West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

HR Bulletin

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Consistency of Treatment

In this month's bulletin we focus on the case of the meerkat, the monkeys and llama ... or more relevantly, staff at London Zoo who looked after these animals. This is the case of Westlake v ZSL London Zoo where at a Christmas party in 2014 Westlake was dismissed after being involved in a fight with another colleague ... the question for the EAT then was why was only one of the employees dismissed and not both given that they both appeared to be equally involved in the fracas? Oh and if you are wondering about the animal references ... all will become clear.

When employment law breaks through into the national press you can usually be sure that the emphasis will be on the sensational aspects of the story rather than the underlying legal principles. You may have read, for example of the case of Westlake v ZSL London Zoo[1]. That involved an employee who was dismissed following a fight at the employer's Christmas party. The Tribunal found that the dismissal was unfair because the employer only chose to dismiss one of the participants and there were no grounds to find that one was more to blame than the other. There is nothing particularly dramatic or interesting about that but since the case involved a meerkat handler fighting a monkey keeper, over a colleague who worked with Llamas, that gave the headline writers lots of good material to play with.

In that case the Tribunal awarded no compensation on the basis that had the employer behaved reasonably it would simply have dismissed both employees and so the claimant had not really suffered any loss. The employer is therefore unlikely to appeal – although a finding of unfair dismissal based purely on inconsistent treatment is far from straightforward.

At about the same time that that case was being heard in the Tribunal, the EAT was considering the issue of consistency of treatment in another case involving an incident at an office party.

In MBNA Ltd v Jones[2] the employer organised a night at the races to celebrate its 20th anniversary. As is now common, employees were specifically reminded that as this was a work event, normal standards of conduct and behaviour would apply. However two employees – let's call them 'A' and 'B' – had already been drinking by the time they arrived at 7pm. As the evening progressed they began to needle each other with A kneeing B in the back of his leg and B – rather surprisingly - licking A's face. Later in the evening B had his arms around A's sister and A came over and kneed him in the leg again. At this point B punched A.

After leaving the event B went on to a nightclub with friends. A knew where they had gone and followed them there. Standing outside the club he began to send B text messages encouraging him to come out so that he could 'rip your [expletive deleted] head off'.

[1] Case No: 2201118/2015

[2] UKEAT/0120/15/MC

In fact there was no telephone reception in the club and B did not receive the messages until the next morning. After a while, A left without carrying out his threat – which is probably just as well.

The employer launched an investigation and B was ultimately dismissed for gross misconduct. A was given a final written warning on the basis that the employer believed he was just reacting to being punched and did not intend to follow through on his threats.

The Tribunal held that the dismissal was unfair because the employer had applied a different test of provocation to A and B's cases. They had given A a warning because he was provoked by B's punch but failed to take into account that A had kneed B (quite hard it seems) in the leg. They also doubted the employer's conclusion that A had no intention of following through on his threats.

The EAT overturned the decision holding that the dismissal of B was fair. The cases of A and B were not sufficiently similar for the lenient treatment of A to make B's dismissal unfair. B had assaulted A while at a work event; A had merely threatened to assault B later in the evening after both of them had left – and had not followed through on the threat. The fundamental job of the tribunal was to assess whether the dismissal of B was reasonable rather than whether someone who was given a warning should also have been dismissed. I suspect that in the London Zoo case the EAT would also have taken the view that the Tribunal should not have interfered in the way in which the employer distinguished between the conduct of the two employees involved.

Consistency is of course important in any concept of fairness. But the reality is that two cases are rarely so very similar that a direct comparison is possible. The employer is entitled – in fact, obliged – to take all of the circumstances of the case into account, including both aggravating and mitigating factors. As long as its approach is rational and it explains its reasons then it should be hard for a Tribunal to interfere.

There is an important way, however in which consistency of treatment does come into play. In deciding whether a dismissal is fair or unfair the tribunal will consider whether the employee should have realised that the conduct in question could lead to dismissal. That is straightforward in clear cases of gross misconduct such as assaulting a colleague. But in cases that are not so clear cut the way in which the employer has approached similar cases in the past may be important. If employees who over-claim mileage are normally given a warning then an employee who is dismissed for doing the same thing might well claim that there was no reason to expect that the conduct would lead to that outcome.

With large employers like local authorities, it can sometimes be difficult to show a consistent approach. Different departments can have a very different working culture and a completely different set of priorities. It is important that any differences in what is considered to be a serious issue are not based on managerial whim but on a clear understanding of the needs and priorities of the business. Careful communication is needed so that employees – and managers – understand why issues might be approached differently depending on the nature and context of the work being done.

Consistency of treatment is really about consistency of approach rather than consistency of outcome. Choosing to dismiss an employee – or just giving a warning – does not set a precedent that must be then followed in all future cases as long as the employer applies the same principles to each case, taking the particular circumstances into account. Clarity about how and why a decision was taken is every bit as important as consistency. Having said that, when the conduct consists of a drunken assault on a colleague at an office party, justifying dismissal should not be too difficult.

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