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West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

HR Bulletin

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Warnings and Investigations

*Possibly the most important – and most often quoted – case in the history of employment law is **BHS v Burchell** from 1978.*

In that case the EAT said that in order for a misconduct dismissal to be fair the employer had to have an honest belief in the guilt of the employee; have reasonable grounds for that belief – and to have conducted a reasonable investigation. Any Tribunal dealing with a conduct dismissal will ask itself whether the 'Burchell test' has been satisfied and an employer that falls down on any one of the three requirements is almost certain to lose the case.

But we should always remember that the 'real' test of unfair dismissal is set out in the Employment Rights Act 1996 – and that is whether, in all the circumstances, the employer has acted reasonably in dismissing the employee. Ultimately it is the overall fairness of the dismissal that counts rather than what is done at each individual stage of the process.

In the case of *NHS 24 v Pillar* the employee was a nurse working on an NHS helpline. She was dismissed after an incident in which she seriously mishandled a call involving a man with chest pains. Instead of spotting the 'red flags' that would have warned her of the risk of heart attack and the need for a 999 call requesting a an ambulance, she advised the patient to seek further advice from an out-of hours doctor's service.

This was obviously a serious matter and an investigation was conducted prior to a disciplinary hearing. The management report that emerged, however, also included details of two previous incidents where the employee's advice had put patient safety at risk – one of them in almost identical circumstances. Following those incidents the employee had undergone further training and assessment but there had been no suggestion of formal disciplinary action.

The employee was dismissed for gross misconduct and the Tribunal found that the dismissal was unfair. The investigation had not been a reasonable one said the Tribunal, because it should not have included reference to the earlier incidents. Having said that the Tribunal went on to find that - based on the information that was actually put before the disciplinary panel - dismissal was 'within the range of reasonable responses' open to the employer. Once the disciplinary panel had been told of the earlier incidents, it was reasonable to take them into account. The dismissal was unfair, said the Tribunal, because the investigation should have not have resulted in those earlier incidents being put in front of the panel.

After observing that it was unusual for a Tribunal to criticise an investigation for being 'too thorough', the EAT held that the Tribunal's approach was inconsistent. How could it be unfair for the investigation to deal with the earlier incidents and yet still reasonable for the employer to take account of those incidents when it came to the disciplinary hearing? The investigation was not a stand-alone feature that could be judged in isolation from the disciplinary hearing that followed it – it was the overall reasonableness of the decision to dismiss that was the key issue. On the findings made by the Tribunal about the serious nature of the misconduct and the fact that it had happened before, the dismissal was a fair one.

The question of when it is appropriate for an employer dealing with an allegation of misconduct to look at previous incidents is not a straightforward one. We know, of course, that if the employee was previously given a warning which has now expired, then that warning must be disregarded when it comes to any future disciplinaries (see the Court of Session in *Diosynth Ltd v Thomson*). On the other hand, where the conduct under consideration would in itself be sufficient to justify dismissal, the employer can take expired warnings into account in rejecting a plea for a lesser sanction because of mitigating circumstances (see *Airbus UK Ltd v Webb*). More recently the EAT seemed to take the view that expired warnings were always part of the background circumstances that could legitimately be taken into account in deciding on the penalty to be imposed (*Stratford v Autorail VR Ltd*). This last case involved an employee who was given a warning for misconduct and then dismissed because the employer believed that further misconduct was inevitable and warnings were doing no good. Since the employee was on his 18th warning, the employer perhaps had a point, although you have to wonder how things had been allowed to get that far.

To my mind what should really matter is how well the employer has communicated the consequences of misconduct to the employee.

Tribunals give employers a great deal of latitude in setting the standards that employees must reach. If it has been made sufficiently clear that there will be zero tolerance of certain forms of misconduct then it is difficult for the Tribunal to overrule the employer and find that dismissal is outside the range of reasonable responses. The question to ask is whether any employee would have understood that the misconduct in question would lead to dismissal.

In the NHS 24 case what strikes me is not that the investigation encompassed previous incidents, but that the way in which those incidents were handled gave the impression that they were not the sorts of thing that could lead to dismissal. When similar incidents had occurred in the past they had been treated as matters of performance and no disciplinary action was taken at all. The employer was frankly lucky that the Tribunal got itself into such a muddle over the difference between the investigation stage and the disciplinary hearing that it rather lost sight of that point. The fact that the misconduct in question had such potentially serious consequences was also, no doubt, a factor in the overall decision that it warranted dismissal. In a less 'life and death' case an employer that had previously sent such unclear signals may well have struggled in an unfair dismissal claim.

As is often the case in employment law, the lesson is to be clear. Clear about the standards that are expected and clear about the consequences of not meeting those standards. While individual circumstances should always be taken into account, taking a consistent approach to instances of misconduct is the best way to ensure that all employees understand what those standards are.

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