EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2020/20 Dismissal unfair where decision-maker was not given accurate information (UK)

The dismissal of an employee for gross misconduct was unfair because the investigating officer failed to share significant new information with the manager conducting the disciplinary hearing who decided to dismiss, the Employment Appeal Tribunal has ruled.

Summary

p style="margin-right:-25px">The dismissal of an employee for gross misconduct was unfair because the investigating officer failed to share significant new information with the manager conducting the disciplinary hearing who decided to dismiss, the Employment Appeal Tribunal has ruled.

Background

p style="margin-right:-25px">In the UK, unfair dismissal is the most common type of claim pursued by employees in an Employment Tribunal (ET). In contrast to an action for 'wrongful dismissal' – where the sole issue is whether the employer acted in breach of the terms of the employee's contract – an unfair dismissal claim under the Employment Rights Act 1996 focuses on the reasonableness of either the employer's decision to dismiss and/or the procedure followed by the employer in carrying out the dismissal.

p style="margin-right:-25px">In most situations, to qualify for the right to claim unfair dismissal, an employee must have a period of two years' continuous employment. Where the ET finds the employee was dismissed, it will uphold the employee's claim unless the employer can show an acceptable reason for the dismissal. In outline, the acceptable reasons are:

lack of capability (including ill-health or injury);
conduct;
redundancy;
that the employee could not continue in the job without contravention of a statutory duty or restriction; or
'some other substantial reason' of a kind such as to justify the dismissal (e.g. a business reorganisation).

p style="margin-right:-25px">If one of these reasons is established, the ET goes on to determine whether the dismissal was fair or unfair, the key question being whether the employer acted reasonably in dismissing the employee for the reason in question. The outcome may depend on whether the employer followed the procedure appropriate for the type of reason for dismissal.

p style="margin-right:-25px">Certain categories of dismissal are automatically unfair, and no qualifying period of employment is required to bring a claim. One such category is dismissal for making a 'protected disclosure' (i.e. whistleblowing).

p style="margin-right:-25px">The UK's Supreme Court (SC) recently ruled that an employee's dismissal was by reason of her whistleblowing and automatically unfair, despite the fact the decision-maker was unaware she had made protected disclosures and genuinely believed she was a poor performer (*Royal Mail Group Ltd – v – Jhuti* [2019] UKSC 55). The decision-maker had been manipulated by another manager who wanted to get rid of the employee because of her whistleblowing. The SC concluded that the real reason for the dismissal was the whistleblowing but was hidden behind the reason of poor performance invented by the manager.

p style="margin-right:-25px">Importantly, the SC's reasoning in *Jhuti* about identifying the real reason for dismissal was not limited to automatic unfair dismissal for whistleblowing but could apply to all types of unfair dismissal. In the case discussed below, the Employment Appeal Tribunal (EAT) followed *Jhuti* in deciding a case of 'ordinary' unfair dismissal for misconduct.

Facts

p style="margin-right:-25px">Mr Uddin, who was employed by the London Borough of Ealing, was dismissed for alleged sexual misconduct towards an intern, SR, following an incident at a pub. CCTV evidence showed that Mr Uddin and SR were both drunk and acting affectionately towards each other. They were seen going into a toilet together, before other work colleagues who were present banged on the door asking them to come out.

p style="margin-right:-25px">SR later alleged that Mr Uddin had dragged her to the toilet and assaulted her. The investigating officer, Mr Jenkins, presented his findings to the disciplinary manager, Ms Fair, including the fact that SR had reported the incident to the police. SR later withdrew her police complaint but Mr Jenkins, who was aware of this, did not inform Ms Fair. Based on the evidence presented to her, Ms Fair concluded that Mr Uddin was guilty of gross misconduct and dismissed him with immediate effect. Mr Uddin brought a claim of unfair dismissal.

p style="margin-right:-25px">The ET rejected the claim, concluding that the employer had reasonable grounds for deciding that SR's account was to be preferred and Mr Uddin had committed gross misconduct. Although Ms Fair had relied on SR's police complaint as supporting her version of events, while not being aware she later withdrew it, the ET found that Ms Fair had already established sufficient evidence for her conclusions. If she had known about SR's withdrawal of her police complaint, it would have made no difference.

p style="margin-right:-25px">Mr Uddin appealed to the EAT, arguing that the SC's decision in *Jhuti* meant that Mr Jenkins' knowledge of the police complaint having been withdrawn should have been attributed to the Borough as employer in deciding on Mr Uddin's dismissal.

Judgment

p style="margin-right:-25px">Allowing the appeal, the EAT said that while *Jhuti* was directly concerned with situations where a manager had manipulated evidence or where the investigating officer had a different reason for acting from the dismissing officer, the principles established by the SC were broader than that. According to the EAT, *Jhuti* established that the knowledge or conduct of a person other than the person who decided to dismiss could be relevant, in relation to either the real reason for dismissal or (as in this case) the reasonableness of the decision to dismiss.

p style="margin-right:-25px">This meant that Mr Jenkins' failure to share a material fact with Ms Fair could be relevant to the consideration of whether the dismissal was fair the EAT said. The fact that he knew SR had withdrawn her allegations to the police, and that Ms Fair had made her decision in ignorance of that, was something the ET should have considered. The EAT noted there was evidence that Ms Fair had relied on SR's report to the police as one of the reasons evidencing that Mr Uddin was guilty of gross misconduct, and she had also admitted that if she had known SR had withdrawn her complaint she would have wanted to know why.

p style="margin-right:-25px">The EAT concluded that, had the ET approached the issue correctly, it would have been bound to find Mr Uddin's dismissal unfair. It therefore substituted a finding of unfair dismissal.

Commentary

p style="margin-right:-25px">“What you don’t know can’t hurt you” has always been a debatable saying, which could be the topic of a philosophy essay. This case shows it will not generally be an advisable approach for employers to adopt in relation to workplace disciplinary matters.

p style="margin-right:-25px">This EAT’s judgment reinforces the SC’s reasoning in *Jhuti*, further emphasising the importance for employers to undertake thorough investigations into disciplinary-related allegations before making a final decision. It is now clear that, even if evidence may not have been intentionally manipulated in order to orchestrate an employee’s dismissal, the omission of investigating officers to share accurate and up-to-date facts that could be material to the outcome may be relevant when later assessing reasonableness.

p style="margin-right:-25px">In order to avoid potential problems, employers should consider inserting clear guidance into their policies to ensure that all managers investigating and reporting on disciplinary matters and allegations are aware they have a continuing duty throughout the whole process to provide information which is and remains accurate.

Comments from other jurisdictions

p style="margin-right:-7px">*Austria (Lukas Disarò & Gregor Winkelmayr, Law Firm MMag.)*: On the basis of the above-mentioned information, a court in Austria could have made the same decision. It is not mentioned when the possible victim reported the case to the police and when she withdrew it. It is noted that there is no such verdict known to the author.

p style="margin-right:-7px">Basically, sexual misconduct is a reason for a fair dismissal – depending on its seriousness. It could have been a fair dismissal if Mr Uddin really had a sexual relationship with SR against her will.

p style="margin-right:-7px">The employer is obliged to investigate if there was a sexual misconduct or not. Therefore, it can ask possible witnesses, such as other employees. Another method of such investigation could be that the employer asks to inspect the police record or talk to the investigating police officer. Basically, in Austria the employer is also obliged to terminate the employment relationship on the basis of such behaviour immediately. Nevertheless, according to the jurisdiction the employer is allowed to make investigations in such cases to check if the dismissal would be fair. It is therefore advisable that the employer puts the suspected employee on garden leave during these investigations. Otherwise, a court could rule that the dismissal was delayed and – even if the dismissal was fair – the employer could lose the case especially when the victim’s report to the police was made a long time ago.

p style="margin-right:-7px">But put simply the employer could assume that the information given to it is accurate and current – especially when the information derives from the investigating police officer. The court could rule that an employer could be obliged to ask the police what the current situation in the particular case is and it is therefore always advisable to ask what that current situation is.

p style="margin-right:-7px">*Germany (Nina Stephan & David Meyer, Luther Rechtsanwaltsgesellschaft mbH)*: First of all, it should be noted that German law does not differentiate between a 'wrongful dismissal' and an 'unfair dismissal'. Instead, dismissals must not be arbitrary and need to be socially justified. The latter only applies after the first six months of the employment relationship without interruptions, since – similar to the UK Employment Rights Act 1996 – the statutory protection against unfair dismissal under the Dismissal Protection Act (*Kündigungsschutzgesetz*, 'KSchG') only applies after six months.

p style="margin-right:-7px">If the KSchG applies, in accordance with Section 1(2) of the KSchG, a dismissal is socially unjustified and therefore invalid:

p style="margin-left:47px; margin-right:-7px">"*[…] if it is not due to reasons related to the person, the conduct of the employee, or to compelling operational requirements which preclude the continued employment of the employee in the establishment.*"

p style="margin-right:-7px">In principle this means that, under German law, employees can be dismissed for reasons of conduct, operational reasons and personal reasons (regularly due to illness). Usually dismissals need to comply with notice periods.

p style="margin-right:-7px">However, in Germany it is also possible to dismiss an employee because of misconduct with immediate effect. According to Section 626 of the German Civil Code (*Bürgerliches Gesetzbuch*, 'BGB') this requires:

An important reason for example gross misconduct.
A balancing of interests, taking into account the employee's breach of duty and fault, risk of recurrence and former breaches.

p style="margin-right:-7px">The Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') had already decided in 2012 that the labour courts need to take into account exonerating circumstances in favour of the employee as well. This also applies if the employer is not aware of such circumstances with/without fault or disregards them in bad faith when giving notice (BAG, ruling 24 May 2012, 2 AZR 206/11). Any dismissal on grounds of suspicion must be objectively based on facts that would lead a reasonable, righteous and fully informed employer

to give notice.

p style="margin-right:-7px">According to this a German court would have to check if there was a reasonable degree of certainty that Mr Uddin assaulted SR, taking into account the fact that SR had withdrawn her allegations to the police. It would presumably come to a similar conclusion as the EAT.

p style="margin-right:-7px">*Romania (Andreea Suciu and Teodora Mănăilă, Suciu | The Employment Law Firm)*: Disciplinary misconduct represents one of the reasons expressly regulated by the Romanian Labour Code for employment termination. While the Romanian employment legislation does not necessarily differentiate between unfair dismissal or wrongful dismissal, elements like reasonableness or mandatory procedure have been included in the exercise of such a dismissal case.

p style="margin-right:-7px">The dismissal of an employee due to disciplinary reasons can be carried out when the employee concerned has grossly or repeatedly violated the regulations regarding work discipline or those stipulated in the employment contract, the collective bargaining agreement or the company internal regulations. The Romanian employment legislation prescribes several other disciplinary sanctions which can also be adopted instead of a dismissal (e.g. reduction of salary for a determined period of time or written warning).

p style="margin-right:-7px">As a general rule, any disciplinary dismissal decision must be adopted based on a prior disciplinary investigation. Thus, the employee must be summoned to a disciplinary hearing notified in writing and given details of the subject matter. During the hearing, the employee has the right to defend themselves and to produce all relevant evidence.

p style="margin-right:-7px">Moreover, the disciplinary sanction imposed by the employer must be in proportion to the seriousness of the employee's offence, taking into account the circumstances and consequences of the offence and the employee's degree of fault, general conduct and disciplinary record.

p style="margin-right:-7px">In the case at hand, the alleged misdemeanour of the employee could have received more specific consideration as gender inequality and harassment at the workplace both of which are topical issues. For example, last year the Romanian Parliament adopted new provisions regarding the obligations of employers to have clear procedures and measures to manage (sexual) harassment/gender discrimination claims at the workplace, to impose new sets of training on gender inequality and reporting obligations of employers dealing with such types of cases.

p style="margin-right:-7px">Initially, the disciplinary liability of the former employee was

cumulated with a criminal liability, as the person affected by the alleged behaviour reported it to the police. However, the later withdrawal of such complaint cannot be interpreted as representing an argument in favour of not sanctioning the employee. While there was no additional information on why the complaint was withdrawn, the national court made reference to the effect such information would have been material in relation to the decision of the disciplinary officer.

p style="margin-right:-7px">Another aspect which might have deserved more attention is whether the initiation of a criminal complaint may give rise to a suspension of the disciplinary proceedings or if whether the employer must take into consideration the findings of the investigators. The case law of the Romanian courts has been rather inconsistent with courts ascertaining that criminal liability holds back disciplinary liability in the same way that it holds back civil proceedings, meaning that it is not possible to cumulate the two liabilities simultaneously, but only subsequently and conditionally. Thus, only after the responsibility of the employee is established can the employer cumulate these two forms of liability. Other courts have appreciated that although the criminal liability of the employee had not been established, the disciplinary dismissal of the employee was correctly established by the employer given that the two forms of liability have different sources, criminal liability having its basis in the violation of criminal law and disciplinary liability in the violation of the employment contract/company regulations.

p style="margin-right:-7px">From our point of view, in the absence of any legal provisions imposing the suspension/obligation to take into consideration the results of the criminal investigation, the employer can initiate the disciplinary proceedings against the employee. However, should the employee challenge the disciplinary dismissal, the employment courts may, in certain situations, have to take into consideration the findings of the criminal investigators/criminal court (e.g. the conclusion that the deed was not committed by the employee as ascertained by the criminal investigators/criminal court may be of relevance in an analysis of the disciplinary offence itself by the employment court).

p style="margin-right:-7px">Nevertheless, in the absence of any other type of liability, the Romanian courts will continue to pay close attention to the disciplinary offence, whether the employer rightfully identified the breached provisions and how the circumstances of the misdemeanour determined the disciplinary sanction. In addition, the courts also have the possibility when ascertaining that a disciplinary sanction was wrongfully established to replace it with another sanction among the ones prescribed by the Labour Code (i.e. a written warning; demotion, with a corresponding reduction in pay, for up to 60 days; or a cut in basic pay of 5% to 10% for between one and three months).

p style="margin-right:-7px">Considering the above arguments and the fact that the national court made no analysis of the seriousness of the misdemeanour and chose to refer to external factors influencing the decision of the employer, in our opinion the Romanian courts would have likely focused more on the factual elements of the misdemeanour and the breach of the company regulations in assessing its lawfulness. Nonetheless, we agree with the conclusion regarding the necessity for employers to ensure thorough investigations into disciplinary-related allegations before making a final decision as such analysis must also be included in the disciplinary decision communicated to the employee.

p style="margin-right:-25px">**Subject:** Unfair Dismissal

Parties: Uddin – v – London Borough of Ealing

Court: Employment Appeal Tribunal

Date: 13 February 2020

Case number: UKEAT/0165/19

Internet publication: https://www.bailii.org/uk/cases/UKEAT/2020/0165_19_13023.html

---

Creator: Employment Appeal Tribunal
Verdict at: 2020-02-13
Case number: UKEAT/0165/19