal also noted that it was important for disciplinary processes not to become over technical and legalistic and that it is important to bear in mind that it is not necessary, nor always helpful, to adopt a `*courtroom approach*` when dealing with internal disciplinary hearings, so formal and professional without being overly legalistic.

How not to manage 'unauthorised absence' from work…

We have heard that over in India a Civil Servant was eventually dismissed for `unauthorised absence` after not showing up for work for a period of 25 years!

Mr Verma, who `worked` as an executive electrical engineer with the Central Public Works Department, last showed up for work in 1990 ... went on `earned` leave in December of that year and never again turned up to perform his duties.

It appears that Mr Verma sought additional time off from work after his initial request, but when this wasn't granted he simply continued not to show up for work ... there was an inquiry into this in September 1992, but this was then delayed ... until 2005 ... and a report submitted into this case in 2007 ... but it went no further.

No one knows if Mr Verma continued to be paid during this period of absence but finally this month, he was dismissed after a quarter of a century.

As a footnote it appears that he is not the only Indian citizen to take a lengthy time-out from their job. Last summer it was reported that a biology teacher has been absent from her job in a Madhya Pradesh school for 23 years ... so she may well end up beating Mr Verma's record.

Just to remind us, these were some of the things happening way back in January 1990 ... Rowan Atkinson first appeared as Mr Bean, Glasgow was the European Capital of Culture – the first for any city in the British Isles, Band Aid along with New Kids on the Block and Kylie Minogue topped the UK Charts and at the end of January 1990, Aston Villa were second in the league table ... how times have changed, or not.