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Albion Chambers EMPLOYMENT AND PROFESSIONAL DISCIPLINARY TEAM NEWSLETTER

Internships and the GiG economy

Employment status

"Cabbies who took on Uber... and won!"
(Daily Mail, 28 October 2016)

"Pimlico Plumber worker should be paid sick pay"
(The Telegraph, 10 February 2017)

"London bike courier is 'delighted [that] the shroud of deceit over gig economy rights has been lifted'"
(The Financial Times, 6 January 2017)

Even the government is getting in on the act, with the Department for Business, Innovation and Skills (now nattily renamed the Department for Business, Energy and Industrial Strategy) publishing its Employment Status Review on 9 February 2017.

What is the GiG Economy?

The gig economy is essentially a labour market based on short-term contracts or freelance work: getting paid for a 'gig' (like a food delivery) rather than a wage. This a set musician, 'gigging'.

Its close cousin is, of course, the zero-hour contract: getting paid simply for the work you do rather than a regular payment. All these new ways of working have their supporters: they offer flexible hours and control over how much time you work while managing other priorities in life. The question is who really is in control and how much benefit do both parties get from such a flexible relationship.

The gig economy may be the latest fashion for mainstream media reporting on employment law, but it is just the latest evolution in flexible working arrangements.

Internships

A few years ago, we were focused on the use and abuse of internships. At the height of the recession, the unfettered use of internment by employers to obtain free work at the expense of desperate graduates was the cause of concern. For a relationship that is an important part of the labour market, it is not known how many interns there are in the UK, and there are surprisingly few employment law cases involving interns. Before looking at these in detail, here is a short refresher in the main principles of employment status in general.

Employment status

People can be: employed, workers, self-employed/independent contractors or volunteers. Employees work under a contract of employment whereas workers contract to personally do work under a contract for services.

The ERA s230(2) defines a contract of employment as *"a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".*

Workers are defined under the ERA s230(3) as:

"an individual who has entered into or works under (or, where the employment has ceased, worked under) -

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual" (what is generally referred to as a "limb (b)" worker).

The irreducible minimum for employment has long been set out in *Ready Mixed Concrete v Minister of Pensions and National Insurance* [1968] 2 QB 497: the commitment to personally undertake work (no substitute), the degree of control of the employer, and the mutuality of obligations between the parties (one provides work, the other does the work).

Market Investigations v Minister of Social Security [1969] 2 QB 173 also highlighted factors such as providing own equipment, hiring of helpers, the degree of financial risk, the degree of responsibility for investment and management, and to what degree a person has the opportunity of profiting through sound management and performance.

Over the years, various strands of authority developed, espousing differing tests to apply. The "dominant purpose" test came from the *James v Redcats (Brands) Ltd* [2007] IRLR 296 line of authority which found its end in *Hashwani v Jivraj* [2011] ICR 1004, determining that the principle purpose of the contract was relevant, but not a decisive consideration. *Hashwani* itself concentrated instead on the degree of control that the person consented to work under. The "integration

test" from *Cotswold Developments v Williams* [2006] IRLR 281 focused on whether the person marketed his services as an independent person to the world in general, or whether he was recruited to work for a principal as an integral part of the principal's operations.

Pick and mix

What is now clear is that there is no one formula or characteristic that is determinative, but that a court should start from the statute itself (see *Bates van Winkelhof v Clyde & Co LLP* [2014] I WLR 2057, *Uber v Aslam* and *Farrar* and *Pimlico Plumbers*). Even how the parties themselves classify their relationship is only relevant, not conclusive. *Autoclenz v Belcher* [2011] ICR 1157 is authority to support that the tribunal should have regard to the relative bargaining power of the parties and assess whether the terms of the agreement/contract reflect the reality of the relationship in fact.

But what about internships?

There is no statutory definition of an 'intern', but, doing the best we can, an intern will be a volunteer, a worker or an employee depending on the facts of the relationship. There is some essential guidance produced by the government: the *"Common Best Practice Code for High Quality Internships"* (September 2013, BIS and Department of Education) and *"National Minimum Wage: work experience and internships"* (15 May 2013, BIS).

For payment of the minimum wage, it is worth noting the statutory exemptions for specific training, work experience or work experience as part of a higher education course under the National Minimum Wage Regulations 2015 Regs 51-56.

What causes a difficulty in proving that an intern is an employee or worker is the presence (or lack of) consideration. If a person decides to participate in an internship without payment as a volunteer, there is no consideration provided by the employer and, therefore, no contract between the parties that would mean that the intern is an employee or a worker. However, consideration can extend beyond wages to other "benefits in kind", such as the promise of a job at the end of the internship. In addition to this, the intern may be reimbursed for expenses but if these payments are not actually linked to their expenses, they can also be seen as consideration. It is worth remembering that the terms of an internment agreement are not conclusive and, even if the intern signs an agreement that they are a volunteer, they may in fact be a worker or an employee.

Limited Judicial Guidance

There is a dearth of reported cases in this area; a surprise given the number of internships reported in the UK. However, some guidance can be derived from the following key authorities.

In *Vetta v London Dreams* (2008), an employment tribunal determined that an unpaid assistant at a film company was a worker. She was doing work normally undertaken by a paid member of staff while being paid on an expenses-only basis. There was no form of training programme in place (the best practice guidance suggests that a structured work plan contributing to the intern's professional and learning objectives that is reviewed through supervision and meetings should be put in place). Similarly, in *Hudson v TPG* (2011), an intern working at a website for several weeks was held to be a worker. She had been put in charge of recruiting other interns and was in charge of a team of writers.

Conclusion

While there is now concern that employers are using false flexible working arrangements in the gig economy in order to circumvent employment protections, this concern has, in fact, existed for some time in the context of internships. The exploitation of this "free labour" pool has yet to be addressed in any substantive way. We await the Taylor Review in respect of the gig economy and hope that it will be expansive in addressing all of modern employment practices.

Erinna Foley Fisher

Delay, abuse of process and professional disciplinary proceedings

In an ideal world, professional misconduct proceedings would be promptly investigated and prosecuted. All matters complained of would be reported contemporaneously, and a simultaneous record created, and, by the time of a contested hearing, matters would still be fresh in everyone's minds.

That's in an ideal world... unfortunately, like unicorns on Barnsley High Street, this ideal world is rarely encountered.

Members of Albion's Employment and Professional Disciplinary Team, whether appearing at the GMC, NMC, HCPC or in Police Misconduct Proceedings increasingly face circumstances where there has been significant delay in reporting, investigating or prosecuting alleged misconduct (or all three). As a result, the team has garnered considerable experience in arguing for, or defending against, abuse applications based on delay.

Starting point

The vast majority of enabling regulations which give rise to professional disciplinary proceedings purportedly set strict time scales in which cases must be investigated and prosecuted. The individual stages are often framed in terms of days and weeks, not months, often accompanied by mandatory language such as 'will' and 'shall'. On the face of it, this mandatory language would demand strict compliance, but in reality, unless there was a gross failure to comply with the regulations, such breaches would rarely give rise to any sort of strike-out or abuse-type argument.

However, where abuse is pursued, three types of abuse of process largely feature in these types of applications:

- delay being a prejudice of itself;
- delay causing prejudice (including regulatory departure); and
- unconscionable behaviour on behalf of the prosecuting authority (including regulatory departure).

As above, the final category, that of unconscionable behaviour, is very hard to establish, especially when it is based solely on regulatory departure; therefore this article will focus on the first two categories: delay being a prejudice of itself and delay causing a specific prejudice.

As per *A-G's Reference (No 1 of 1990)* [1992] QB 630, a stay for unfairness should only be granted in exceptional circumstances:

"(1) a stay for delay or any other reason was to be imposed only in exceptional circumstances; that, even where delay could be said to be unjustifiable, the imposition of a permanent stay was to be the exception rather than the rule; and that

even more rarely could a stay properly be imposed in the absence of fault on the part of the complainant or the prosecution

(2) That no stay was to be imposed unless the defendant established on the balance of probabilities that, owing to the delay, he would suffer serious prejudice to the extent that no fair trial could be held, in [other words] that the continuation of the prosecution amounted to a misuse of the process of the court..."

In terms of professional disciplinary case law, a similar approach was adopted in *Haikel v General Medical Council* [2002] UKPC 37, the court stating that:

"To stay proceedings on the ground of [delay] is a rare step"

These authorities remain good law, so far as they go.

Burden of proof

The onus is on the professional seeking to establish prejudice/abuse to prove it on the balance of probabilities, as per *R v Chief Constable of Devon and Cornwall Constabulary ex parte Hay* [1996] 2 All ER 711.

The proper test

Building on the authority of *A-G's Reference (No 1 of 1990), R (on the application of Redgrave) v Commission of Police of the Metropolis* [2002] EWHC 1074 (Admin) states the proper test to be applied as follows:

"40. The correct approach is to consider whether a fair or just hearing is possible in the light of such inexcusable delay and serious prejudice as the [accused] may establish. All delay will cause anxiety and possibly worse to an [accused] awaiting a hearing, but not all delay will lead to the conclusion that a fair hearing is no longer possible..."

Delay as prejudice of itself

It is of note that *Redgrave* does not state that delay of itself cannot be a prejudice of itself so as to result in a stay. Nevertheless, it must be acknowledged that such a conclusion, that delay as of itself may give sufficient grounds for an abuse of process argument, could only be established in relatively rare circumstance.

This is consistent with the earlier authority of In *R v Chief Constable of Merseyside ex parte Merrill* 1989 WL 651452. It states:

"The Chief Constable had no need to concern himself with "abuse of process". As a judicial tribunal, he had a discretionary power to dismiss the charge without hearing the full evidence if he was satisfied that, whatever the evidence might reveal, it would be unfair to proceed further. "Unfairness" in this context is a general concept which comprehends prejudice to the accused, but can also extend to a significant departure from the intended and prescribed framework of disciplinary proceedings or a combination of both."

As referenced previously, the various misconduct regimes are universally geared towards swift resolution. Matters should be investigated thoroughly but in a timely manner, allegations should be put to the relevant professional and answers sought as soon as is reasonably practicable, and a hearing or meeting convened (if there is a case to answer) and concluded in short order.

As per *Merrill* cited above (in *Merrill* the delay was 15 months) the court stated as follows:

"...neither he [The Chief Constable], nor for that matter the Divisional Court, appear to have given any weight or indeed consideration to the prejudice inherent of depriving a police officer for 15 months of the information to which he was entitled under regulation...

The public interest in complaints against police officers being fully investigated and adjudicated is undoubted, but it must be done speedily. I express no view upon whether Detective Constable Merrill was guilty of the offence charged, but if he was the course of these proceedings has been such that it will have provided neither him nor any other police officer with any encouragement so to attend. If he has not, he has already suffered injustice which should not be increased".

The delay itself was the prejudice.

This approach was recognised in the cited case of *Redgrave* above, at para 25 the court stated as follows:

"[This case Merrill] emphasises the importance of a disciplinary board focussing on overall unfairness and recognising that prejudice may be inherent in excessive delay".

and at para 39

"My only note of caution in relation to applying ex parte Hay in every case relates to the nature of the prejudice. In ex parte Hay, as I have said, Sedley J was concerned with an assertion by the police officer of specific prejudice. That, in my view, will not always be necessary. It is possible to conceive of a case where the evidence remains untainted because, for example, it is in writing or admitted, but where the delay is so great and so unjustifiable that it may be said to give rise to injustice to the accused just as in ex parte Merrill."

However, the period of 15 months in *Merrill* should not be taken as any sort of durational watershed. In *Williams v General Medical Council* [2007] EWHC 2603 (Admin) the court soundly rejected criticism of the GMC panel who refused to stay proceedings as an abuse due to a 15-month delay.

It is also worth referencing Art 6 ECHR at this stage. Art 6, the right to a fair trial, is often referenced when complaints are made about the impartiality of the tribunal, the withholding of evidence or other 'sexier' complaints. An oft-neglected aspect of Art 6 is delay. Article 6(1) reads as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

However, what constitutes 'reasonable' is very much a moveable feast. As an example, in criminal law many cases are prosecuted many, many years after the alleged offence was first committed, but in terms of calculating the start date by which to judge delay, generally speaking it is when the authorities were first informed of the issue in question, not when the act took place. Nevertheless, such historic cases have not fallen foul of Art 6 'reasonable time' stipulation and that is why an identifiable prejudice is often required, see *R v H* [2015] EWCA Crim 782 as a good example, where a fair trial was found to be possible even in circumstances where the defendant suffered with dementia.

Delay causing or compounding prejudice

As will be appreciated, trying to establish an abuse based solely upon delay, without something more, is very much an uphill struggle. However, in the experience of the writer, if one can establish significant and unjustified delay, and then point to a real prejudice caused by, or at the very least, compounded by that delay, the chances of success in arguing an abuse argument are increased significantly.

The primary prejudice(s) that is/are often caused by delay is either the inability to obtain rebuttal evidence or the unreliability of memory due to the passage of time.

This is a real prejudice and can cause proceedings to be unfair. This unfairness is encapsulated neatly by the judgment in the family law case of *Lancashire County Council v R* [2013] EWHC 3064 (Fam).

The Court stated:

"The assessment of credibility generally involves wider problems than mere demeanour which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. With every day that passes the memory becomes fainter and the imagination more active. The human capacity for honestly believing something which bears no resemblance to what actually happened is unlimited."

Therefore, those who are bringing an abuse argument on this ground, or indeed those who are resisting such an application, should study the primary and contemporaneous evidence carefully; has there been a change of position, has there been a 'slippage' in the accounts provided or does a witness qualify their evidence with phrases such as *"as far as I can remember"* and *"it was a long time ago but..."*?

In the commercial dispute of *Phelps v Button* [2016] EWHC 3185 (Ch), a delay in concluding proceedings caused prejudice to the defendant in not being able to obtain documents from a third party that would have assisted in its case. However, this should be compared with the body of case law in the criminal field where the argument(s) that CCTV was no longer available to disprove the allegations against a defendant have been roundly rejected, see *R v Robson* [2001] EWCA Crim 1606.

Conclusions

Though not a regulatory or misconduct authority, *The Owners and/or Bailees of the Cargo of the Ship Panamaz Star v The Owners of the Ship Auk* [2013] EWHC 4076 (Admlty), as endorsed in *Phelps,* probably provides the neatest encapsulation of the current state of affairs in terms of abuse and delay:

"(1) There are no hard and fast rules. The court has to make a broad judgment having regard to all relevant circumstances and the justice of the case.

(2) The relevant circumstances may include the length of, explanation for and responsibility for the delay; whether the Defendant has suffered prejudice as a result and if so how it can be compensated for, and whether the delay is such that it is no longer possible to have a fair trial.

(3) A defendant cannot let time go by without taking action so where delay does cause prejudice to him he cannot say that it is entirely the fault of the claimant."

Point 3 should be specifically highlighted, similar to proceedings in equity; the behaviour of the accused professional is likely to be a key consideration. If an accused professional has complied with the procedural obligations on him, has responded fully and in a timely manner, has co-operated with proceedings, has provided promptly witness statements and evidence on which he seeks to rely, he will be in a much better position to argue abuse for reason of delay... after all, what more could he have done?

Richard Shepherd

Hearsay in disciplinary proceedings

A cautionary tale

It is a fact of life in most breeds of disciplinary hearing that the panel can, and indeed does, regulate its own procedures and is bound only by the principles of procedural fairness. This approach can cause difficulties for a practitioner who finds him or herself representing an individual, where that practitioner is used to abiding by the usual rules of evidence. The evidential issues that cause most consternation are those which relate to issues of hearsay.

The Court of Appeal has recently given some guidance to the issue of the admissibility of hearsay in the case of *Squire v CC of Thames Valley Police and The Police Appeals Tribunal*. [2016] EWCA Civ 1315.

The appellant, Mr Squire, was a police officer. In May 2013, a member of police staff made a complaint against him. It was alleged that he had conducted himself in an inappropriate and sexually motivated manner towards the complainant. At the hearing before the disciplinary tribunal, the panel admitted hearsay evidence. DC Payne gave the offending evidence. DC Payne's evidence was that other officers had also made comments about the appellant, e.g. he was pervy. Those other officers were to be called before the tribunal, but their statements did not repeat or support the comments contained in DC Payne's evidence.

Push Me Pull You

For reasons that are not entirely clear, the appropriate authority sought to adduce the evidence of DC Payne before they called the witnesses who DC Payne had overheard making complaints about Mr Squire. This decision was made even more difficult to understand by reason of the fact that none of those other witnesses supported the account given by DC Payne.

The panel found against Mr Squire and dealt with the issue of the hearsay point by saying:

"The evidence relied upon… included hearsay…. We ruled that that evidence was admissible despite it being hearsay. However when the witnesses came to give oral evidence, none of that evidence was supported by the officers who were mentioned as having made the comments. In the circumstances we did not consider it to be fair to DI Squire for us to place any reliance on any evidence of that type."

At the PAT

Mr Squire appealed to the Police Appeals Tribunal who found that the consequence of this decision was that:

"...[there was] a real possibility or danger that the panel was biased and that a fair-minded and informed observer would have so concluded or perceived it to be… the panel, having decided to admit hearsay evidence, misdirected itself, thus making its decision as to its finding unreasonable."

On Appeal

Perhaps unsurprisingly the appropriate authority appealed to the Court of Appeal who roundly rejected this reasoning in the following terms:

"These were not conclusions the [PAT] was entitled to reach…..The panel was a professional or semi-professional panel. It made it clear beyond doubt that it had put DC Payne's evidence, except that about the complaints made to her by Jaimie Evans, entirely out of account when assessing the strength of the case against

DI Squire. In the absence of evidence to show that it did not do so, its reasoning is to be accepted, as the Tribunal itself recognised… There was no such evidence, other, perhaps, than the [PAT]'s reasoning about the three incidents. It is only if that reasoning must be accepted that the [PAT]'s conclusion on this issue might be capable of being sustained. It cannot be."(Mitting J)

The court did, however, address the "hearsay issue" and offered the following comment:

"It was common ground that the panel was entitled to admit hearsay evidence. That said, I also agree with Mitting J that the evidence of DC Payne should not have been admitted at least until the evidence of the other witnesses had been heard."

"Whilst the order of witnesses was a case management decision for the panel, with which any appellate tribunal will be slow to interfere, it would have been prudent to adopt a different approach, hearing the quoted witnesses first. If they or any of them failed to come up to proof on what DC Payne was capable of saying they said, the clearer, simpler, and more logical route would have been not to admit the hearsay evidence at all."

"The question, however, is what if any impact this case management decision had on the panel's decision. In my judgment, though the wiser course would have been a different order of witnesses, that the panel proceeded as it did does not impugn its ultimate analysis of the hearsay issue." (Rafferty J)

Conclusions

The lesson to be learned is that when hearsay evidence of this type is to be adduced, it is important that the observations of Rafferty J are observed. If the suggested approach had been adopted in the case of Squire, the evidence of Payne would never have been admitted, there would, accordingly, have been no suggestion of bias and a great deal of time and expense would have been saved by removing the need for hearings before the PAT and the Court of Appeal.

Stephen Mooney

Conduct dismissals

An in-depth review

This article looks at four recent cases concerning dismissals for misconduct:

- ***Stratford v Auto Trail VR Ltd*** **UKEAT/0116/16/JOJ**
- ***Perry's Motor Sales Ltd v Edwards*** **UKEAT/0061/16/DA**
- ***Adesokan v Sainsbury's Supermarkets*** **[2017] EWCA Civ 72**
- ***Arnold Clark Automobiles Ltd v Spoor*** **UKEAT/0170/16/DA).**

The first two cases involved issues concerning final warnings whilst the latter two considered, respectively, the questions of what constitutes gross misconduct and what an employer has to take into account before deciding to summarily dismiss for gross misconduct.

You've been warned

An employer can legitimately rely on a final warning provided that it was issued in good faith, that there were at least prima facie grounds for imposing it and that it was not manifestly inappropriate to issue it (*Davies v Sandwell Metropolitan Borough Council* [2013] IRLR 374, CA; *Wincanton Group plc v Stone (formerly known as Joyce) and anor* [2013] IRLR 178, EAT). In *Davies*, the Court of Appeal disagreed with the appellant employee that the tribunal's role was to consider the validity of the final warning. Mummery LJ held that the tribunal's function is not to re-open the final warning and rule on an issue raised by the claimant as to whether it should or should not have been issued, and whether it was a legally valid warning or a "nullity". The tribunal's function is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance, which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct.

Stratford v Auto Trail VR Ltd

What of a warning that has expired? That was the issue considered by the EAT in *Stratford v Auto Trail VR Ltd* UKEAT/0116/16/JOJ, [2016] All ER (D) 208 (Oct).

The claimant had a poor disciplinary record. Employed for just under 13 years, he was dismissed in October 2014 after his 18th disciplinary offence. The 16th and 17th items on his disciplinary record were a nine-month disciplinary warning for failing to make contact while off sick in December 2012, a three-month warning for using company machinery, and time for what the Employment Tribunal described as preparing materials for personal purposes in January 2014. In October 2014, he was dismissed after being seen with his mobile phone in hand on the shop floor, which was something that was described in the employee handbook as being "strictly prohibited".

At his disciplinary hearing, the Production Manager accepted the reasons put forward by the Claimant for having his mobile phone on him and decided that he was not guilty of gross misconduct, but having found that the Claimant had deliberately chosen to ignore the Respondent's rules, albeit not maliciously, he decided to issue him with a final written warning. The Production Manager then went on to consider whether the Claimant could learn from the process or whether they would be discussing yet another matter within a few months. Not only was this the 18th time that they had had to discuss the Claimant's actions on a formal basis, but there had been informal conversations on many occasions in which the Claimant had said *"this is the last time"*. His manager said that he had *"been given every chance"*, but that the claimant had given him *"no reason to believe we will not be having a similar conversation in the near future"*, and that *"Whilst your actions may not always be intentional, you do not understand the consequences of your actions and I do not believe that this will change"*. He therefore decided to terminate the Claimant's employment.

The Tribunal found the dismissal to have been fair, the principal reason for the dismissal being the Claimant's disciplinary record and the Respondent's belief that the Claimant would not improve. On appeal, the Claimant argued that where an employee is guilty of misconduct falling short of gross misconduct which, in itself, does not justify the sanction of dismissal, it is not reasonable for the employer to rely upon earlier misconduct as the principal reason for dismissal where any previous warnings have ceased to have effect.

The EAT was referred to two authorities: *Diosynth Ltd v Thomson* [2006] IRLR 284, a decision of the Inner House of the Court

of Session in Scotland, and *Airbus UK Ltd v Webb* [2008] IRLR 309, CA. In *Diosynth*, the Claimant had failed to carry out a safety process. He was disciplined and given a 12-month warning. The 12 months had expired a few months before there was a fatal explosion in the plant that led to an inquiry in which it was disclosed that the Claimant and 18 others had failed to carry out that same safety process. The Claimant was dismissed. The employer made it clear that but for the previous warning he would not have been dismissed. The Court of Session held that the dismissal was unfair; the essence of its decision being that it was a contravention of the principle of fairness for an employer to put a time limit on a warning and then take it into account as a determining factor in a dismissal of an employee for a misdemeanour after the expiry date.

On the other hand, in *Airbus*, the Court of Appeal held that *Diosynth* was not authority for the general proposition of law that misconduct, in respect of which a final warning was given but which has expired, can never be taken into account by an employer when deciding to dismiss an employee, or by an employment tribunal when deciding whether the employer had acted reasonably or not.

In that case, the Claimant had been summarily dismissed for gross misconduct in July 2004, but on appeal the lesser sanction of a final written warning, expressed to remain on his file for 12 months, was substituted and he was warned that further misconduct was likely to lead to dismissal. In September 2005, three weeks after that written warning had expired, the Claimant and four other employees were disciplined for being away from the workplace when they should have been working. The employer found them all guilty of gross misconduct, but only the Claimant was dismissed; the others, who had no prior disciplinary record, were given final warnings.

Mummery LJ held:

"I see nothing in the very wide wording of [section 98(4) of the Employment Rights Act 1996] as laying down a rule for tribunals that the circumstances of the employee's previous misconduct must be ignored by the employer, if the time-limited final warning had expired at the date of the subsequent misconduct, which was the reason, or principal reason, shown by the employer for the dismissal. The fact of the previous misconduct, the fact that a final warning was given in respect of it and the fact that the final warning had expired at the date of the later misconduct would all be objective circumstances relevant to whether the employer acted reasonably or unreasonably and to the equity of the case and the substantial merits. The legislation does not single out any particular circumstance as necessarily determinative of the questions of reasonableness, equity, merits or fairness."

Although not binding on the Court of Appeal, *Diosynth* was said to be "highly persuasive", however, Mummery LJ distinguished it on the basis that in Webb the principal reason for dismissal was the index offence, which was itself a matter of gross misconduct warranting dismissal, whereas in *Diosynth* the reason was more the history, and the index offence did not, in itself ,amount to gross misconduct warranting dismissal.

In *Stratford*, the EAT held that the legal position to be followed was as described by Mummery LJ at paragraphs 45 and 47 of Webb. It held that there had been no error of law in the Tribunal's decision by taking account of the previous record, along with the index offence and the manager's prediction as to how the future was going to pan out if the Claimant were not dismissed. If *Diosynth* had to be distinguished, the EAT noted that in this case the Claimant's disciplinary record was very different to that in *Diosynth*. It was longer, there were many more incidents, they covered the entire period of the Claimant's employment and some involved no formal action at all so there was no warning to be expired. In *Diosynth*, however, there was just one previous warning, which had expired, and which was described as tipping the balance rather than being looked at as part of a whole record leading to dismissal.

The decision in *Stratford* might need to be treated with some caution, however. Whilst in *Webb*, the conduct leading to the disciplinary investigation was held sufficient by itself to amount to gross misconduct, and the previous misconduct, in respect of the expired warning, was relevant only in relation to considering whether there were mitigating circumstances justifying a lesser sanction. In *Stratford,* the employer had specifically held that the final act of misconduct did not amount to gross misconduct justifying dismissal.

Perry's Motor Sales Ltd v Edwards

When should a Tribunal examine whether a final warning was issued in bad faith, was manifestly inappropriate, or whether there were no prima facie grounds for imposing it?

In *Simmonds v Milford Club* UKEAT/0323/12, Slade J said that if an employment tribunal has cause, on the facts, to consider that a material previous disciplinary sanction may have been manifestly inappropriate, it should hear evidence and decide on the relevant facts whether the sanction applied was manifestly inappropriate. However, it is only where, on the facts, there is a real concern that a sanction may have been inappropriate, that it will be necessary for a tribunal to engage in a factual inquiry, and detailed scrutiny of the circumstances in which that sanction was applied.

In *Perry's Motor Sales Ltd v Edwards* UKEAT/0061/16/DA, the Claimant was the Service Manager in the Respondent's franchised Vauxhall dealership. Having been found guilty in May 2014 of issues regarding tampering with company paperwork, including invoices, he was given a first and final written warning. The conduct on that occasion was said by the Respondent to be "a fraudulent act on your behalf and a breach of trust". The Claimant did not appeal against that final warning.

In August 2014, whilst the final warning was still live, an issue arose as to a faulty gearbox on a used car sold by the business. Vauxhall agreed to bear 80% of the cost of the work and parts but, for this to happen, a claim needed to be submitted within 45 days of the work being completed. The work was completed on 28 August 2014, but a claim was only submitted on 16 November 2014. This had been done by the Claimant, who then entered the date on which the work was completed as 20 October 2014: within the 45-day period preceding the submission, but incorrect as a matter of fact. A disciplinary investigation was launched into this and certain other issues relating to the Claimant's department.

His employer considered that the Claimant should be dismissed because the issues were so similar to those for which he had been given his final written warning. The Tribunal, however, found that the dismissal was unfair as the sanction of the previous final written warning fell outside the range of reasonable responses, and the dismissal fell outside the band of reasonable responses as the Claimant had not been provided with promised monitoring, appropriate training and support on the operating procedures that applied, and had been put under pressure not to write off costs and denied the help that he had asked for. He was, however, found to have contributed to his dismissal by 50%.

On the Respondent's appeal, HHJ Eady QC held that the Tribunal had been wrong to look into the validity of the previous warning that had not been challenged by the Claimant. Although no issue had been raised by the Claimant,

either as to the validity of the final warning or the employer's ability to rely on it when it subsequently decided to dismiss the Claimant, the Tribunal had taken it upon itself to look behind the warning, making findings as to what it really related to, and whether the penalty had fallen within the permissible range. The EAT held that the Tribunal had erred in law because it had engaged in determining a point that had not been in issue before it.

Judge Eady also held that the Tribunal had applied the wrong test when considering the warning's validity, asking itself whether the warning fell within the range of reasonable responses, rather than asking whether it had been issued for an oblique motive or was manifestly inappropriate, absent good faith and without *prima facie* grounds for making it.

The Tribunal had, therefore, failed to consider the fairness of the dismissal against the existence of a valid final written warning. As it did not inevitably follow that the dismissal was fair, the case was remitted to a differently constituted Tribunal for matters to be considered afresh.

As to the Claimant's decision not to challenge the final warning at the time, Judge Eady said:

"There was no dispute that a final written warning had been issued in May 2014 and was still extant at the time of the subsequent matters that had led to the dismissal itself. There was equally no dispute that the Claimant had not sought to appeal against that warning: he might not have agreed with it, but he had accepted himself as bound by it. An employee's decision not to challenge a disciplinary warning might, of course, involve a careful balancing of issues; not least a concern not to prolong a point of dispute with their employer. And where an employee retains a sense of grievance as to the probity of the earlier warning, or its manifest inappropriateness, it might still be open to them to put this in issue in any later ET proceedings relating to a dismissal that took that warning into account; that could be a further relevant circumstance to which the ET should have regard, albeit within the constraints explained in Wincanton."

In *Davies*, although the point had not been formally part of the appeal to the Court of Appeal, Lewison LJ, referring to the EAT's ruling that the Tribunal had made an error of law in having regard to the fact that the appeal against the written warning was not pursued to a conclusion, had commented, obiter, that he would not wish to be taken as endorsing the view that it is always unreasonable for an employer to take into account the fact that an appeal against a historic disciplinary sanction has been withdrawn or abandoned. Beatson LJ had considered that, where there has been no appeal against a final warning, or where an appeal has been launched but not pursued, there would need to be exceptional circumstances for going behind the earlier disciplinary process and in effect re-opening it.

That's Gross! Adesokan v Sainsbury's Supermarkets

In what circumstances can an employee be summarily dismissed for gross negligence? In *Alidair Ltd v Taylor* [1976] IRLR 420, a case concerning the actions of an airline pilot, the EAT held (in a passage subsequently approved by the Court of Appeal) that:

"There are activities in which the degree of professional skill which must be required is so high, and the potential consequences of the smallest departure of that high standard so serious, that one failure to perform in accordance with those standards is enough to justify dismissal".

That was a case involving a claim for unfair dismissal. What of claims for wrongful dismissal where the issue is whether the employee was actually in breach of contract?

In *Adesokan v Sainsbury's Supermarkets* [2017] EWCA Civ 72, the Claimant had been a Regional Operations Manager with responsibility for 20 of Sainsbury's stores. From time-to-time Sainsbury's would apply an employee engagement policy, the Talkback Procedure, in which staff were encouraged to provide comments in confidence about their work and their managers. An HR partner, Mr Briner, sent an email to five store managers in the claimant's region, in which he suggested that only the most enthusiastic members of staff should be selected to take part. That had the potential to undermine the Talkback Procedure's method of measuring staff engagement by deliberately manipulating the results of the survey. With ten days still left to run on the project, the Claimant found out about the email and asked the HR partner to 'clarify what he meant' with the store managers. The Claimant, however, did not check to see whether that was done (which it wasn't), did nothing himself to try to rectify the situation, and failed to notify senior management. Following an anonymous report, a disciplinary investigation was commenced culminating in the Claimant's summary dismissal for gross negligence.

At first instance, the High Court dismissed the claim for wrongful dismissal, holding that the Claimant's contract of employment provided examples of gross misconduct which included "any other serious breach of policy or procedure that leads to a loss of trust and confidence" and, although the Claimant's conduct had been neither wilful nor dishonest, his failure to take any active steps to remedy the situation amounted to gross misconduct, and his conduct so undermined the trust and confidence in the employment relationship that summary dismissal was justified.

On appeal, the first issue for the Court of Appeal to determine was whether, as a matter of law, the conduct of the Claimant had been capable of amounting to gross misconduct. The Claimant argued that given his long and unblemished service over 20 years, and the fact that he had not been responsible for sending the email, it was too harsh to dismiss him for a single act of negligence.

Giving the only reasoned judgment, Elias LJ referred to the judgment of Lord Jauncey in *Neary v Dean of Westminster* [1999] IRLR 288 and went onto say (at paragraph 23) that:

"The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence."

Elias LJ held that it had been open to the High Court to find that there had been gross misconduct, the critical feature being that the Claimant had been responsible for ensuring the successful implementation of the Talkback Procedure. Given the critical role which the Talkback Procedure played in Sainsbury's culture and the significance Sainsbury's placed on it, once it had become aware to him that the integrity of the process was being undermined, or at least was at risk of being undermined as a result of the HR partner's email, it had been the Claimant's duty to ensure that that was remedied. He had to correct the message sent in the email or at least take steps to ensure that was done. The step he had taken, requiring Mr Briner to clarify the situation, had not been enough, or at least it had plainly been insufficient once he had known that his instruction had been ignored.

The Judge had been entitled to find that that had been a serious dereliction of duty, and that that failing constituted gross misconduct because it had the effect of undermining the trust and confidence in the employment relationship. Elias LJ, however, added a note of caution, saying (at paragraph 24):

"the parameters available to a judge in a case of this kind are limited; it ought

not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal."

Arnold Clark Automobiles Ltd v Spoor

In Perry's Motor Sales, it had been accepted that a dismissal does not automatically fall within the range of reasonable responses simply because gross misconduct was found. The test is one of fairness, not a contractual one, and mitigating circumstances might take a dismissal outside the range of reasonable responses *(Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854, per Langstaff P).

In *Arnold Clark Automobiles Ltd v Spoor* UKEAT/0170/16/DA, the Claimant was dismissed for an incident in which he was alleged to have been physically violent towards a colleague. The Claimant admitted grabbing the other employee but denied any physical violence. He was alleged to have grabbed him by the neck, but when interviewed the Claimant said that "he may have caught his throat but he did not have him by the throat" and he had apologised to his colleague. Management decided that the incident was a case of "handbags" – which readers who are football fans will recognise as meaning a petty and insignificant disagreement – and decided not to proceed with formal disciplinary action. When, however, the matter came to the attention of the Respondent's HR Department, it was decided that a formal disciplinary hearing was needed, and the Claimant was thereafter summarily dismissed in line with the Respondent's alleged zero-tolerance policy towards physical violence. No account was taken of his 42 years of exemplary service, and no assessment was made as to the degree or level of physical violence involved.

The Claimant's claim for unfair dismissal was upheld, although a finding of 50% contributory conduct was made. On appeal, the EAT agreed with the employer that it was not clear from the Tribunal's judgment whether it had accepted that the physical violence on this particular occasion had amounted to gross misconduct. By agreement, rather than remitting the case to the Tribunal, the EAT went onto dispose of the appeal itself on this point.

It held that the Claimant's physical violence did amount to gross misconduct under the Respondent's disciplinary procedure, however the employer had presumed that gross misconduct necessarily led to summary dismissal. There was no evidence that it operated a zero-tolerance policy, and the disciplinary procedure was in fact expressed in terms to the contrary, the use of the word "normally" indicating that the employer had a discretion to exercise. The EAT held that the employer had erred in not having regard to all of the circumstances, including the Claimant's exemplary record, and that therefore the dismissal was unfair.

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