SUMMARY

2014/46 Employer not permitted to increase disciplinary sanction on appeal (UK)

<p>The Court of Appeal has upheld a High Court decision that an employer was not entitled to increase an employee’s disciplinary sanction on appeal, because its contractual disciplinary procedure did not expressly permit this to happen.</p>

Summary

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Background

Employers normally allow employees the right to bring an internal appeal against the imposition of a disciplinary penalty. In the UK, this is recommended as good practice by the conciliation service ACAS (the Advisory, Conciliation and Arbitration Service) in its statutory *Code of Practice on Disciplinary and Grievance Procedures*. Consequently, this is normally a requirement for a fair dismissal process in terms of the unfair dismissal provisions of the Employment Rights Act 1996 (ERA).

An employee appeals, of course, in the hope that the disciplinary sanction will be reduced or removed altogether. However, there is always the risk that those hearing the appeal might take a more severe approach than the original decision-maker and increase the sanction. Some disciplinary procedures expressly provide for this possibility, so the employee is forewarned that the sanction could go up as well as down. But what if the employer's policy is silent on the

issue – is it still permitted to increase the sanction following an appeal?

Facts

Ms McMillan worked for Airedale Foundation NHS Trust. She was disciplined for misconduct and issued with a final written warning under the Trust's disciplinary procedure. She appealed against this decision. The Trust told her that the appeal would be a rehearing of her case and the panel would be entitled to determine its own outcome "*in terms of the sanction applied*" – meaning the penalty could be increased as well as reduced.

The appeal panel upheld the allegations and indicated orally that they thought Ms McMillan's employment was untenable. However, before any sanction was actually applied, she withdrew her appeal and applied to the High Court for an injunction preventing the Trust from increasing the sanction of a final warning by dismissing her.

The Trust's disciplinary procedure was expressly incorporated into Ms McMillan's contract of employment. It was set out in two documents: one contained details of the formal procedures and defined misconduct; the other (the Trust's code) included information about sanctions. The code also covered appeals, saying that an employee could appeal against a warning or dismissal and there would be no further right of appeal. Neither document said anything about increasing sanctions on appeal.

The High Court decided that Ms McMillan's employment contract did not allow the appeal panel to increase a disciplinary sanction. It granted an injunction preventing the Trust from reconvening the appeal panel to consider the matter any further. The Trust appealed against this decision to the Court of Appeal.

Court of Appeal Judgment

The Court of Appeal agreed with the High Court and held that, on the wording of the Trust's contractual procedures, it was not entitled to increase the disciplinary warning on appeal.

In reaching this decision, the Court was particularly influenced by the precise wording of the Trust's procedures. These gave a right of appeal "*against a warning or dismissal*", which indicated that the appeal was intended to benefit the employee and not the employer. There was also no further right of appeal, meaning the employee was unable to appeal if a more serious sanction such as dismissal was applied. The Trust's code also expressly referred to a guide to disciplinary procedures published by ACAS – separate from its *Code of Practice* - which says that an appeal should not result in an increased sanction.

The Court held that the Trust was bound by the terms of its own contractual procedure, so

imposing an increased sanction on Ms McMillan would be in breach of contract. The injunction preventing the Trust from doing so was therefore upheld.

Commentary

The result in this case is perhaps unsurprising, given the Trust had a binding contractual disciplinary procedure which gave a limited right of appeal. But there are wider implications arising from the case and the comments of the Court of Appeal.

The first point to note is that the remedy of an injunction, which prevents an employer from taking action to dismiss an employee, will only be available if the disciplinary procedure is part of the employee's contract of employment. UK law requires details of where to find disciplinary procedures to be included in an employee's statement of terms of employment, but many employers expressly make the disciplinary procedures themselves non-contractual. An employer's failure to follow non-contractual procedures may make a dismissal *unfair* under the ERA, but it would not allow an employee to apply for an injunction on the basis of breach of contract.

The judgment makes clear that an employer can still expressly provide in its procedure for a sanction to be increased as well as reduced on appeal. The Court of Appeal said that there was nothing wrong with that in principle. Although ACAS's guide suggested that sanctions should not be increased in this way, this was not legally binding.

The Court also recognised a potential problem, if an employer does not have this contractual right, where a full appeal uncovers new evidence which makes the original misconduct more serious. Is the employer's only option to start the disciplinary process again? The Court thought that this could be dealt with by a court using its discretionary powers. If the employer was justified in acting outside the contractual procedure and had otherwise acted fairly - particularly if a further right of appeal had been offered - the court could refuse to grant the injunction even if the employer had acted in breach of contract.

Taking these points together, it seems that the option of increasing a disciplinary sanction on appeal is still open to employers. To be confident that this approach is permissible, the right to increase the sanction should be expressly included in the disciplinary procedure. If new evidence is uncovered at the appeal stage, it may be fair to increase the sanction even if this is not expressly permitted in the applicable procedure. However, if this involves a dismissal, it may be prudent to allow a further appeal against this decision - otherwise the employee is very likely to have a valid claim for unfair dismissal under the ERA.

Subject: Unfair dismissal

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Parties: McMillan - v - Airedale NHS Foundation Trust

Court: Court of Appeal

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