



Legal update — June 2018

Employment A new approach to misconduct?

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Over the last month there have been a couple of decisions dealing with misconduct dismissals which suggest that summary dismissal may be fair even if it is not possible to point to a specific instance of gross misconduct.

Under the Employment Rights Act 1996 (the ERA) misconduct will be a potentially fair reason for dismissal. In deciding whether such a dismissal is fair a tribunal will consider whether in the circumstances (which include the employer's size and administrative resources) the employer acted reasonably in dismissing for that reason (section 98(4) ERA).

In *British Home Stores v Burchell* [1978] IRLR 379 it was held that a misconduct dismissal will only be fair if, at the time of the dismissal:

- the employer believed the employee to be guilty of misconduct;
- it had reasonable grounds for that belief; and
- at the time it held that belief, it had carried out a reasonable investigation.

This is known as "the range of reasonable responses" test.

What is gross misconduct?

Gross misconduct is conduct which undermines the relationship of trust and confidence which should exist between employer and employee.

The ACAS Guide: Discipline and Grievances at Work (2015) (the Acas Guide) states that "Acts which constitute gross misconduct must be very serious and are best determined by organisations in the light of their own particular circumstances". The Acas Guide contains a non-exhaustive list of examples of gross misconduct. These include theft or fraud, physical violence or bullying, unlawful discrimination or

harassment, a serious breach of health and safety rules, and a serious breach of confidence.

The Acas Code

The Acas Code of Practice on Disciplinary and Grievance Procedures (the Acas Code) states that employees who are guilty of misconduct or performing unsatisfactorily should usually be given a written warning about their conduct before a final written warning is issued as a result of a further act of misconduct or a failure to improve.

It will, however, be fair for an employer to dismiss for gross misconduct where there have been no prior written warnings, subject to the proviso that a fair disciplinary process must always be followed.

What about when there is no single act which constitutes gross misconduct? Will it still be fair to dismiss?

Summary dismissal fair even though no single act amounted to gross misconduct

The Employment Appeal Tribunal (EAT) has held in *Mbubaegbu v Homerton University Hospital NHS Foundation Trust* that the hospital trust fairly dismissed a consultant orthopaedic surgeon for a series of misconduct issues, even though no single act amounted to gross misconduct. Prior to the disciplinary proceedings that led to his dismissal, Mr Mbubaegbu had an unblemished disciplinary record with no previous warnings.

New Department Rules and Responsibilities (the DRR) were introduced and consultants in the Trauma and Orthopaedics department were told that their compliance with the DRR would be monitored. An investigation subsequently carried out by an external HR consultant found that there had been non-compliance with the DRR by Mr Mbubaegbu and four other consultants, though the findings against Mr Mbubaegbu were the most serious. Disciplinary action was taken and Mr Mbubaegbu was summarily dismissed for gross misconduct and his appeal was not upheld.

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The EAT held that it was not necessary for there to be one particular act that amounted to gross misconduct for a summary dismissal to be fair. The disciplinary panel had considered some of Mr Mbubaegbu's actions to be grossly careless and negligent. The repeated process of his unsafe behaviour led to increased patient risks. His actions showed that he was wilful in his approach and the EAT held that these findings clearly demonstrated that the relationship of trust and confidence was undermined. The trust had lost confidence that Mr Mbubaegbu would change his behaviour so as to avoid the risk of the misconduct reoccurring.

The EAT stated:

"It is quite possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee... There is no authority to suggest that there must be a single act amounting to gross misconduct before summary dismissal would be justifiable or that it is impermissible to rely upon a series of acts, none of which would, by themselves, justify summary dismissal."

It went on to state that conduct amounting to gross misconduct is conduct which undermines the relationship of trust and confidence, and that this "could comprise a single act or several acts over a period of time".

Although the EAT found that the employer had been entitled to dismiss Mr Mbubaegbu where there were no prior warnings and no clear single act of gross misconduct, employers should tread with caution before taking a similar approach. Here a series of acts of misconduct, taken together, amounted to gross misconduct, and the correct focus to take was whether the employee's actions had undermined the relationship of trust and confidence (which, in this case, they clearly had).



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Dismissal without a warning for "serious misconduct" could potentially be fair

In *Quintiles Commercial UK Ltd v Barango* the EAT held that the tribunal was in error when it assumed that dismissal without prior warning for "serious" misconduct (rather than gross misconduct) could not be fair.

Mr Barango was employed by Quintiles Commercial UK Ltd (Quintiles) as a Medical Sales Representative selling drugs for Astra Zeneca (AZ). He was dismissed for two acts of misconduct; the first being a failure to complete AZ's compliance online training course by the deadline, and the second being his failure to attend AZ's compulsory pioneer training course. At the time of these two acts of misconduct he was also on a Performance Improvement Plan so there were existing issues with his capability to carry out his role. Quintiles concluded that the relationship of trust and confidence had been destroyed and Mr Barango was dismissed on notice, for gross misconduct.

He appealed the decision. On appeal the view was taken that Mr Barango was guilty of serious rather than gross misconduct, but that trust and confidence had broken down and so the decision to dismiss was upheld. At first instance the tribunal held that the ultimate characterisation of Mr Barango's misconduct as serious rather than gross had significant implications:

"If the Respondent had believed and reasonably so that his misconduct had been gross then that could furnish a reason for not applying warnings. However, the characterisation of the misconduct as serious on appeal means that the failure to issue a warning renders the dismissal unfair."

The EAT disagreed. It held that the tribunal should have kept in mind section 98(4) ERA:

"That provision does not lay down any rule that, absent earlier disciplinary warnings, a conduct dismissal for something less than gross misconduct must be unfair. It may be that in most cases an ET will find that a dismissal in such circumstances falls outside the band of reasonable responses, but it should be careful not to simply assume this is so..."

The EAT remitted the matter to a different tribunal to determine.

Conclusion

Following the decisions in *Mbubaegbu* and *Barango* the following points should be taken on board:

- Gross misconduct does not have to be a single stand-alone instance of misconduct, but can amount to several acts over a period of time.

- It is not necessarily the case that dismissing an individual for something less than gross misconduct will be unfair.
- If behaviour has led to a breakdown of trust and confidence it is likely that misconduct serious enough to justify summary dismissal has occurred.
- Tread with caution before coming to a decision to dismiss. Ensure that matters are investigated properly and that you are acting in accordance with your disciplinary policy.

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