Employee unfairly dismissed for refusing to put work app on her personal phone

An Employment Tribunal has ruled that a journalist was unfairly dismissed for refusing to install an "intrusive" work-related app on her personal phone, which would have left her unable to separate her work and home life. The employer should have considered alternatives such as providing her with a work phone or installing the app on her laptop.

What happened in this case?

The Claimant worked as an Online News Editor for the Respondent newspaper. The Respondent had regarded her as a self-employed freelancer, but it was later determined that she was actually an employee.

By 2017, the Online News team was publishing at least one hundred news stories per day, and it had become impossible for the team's supervisors and editor to review every article before publication. To help with this, the Respondent introduced a new online platform called Viber to track what stories were being submitted and avoid duplication of content. Viber would also alert supervisors more efficiently to when sensitive articles needed to be checked. Initially, the use of Viber was not compulsory.

The Respondent developed concerns that the Claimant had duplicated articles that had already been published by them. On 1 November 2019, Ms Aloul, the Editor in Chief, sent the Claimant a message asking her to start using Viber "now"

to avoid mistakes in the publication of articles. Yet on 4 and 26 November 2019, the Claimant published articles on topics that had already been covered. Again, the Claimant was asked to use Viber.

However, the Claimant objected to having the Viber app on her personal mobile phone. She said she was getting disturbed by the volume of messages that came through the app, day and night. She asked to be provided with a separate work phone for this purpose. The Claimant was told that she could mute the Viber notifications, but she did not feel that was an acceptable solution since she would still be able to see the visual notifications on her phone screen. Alternatively, she was told to buy a separate phone herself, but that the Respondent would not pay for it as she was a freelancer.

The Claimant continued to refuse to put the Viber app on her phone. As a result, on 8 January 2020, Ms Aloul gave the instruction to block the Claimant's access to the Respondent's systems. On 13 January 2020, the Claimant raised a grievance alleging bullying, harassment and race discrimination by Ms Aloul. The relationship was eventually terminated on 6 February 2020.

The Claimant brought claims alleging that she had been unfairly dismissed. She also brought claims of breach of contract, unlawful deductions from wages and unpaid holiday pay. This briefing considers the unfair dismissal claim only.

What was decided?

The Employment Tribunal decided that the principal reason for the Claimant's dismissal was that she had refused to put the Viber app on her personal phone. The refusal to use the app fell within the category of "conduct" and was, therefore, a

potentially fair reason for dismissal.

Whether or not the dismissal was, in fact, fair turned on whether the decision to dismiss fell within the "band of reasonable responses". The Tribunal found that it did not. It held that no reasonable employer would have dismissed an employee for refusing to put an intrusive work-related app on their personal phone. The Respondent's approach meant that the Claimant would not be able to separate her home and work life. This was unreasonable given that there were alternative solutions available, such as providing her with a separate work phone or phone number or downloading the app onto her laptop.

In any event, the dismissal was procedurally unfair, given that no investigation or disciplinary hearing took place before a final decision to terminate was taken. Nor had the Claimant received any prior disciplinary warnings about the matter. It was clear that the Respondent did not feel it had to follow proper procedures because it (erroneously) believed that the Claimant was self-employed.

The Tribunal also dismissed the argument that this was a case in which it was fair to dismiss without following *any* procedure on the basis that there had been a complete breakdown in working relations, meaning that a procedure would serve no useful purpose. While there had been some arguments in the past, there had not been a major breakdown in working relations. There was no reason a disciplinary hearing could not have been held.

The Tribunal declined to order reinstatement on the basis that trust and confidence between the Claimant and Ms Aloul had now broken down. Instead, it awarded compensation of almost £20,000 for the unfair dismissal, including an uplift of 25%

for failure to comply with the statutory Acas Code of Practice on Discipline and Grievance. The Tribunal also awarded a further £12,000 in respect of the claims for breach of contract, unpaid holiday pay and unlawful deductions from wages.

What are the learning points for employers?

Firstly, this decision highlights the need for employers to be clear about the employment status of those working for them. Had the employer understood that the Claimant was an employee, they could have made sure that they followed a proper process prior to any dismissal. The failure in this respect meant that the dismissal was unfair and also landed them with an uplift to compensation of 25%.

Secondly, employers facing resistance from employees about the use of technology should explore whether any other solutions are available. In this case, the issue may have been swiftly resolved by providing a work phone or installing the app on a laptop. Had the Claimant continued to refuse to use the app in those circumstances, it is likely that the employer could have fairly dismissed for misconduct, subject to following a fair procedure.

Thirdly, the decision reminds employers to be wary of the degree to which work-related technology intrudes into the personal lives of employees. Although many employers in this situation would have provided a work phone, it may well have come with an expectation that the employee would monitor notifications outside normal working hours. This still presents the problem of leaving employees unable to separate their work and home lives and blurring the line between working time and non-working time. Depending on the circumstances, it may not be unreasonable for an employee to

refuse to do so.

And it may not be long before workers are given a specific legal right to disconnect. The Labour Party has indicated that it would legislate to introduce a right for workers not to be contacted about work outside of normal working hours. Indeed, several EU member states have already successfully introduced legislation or guidance in this area, including France, Italy, Spain, Ireland, Portugal and Belgium. Further, in January 2021, the European Parliament passed a resolution calling for a new EU Directive to introduce a right to disconnect.

Alsnih v Al Quds Al-Arabi Publishing & Advertising

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.