Gross misconduct Dismissals – Getting it Right

Overview

The Employment Appeal Tribunal has confirmed that when determining whether an employer’s decision to dismiss an employee is fair, tribunals should consider whether it was reasonable for the employer to characterise the employee’s conduct as gross misconduct.

The Law
Misconduct is one of the five potentially fair reasons for dismissal set out in section 98 of the Employment Rights Act 1996 (ERA 1996). In order for a dismissal on the grounds of misconduct to be fair, employers must show the following:

1. That the employer believed the employee to be guilty of misconduct.
2. That the employer had reasonable grounds for believing that the employee was guilty of that misconduct.
3. That at the time the employer held that belief, it had carried out as much investigation as was reasonable.

The tribunal must also consider whether the employer’s decision to dismiss the employee fell within the range of reasonable responses to the misconduct that a reasonable employer in those circumstances may have adopted.

Whether an employee’s behaviour amounts to gross misconduct depends on the particular circumstances of the case. Ultimately to constitute gross misconduct, the employee’s conduct has to be so serious that it warrants dismissal without prior warnings and without notice. Tribunals should consider whether there has been deliberate wrongdoing or gross negligence and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case.

Background

The Respondent, a housing association which provides accommodation for the elderly, infirm and vulnerable. Mr Cunningham had been employed as a caretaker for 32 years and had an exemplary record.

Mr Cunningham’s wife had formed a close relationship with one of the association’s tenants who appointed her as sole executrix of his will and bequeathed the whole of his estate to the couple jointly. EHP’s Code of Conduct prohibited employees from accepting gifts over £50 whilst at the same time (and slightly inconsistently) stated that benefits received of any value had to be declared to management and approved by the Chief Executive and Chairman of the Board. Mr Cunningham did not notify EHP that he and his wife had received a personal benefit from a tenant until three months after the tenant’s death. By this time, a disciplinary investigation against Mr Cunningham had already began.

Following a disciplinary hearing, Mr Cunningham was dismissed without notice on grounds of gross misconduct. EHP took the view that Mr Cunningham was in a position of trust and one that required him to set an exemplary standard given the fact he came into direct contact with vulnerable tenants.

Employment Tribunal decision

The tribunal upheld Mr Cunningham’s claims for unfair dismissal and wrongful dismissal. Although the tribunal concluded that EHP had been justified in pursuing disciplinary proceedings against Mr Cunningham, it found that a reasonable employer would have regarded a formal warning to have been a more appropriate disciplinary sanction given Mr Cunningham’s length of service, exemplary record, there being no allegation that Mr Cunningham had sought to apply any influence on the tenant and the extremely impressive character reference letters received from tenants on the estate.

Nonetheless the tribunal deducted 25% from the award of compensation on the basis that Mr Cunningham’s “lack of transparency” in relation to the bequest and his delay in notifying EHP was conduct which contributed towards his dismissal.

EHP appealed on the grounds that (1) the tribunal had failed to conduct an analysis of whether characterising the conduct of Mr Cunningham as gross misconduct was a reasonable position for EHP to have adopted in the circumstances of the case; (2) the tribunal had substituted its own views rather than the reasonable response test when concluding it was unreasonable to dismiss Mr Cunningham in the circumstances; and (3) that too narrow an approach had been taken in relation to the consideration of contributory fault.

Employment Appeal Tribunal (“EAT”) decision
In relation to the first ground of appeal, the EAT agreed with EHP and held that there had been no attempt on the part of the tribunal to analyse Mr Cunningham’s misconduct or EHP’s approach to that conduct in terms of whether it was capable of amounting to gross misconduct or whether it was reasonable for EHP to believe that it amounted to gross misconduct.

The EAT rejected the argument that the tribunal had substituted its judgment for that of EHP and refused to make a finding in relation to the issue of contributory conduct.

The case was remitted to a freshly constituted tribunal to be heard again.

**Commentary**

This case suggests that tribunals need to conduct an analysis as to what might amount to gross misconduct and why an employee’s conduct was not sufficiently serious to justify dismissal without notice rather than merely providing a generic description of what might constitute gross misconduct.

Employers should make sure that examples of gross misconduct in their disciplinary policies and procedures are comprehensive and up to date, even if they are not exhaustive. Employers should however be careful not to blindly rely on such lists and should be able to explain and evidence why they believe the misconduct in question amounts to gross misconduct and why it was reasonable in the circumstances to characterise it as such.