

## Let's be reasonable! Relying on a different reason to dismiss

The recent case of *Perry -v- Imperial College HealthCare NHS Trust* illustrates the standards required of an employer who decides to rely on a different ground for dismissal at the appeal hearing to that relied upon during the initial disciplinary hearing.

### The case details

This case involved a midwife who worked for two different NHS Trusts, Imperial College and Ealing. In the job she did for Imperial College, Mrs Perry was required to undertake home visits. The job Mrs Perry did for Ealing was clinic based. The jobs did not overlap.

Due to mobility issues, Mrs Perry was signed off sick from her Imperial job but was able to continue with the Ealing job. She did not tell Imperial that she was still able to do her other job and Imperial only discovered this when she was returning to the Imperial job after almost a year's absence on sick pay.

Imperial dismissed Mrs Perry for gross misconduct on the basis that she had defrauded Imperial by remaining in her paid employment with Ealing whilst certified sick and in receipt of sick pay for the Imperial role.

Mrs Perry appealed. At the appeal hearing, Imperial realised that the initial decision to dismiss Mrs Perry on the basis of fraud was unsupportable. Evidence was produced to the appeal panel that illustrated it was perfectly normal for an employee to undertake two different NHS roles at the same time and it was not uncommon for an employee to be sick from one role but still able to work in the other role. Therefore what had happened could not be fraud. However, the appeal panel upheld the dismissal relying on different grounds. It argued that Mrs Perry had a duty to tell Imperial that she was still able to undertake her role for Ealing even

though off sick from the Imperial role, suggesting that it was commonsense for Mrs Perry to understand that she had a contractual duty to tell Imperial this. This would have enabled Imperial to consider redeploying her. They decided that Mrs Perry's failure to tell Imperial that she was still working for Ealing amounted to deception.

The Employment Appeal Tribunal found that this new finding by the appeal panel did not justify summary dismissal. It was not a decision within the range of reasonable responses, that could have been taken by that employer acting in a reasonable way (the *British Home Stores -v- Burchell* test). The EAT felt that dismissal was not a reasonable sanction. It is interesting that the Tribunal had found that Mrs Perry was not dishonest and that she had genuinely believed, having considered her Contract of Employment, that she had no duty to tell Imperial that she was still working for Ealing. This may have swayed the EAT in deciding whether there had been any attempt to deceive Imperial.

### What does this mean in practice?

This case emphasises the key elements of the test for unfair dismissal:

- Follow a fair procedure.

For any dismissal, an employer must be able to show that it followed a fair procedure. This is particularly important, and must be apparent, on a dismissal for gross misconduct. The fair procedure should include a full investigation. The letter inviting the employee to the disciplinary hearing must clearly set out the allegations that are being made, the evidence which the investigation has shown in relation to those allegations, the possible outcomes of the disciplinary hearing and the right to be accompanied.

- Act reasonably

The employer must be able to show that it has acted reasonably in the decision it has reached and that its decision is within the range of reasonable responses. This emphasises the need for the minutes of a disciplinary hearing, be it at the initial hearing or at any appeal, to set out clearly the allegations that are being considered, the evidence in support of those allegations and the employee's response. The decision letter which will follow the disciplinary hearing must also set out clearly the allegations, the evidence and employee's response. The letter must also explain why the employer reached the decision it did.

This case involves the employer relying upon a different decision to dismiss an employee at the appeal hearing to that relied upon at the initial disciplinary hearing. This case does **not** mean that it is impossible to rely upon a different decision at the appeal hearing. However, beware! A different reason could only be relied upon if the employees has notice of the new allegation and has been given an opportunity to respond to that new allegation. It may involve the employer in further investigation before reaching a decision. Furthermore, if the new reason is the only reason relied upon in the dismissal, the employee should be allowed a further right of appeal.

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