Insight

Gross misconduct dismissals

Serious conduct issues may be sufficient to justify immediate termination of employment, without notice, on the grounds of gross misconduct. Such dismissals are usually fraught with uncertainty about whether the conduct is sufficiently serious so as to make dismissal in the circumstances fair. This is particularly so given the high stakes for the employee, who may find obtaining a new role particularly difficult. The reputational and financial consequences for the employee impact on the employer who will often face a vigorously fought tribunal claim, making it even more important that the employer has taken all steps possible to protect itself.

Where an employer is seeking to dismiss an employee on the grounds of the employee’s conduct, to avoid a finding of unfair dismissal the employer must establish that it acted reasonably in treating the conduct as a sufficient reason for dismissal. Key factors in doing so are:

- the employer (that is the decision-makers in the disciplinary proceedings) believed that the employee had engaged in the alleged conduct;
- this belief is reasonably held, taking account of the extent of the employer’s investigation and the facts reasonably known to it, including the employee’s defence; and
- the circumstances of the conduct, including any mitigating circumstances, and the approach taken towards other employees.

In both the recent cases of Stuart v London City Airport (“Stuart”) and Carmelli Bakeries Ltd v Mr Benali (“Carmelli”) the Employment Tribunal had to decide whether or not the respective employees had been fairly dismissed. In doing so, it was not for the tribunal to decide whether it would have
reached the same decision as the employers, but whether the decision to dismiss was a reasonable decision for an employer to take in the circumstances. The cases demonstrate the importance of a reasonable investigation whatever the context of the allegations. In Stuart, where the investigation was found to be reasonable, the Employment Tribunal agreed with the employer (and this decision was upheld in the Court of Appeal), but in Carmelli, where there was little evidence of any investigation, it did not. Further, the recent case of Brito-Babapulle v Ealing Hospital NHS Trust ("Brito"), demonstrates that even where there is a finding of gross misconduct which the Employment Tribunal does not dispute, the dismissal may still be found to be unfair if all the circumstances, including mitigating factors have not been considered by the employer.

“Stuart”

The employee was an airport worker who had visited the duty free shop within the airport during his break. He was accused of taking items from the shop without intending to pay for them. The employee’s central defence in the disciplinary proceedings was that he was not aware that he had stepped outside of the boundary of the duty free shop. After visiting the location in the airport, the decision-maker was satisfied that this was not a credible argument and that the employee had been dishonest. The employee later complained that more witnesses should have been interviewed and that the disciplinary should have involved consideration of CCTV footage from the shop. The Employment Tribunal disagreed, finding that it was reasonable for the dismissing manager and the manager on appeal to conclude that the employee had been dishonest from the investigation they had carried out. It was not relevant to the fairness of the dismissal that the employee was later exonerated at a criminal trial; what mattered was whether the managers reasonably believed in the employee’s dishonesty at the time of the dismissal and whether they had reasonable grounds on which to do so.

“Carmelli”

The employee worked in a kosher bakery. Prior to the incident in question he had been absent from work for 10 months due to sciatica and on his return had asked for reasonable adjustments to be made for him on account of his disability. This request had not gone down well and the employer refused to accept that the employee had a disability.

The use of kosher ingredients was fundamental to the bakery’s success and the business was at risk of being closed down if it did not use kosher-only ingredients. During one shift, the employee asked the cleaner to purchase some jam from Tesco. Knowing that that this was not kosher jam, the employee then used it on the products he was making. On discovery of the non-kosher jam, the employee admitted he had used it but claimed that he was authorised to do so by management. A very limited investigation took place which was led by the manager accused by the employee of authorising the purchase; the manager simply denied he had done so. No aspect of the employee’s defence was investigated. Against these facts and the background to the case, the Employment Tribunal found that the "jam
incident” was not the operative reason for the dismissal and the dismissal was unfair and an act of victimisation under the Equality Act, entitling the employee to substantial compensation.

Gross misconduct dismissals: a fairness checklist

- **Reasonable belief.** The decision-makers must reasonably believe that the employee has engaged in the alleged conduct.

- **Investigation.** The decision-maker’s belief should be based upon a reasonable investigation. This should be as thorough as possible. Although it may not be necessary for the decision-maker(s) to explore every avenue to establish whether the employee’s arguments in defence have any credibility, one Employment Tribunal’s view of what is reasonable can differ from another; therefore, the more points which are covered off, the stronger the position of the employer.

- **Context.** This is particularly important where there are other circumstances (such as performance or conduct issues) which may make dismissal an attractive option. The decision-maker(s) need to establish that it is the conduct in question which has led to consideration of dismissal.

- **Burden of proof.** A dismissal may be fair even if the employee is exonerated in criminal proceedings; the burden of proof for a fair dismissal is not as high.

- **Admission.** An investigation is still required, even if the employee has admitted the conduct in question, as there may be mitigating circumstances (including the admission itself).

- **Mitigation.** Consider whether there are any mitigating circumstances, including the treatment of other employees in similar situations, before imposing the penalty of dismissal.

- **Appeal.** Give the employee the opportunity to appeal the dismissal.