

# HR Briefing

## July 2010

### EMPLOYMENT LAW UPDATE – DISMISSALS

There have been a number of recent cases that have impacted on the area of dismissals and this month we consider some of the major cases and the implications of these for employers.

#### Unfair Dismissal

##### **Sarkar v West London Mental health NHS Trust**

The employer implemented a "Fair Blame Policy" against its employees. This was designed to deal with fairly low-level breaches of conduct and performance, which did not constitute serious offences. The most serious sanction that the policy could impose was a written warning.

In this case, however, the employee's alleged misconduct was found to be more serious than originally thought and was, in fact, so serious that he was dismissed.

The EAT found that the employer acted reasonably in dismissing the employee for gross misconduct under its procedures despite initially taking the view that the misconduct could be dealt with under the 'Fair Blame Policy' designed for less serious matters.

However, the Court of Appeal overturned the EAT's decision ruling that it was unreasonable of the employer not to follow its own procedures. It was not reasonable to dismiss the employee in accordance with a process that was designed to address relatively minor disciplinary matters. The law required the employer to act within a range of reasonable responses when considering the employee's disciplinary position, which it had failed to do.

#### Constructive Dismissal

Constructive dismissal occurs where an employer fundamentally breaches an employee's contract entitling the employee to treat their employment as at an end.

##### **Buckland v Bournemouth University Higher Education**

The Court of Appeal held in this case that the test for whether conduct amounted to a fundamental breach of contract was an objective test and should not be considered with reference to a range of reasonable responses.

It was further found that an employer cannot "cure" a repudiatory breach of contract before an employee decides to treat it as a constructive dismissal. An employee's claim for constructive dismissal may, however, fail if they affirm the contract by delaying their resignation.

##### **Munchkins Restaurant Ltd and another v Karmazyn and others**

The Claimants were four waitresses at Munchkins Restaurant Ltd. They had worked at the restaurant for between 1 and 5 years and were all migrant workers from Europe. They claimed that they had been subjected to sexual harassment from the owner of the business, Mr Moss, throughout their employment. The assistant manager, who was female, acted as a buffer between the Claimants and Mr Moss. When the assistant manager left, all four waitresses resigned within three months.

The Tribunal and EAT both upheld the Claimants' claims.

### Key recommendations

- For a dismissal to be fair an employer has to show it has a potentially fair reason for the dismissal and that it was fair in all the circumstances.
- Disciplinary procedures should be in place so that employers comply with the relevant ACAS code.
- Employers must ensure that their disciplinary and dismissal procedures are operated fairly.
- It is vital that managers who will be dealing with the disciplinary process are properly trained and have a full understanding of the disciplinary procedure
- When assessing reasonableness, a tribunal will consider the employer's dismissal procedure to see whether it satisfied this test.
- It is important for proper scrutiny and investigation of allegations of professional misconduct to take place, particularly where dismissal on those grounds mean that finding suitable employment elsewhere may be difficult.

There was found to be constructive dismissal where the Claimants had put up with 'intolerable' conduct for several years, despite there being a considerable delay in resigning. In relation to the Claimants' delay in resigning, regard was had to the fact that they were migrant workers with no certainty of continued employment and who were under financial and sometimes parental pressure. In addition, the assistant manager had made the job "acceptable" but this was disturbed when she departed. It was significant that all Claimants resigned within three months of her departure.

This case casts doubt on what was well-established principle that that an employee must act quickly in response to a breach in order to claim constructive dismissal or be taken to have affirmed the contract. It adopts a very tolerable approach to the question of why the employee delayed resigning.

It is not clear to what extent such an argument could extend to the wider population given the economic climate where many are fearful about not being able to obtain other work if they resign but this case does seem to create a greater opportunity for employees to argue that the delay did not constitute affirmation of the contract.

### Compensation for unfair dismissal

#### **Edwards v Chesterfield Royal Hospital NHS Foundation Trust**

Dr Edwards was a consultant and was dismissed for gross professional and personal misconduct. He claimed that he was entitled to compensation for his notice period, damages for the time it would have taken the trust to properly carry out its disciplinary procedure and also damages for his loss of continued employment, as a result of the trust dismissing the allegations against him which they would have done if the disciplinary procedure had been properly carried out.

The case went to the Court of Appeal where it was decided that Edwards was entitled to damages for his notice period and the length of time it would have taken the trust to carry out the contractual disciplinary procedure. The Court of Appeal also assumed that it would be found that if the procedure had been followed there would be no findings of misconduct and Edwards would not have been dismissed but would have worked until retirement. Given the trusts actions, he had lost the opportunity to work as a consultant in the NHS.

It appears an employee can now claim for unfair dismissal and damages for breach of express terms of their contract on a failure to follow the correct disciplinary procedure. What these damages would be, if breach of contract were proved, would however depend on evidence given at trial.

### Summary

A dismissal will be unfair if there is no fair reason for the dismissal, if the correct process is not followed during the dismissal or if the dismissal is for an automatically unfair reason.

Employers need to ensure they have adequate procedures in place to deal with disciplinary matters and dismissals and ensure they are followed correctly and fairly and that appropriate training is given to managers to ensure that this is the case.

In relation to constructive dismissal, following recent case law, employers should be alert to the fact that they may find themselves facing claims of constructive dismissal long after the alleged breach of contract occurred and they should not rely on the assumption that the employee has affirmed their contract by remaining in employment until that time.

If you have any queries on any of the above please contact **Alison Loveday** at [alisonl@berg.co.uk](mailto:alisonl@berg.co.uk) to discuss further issues. Alternatively you contact **Alison** on **0161 833 9211**.

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- Employers must be able to show that they have been consistent with dismissals and have not dismissed an employee for something they normally allow other employees to do.

- A central disciplinary record, noting all disciplinary action taken (including dismissals) will help with this and enable a review of decisions to be easily undertaken.