Does gross misconduct need to be a single act?

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The EAT has clarified the circumstances in which an employee can fairly be dismissed for gross misconduct.

Gross misconduct is defined as conduct which is so serious that it undermines the employer's trust and confidence in the employee and entitles it to dismiss without further notice. Usually, this will be a single, clear act of serious misconduct. However, the EAT has held that this need not be the case, and gross misconduct can be comprised of a series of

acts of misconduct which would not be sufficient reasons to dismiss if taken individually.

The employer's decision to dismissal summarily was found to be fair on the facts of this case. The employer was an NHS Foundation Trust, and it had introduced new Department Rules and Responsibilities to the Trauma and Orthopaedics department. Having notified all staff that compliance with the new rules would be monitored, a subsequent investigation found non-compliance by 5 consultants in the department. Disciplinary action against three of the consultants resulted in a first written warning, a final written warning and a resignation respectively. In contrast, the Trust concluded that the allegations against the fourth consultant, Mr Mbubaegbu, were cumulatively serious enough to justify summary dismissal on grounds of gross misconduct. This is despite the fact that Mr Mbubaegbu had previously worked for the Trust for 15 years with an unblemished disciplinary record.

The EAT held that Mr Mbubaegbu had not been unfairly dismissed. It stated that it was not necessary for an employer to point to a single act and identify it as gross misconduct, as a series of acts can be serious enough to undermine the relationship of trust and confidence between the employer and employee.

This case emphasised that the right way to look at a gross misconduct dismissal is to consider whether the employee's conduct had undermined the employer's trust and confidence in them. The misconduct does not necessarily have to take a particular form for that to be so. Fundamentally, this does not change the inquiry expected of the employer in relation to misconduct; it remains necessary in every case for an employer to keep an open mind as to the appropriate level of sanction, whatever the nature of the allegations against the employer.

Mbubaegbu v Homerton University Hospital NHS Foundation Trust *UKEAT/0218/17*

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