

HR Bulletin E-Update 4 - November 2010

In McCormack v Hamilton Academical Football Club, the Scottish Court of Session concluded that a series of incidents may amount to gross misconduct if the cumulative effect of these actions destroys the employer's trust and confidence in the employee. However, the obligation to maintain trust and confidence was a mutual one and the employer also has a duty to keep the employee fully informed of any perceived deficiencies in their conduct which is causing the employer to lose trust and confidence in them. The failure to do so led to a finding of wrongful dismissal.

Background

McCormack was appointed as the Assistant Manager of Hamilton Academical FC in June 2008, with the club knowing he had a reputation in football circles of being a "hard man". Shortly after his appointment, at a tournament in July 2008, McCormack was accused of unduly aggressive behaviour whilst on the touchline, with references to unacceptable language being overheard by players' families who were in attendance. McAvoy, the youth team coach, had phoned the Manager, Billy Reid, to complain "John is running amok up here" and "he's like a madman at the side of the park". The team physiotherapist, Miss Galloway, supported McAvoy's account. McCormack accepted that he might have shouted and used the odd swear word, but denied the suggestion that he had bullied the players, which he said would have been counter-productive.

At a subsequent match, McCormack was described as "fired up" and the Chairman, McDonald, stated he was horrified regarding the behaviour of both the players and the manager. At half time he had told McCormack that the club's ethos did not tolerate this standard of behaviour. McDonald said that in response, McCormack stared at him as if he was talking gibberish and said that it was none of his business.

McDonald monitored his behaviour for the remaining three games but he had no occasion to speak to McCormack again during the course of the tournament.

Shortly after, ahead of a match against Dundee, McCormack made some inappropriate comments of a sexual nature in front of Miss Galloway, which he later described as standard locker room banter. At the conclusion of the match, he also made further similarly inappropriate comments and subjected Miss Galloway to behaviour claimed to be of an overtly sexual nature. She was both embarrassed and intimidated but concerned not to say or do anything that might harm her career.

McAvoy said that he had been generally embarrassed by these incidents and stunned by the remarks made in the dressing room. He described the events as his "worst day in football" and had contemplated going back to his former job as a taxi driver.

The Club Chairman, McDonald called McCormack to a meeting to discuss matters and rebuke him for his behaviour. McCormack replied that no one had told him that before the tournament and agreed to adopt a quieter style in future. McDonald did not threaten to dismiss McCormack at the meeting, but effectively warned him that his behaviour was "not good enough and should never be repeated".

However, he claimed to have made it plain that if such conduct recurred, the contract of employment could not go forward and see out its full term.

A week later, McDonald became aware of the dressing room incidents. At a second meeting he asked McCormack for his version of events, who gave an account substantially along the lines above, but with two differences. First, he referred to a flippant remark to Miss Galloway about the boys' "tackle" but described the claim he had undressed and changed in front of her in the dressing room as "fabrication".

Macdonald was concerned with McCormack's behaviour and that there might be a sexual harassment claim from Miss Galloway. He stated that he had mentioned the possibility of dismissal if the matter was proved. Before the Court, McCormack accepted that at the meeting McDonald told him that his conduct amounted to sexual harassment and gross misconduct and that he was not now going to give him a contract. McCormack said that he replied to the effect that "if you don't want to give me a contract that's your position, but your manager needs me"

At a subsequent team meeting, as a prank, McCormack pulled a player's chair away, causing him to fall on the floor, causing hilarity among the players. A nutritionist presenting at the meeting was incensed by McCormack's behaviour, which she regarded as inappropriate for a senior member of staff. When the club secretary found out about this incident, he thought it was "just a laugh". Macdonald learned of the incident, but did not raise it with McCormack.

Between the above mentioned tournament and the date of his dismissal on 1 September 2008, no one expressed any concerns to McCormack about his coaching style. Reid said he was happy with McCormack's first team coaching. However, some of the younger players were unhappy when they were taken for training by McCormack. It was suggested that McCormack's style was old school and that he might be bullying some of the players, with Reid stating the matter was raised with him a total of "three, four or five times".

The 'final straw' (for the club) was a further specific incident where McCormack was heard to be "ranting, raving and swearing" down the phone to a youth team player (Vidiera). McCormack was told to attend a meeting with the Manager and Chairman although not told of its purpose. Accordingly, he was not given an opportunity to seek advice or to bring a representative. At the meeting, McCormack was told "we're going to part company" and it was then confirmed that he was being dismissed. When McCormack asked for a reason he was told "that it was not working out" and "You're not really a number two John, you're a number one."

In giving a different version of events, Macdonald said that he listed McCormack's indiscretions and stated Reid had said "as a result of these we are dismissing you". According to McDonald, McCormack's reaction varied between aggression and acceptance and he had asked "How much am I getting? I want every penny of my contract". At this stage, he was reminded there was no written contract.

Reid confirmed his chairman's account, and that he himself had referred to the incidents involving Miss Galloway and Mr Videira; the nutrition event, and; the need to bring on young players. Macdonald stated that the question of dismissing McCormack had come before the Board at an earlier stage, when it was decided that there was not, at that time, sufficient evidence to justify dismissal.

The employers representative stated that the incidents occurred over a period of just 40 days and contended that should be regarded as forming a course of conduct. Following early incidents McCormack had been told to behave with professional respect towards others, including his colleagues and the young players. The incident in respect of Mr Videira therefore constituted the last straw.

The Court's Deliberations

The club argued McCormack was lawfully dismissed for gross misconduct. The question for the Court was whether the various matters relied on by the Club collectively justified summary dismissal, even although singly they may not do so. The Court identified the proper approach was to identify whether an employee's conduct made "the continuance of the contract of service impossible" *Wilson v Racher*.

Furthermore, relying on *Malik v BCCI*, the central question was the degree to which the conduct undermined the **mutual obligation of trust and confidence**, upon which the whole contract of employment hinged

In situations of conflict of evidence the Court “unhesitatingly” preferred the evidence of others ahead of McCormack and concluded that at the time of dismissal Macdonald no longer had confidence in McCormack, albeit observing an absence of documentation in the period leading up to the dismissal. There were no written records of any complaints made against McCormack; no formal oral or written warning issued in respect of any of the incidents; no report of any internal enquiry or legal advice; and no board minute deciding that McCormack should be dismissed.

The Court observed that if it had been acknowledged that McCormack had a reputation as a hard man before he was appointed and should adopt a different style of coaching, therefore, the club should have given him appropriate instructions at the outset. Whilst his conduct in the dressing room was wholly inappropriate, he had apologised to Miss Galloway and the club did not issue a formal reprimand and the behaviour was not repeated. Allegations of bullying were not reported to McCormack and he had no opportunity to reappraise or realign his coaching style. With regard to the telephone call to Videira, the Court found that this incident had not figured largely in the reasons given at the dismissal meeting, or that McCormack had a proper opportunity to set out his side of the case.

Focusing on the obligation of confidence and trust as a mutual one, the **Court concluded that the club itself was under a duty to keep the employee fully informed of any perceived deficiencies in his or her conduct during the course of a contract of employment.** That had not occurred. In viewing all incidents taken together, the Court held they did not justify summary dismissal, as **his conduct was insufficient to demonstrate that he was repudiating the contract.** A finding of wrongful dismissal was made and the case remitted for an award of damages.

Whilst this case focused on the wrongful (rather than unfair) dismissal, due to the short service of the employee, it highlights a need for employers considering the cumulative effect of a series of misdemeanors as representing gross misconduct, to consider the extent to which one or all have gone to the root of the contract and broken the mutual trust and confidence. Where there are multiple incidents, it remains necessary to consider whether the employee had clearly been made aware of their unacceptability and apply the normal principles of reasonableness. In failing to do so an employer may find a mirror applied to the breach of trust and confidence test.

Employer Services Team is here to help

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