Employer’s failure to investigate impact of a medical condition first disclosed during an internal appeal process may render the dismissal unfair

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In Daley v Vodafone Automotive Ltd the EAT held that an Employment Tribunal should have considered whether an employer’s failure to probe the impact of an employee’s depression and medication rendered the dismissal process unfair.

What happened in this case?

Mr Daley worked as a warehouse supervisor for Vodafone Automotive Ltd. In October 2018, he had an argument with a colleague at work. The colleague complained that Mr Daley had been offensive, threatening, intimidating and had sworn at him during the argument. Vodafone commenced an investigation and the result was that Mr Daley was dismissed for gross misconduct.

Mr Daley lodged an appeal. He did not accept that he had behaved inappropriately. However, he also disclosed (for the first time) that he had been suffering from severe depression since April 2017. He explained that he took strong medication to help manage his condition, and that both the depression and the medication caused side effects including anger, frustration, irritability and anxiety.

However, Vodafone rejected the appeal. As far as his depression was concerned, Vodafone noted that Mr Daley had not raised this during either the investigation or disciplinary hearing. Nor was Vodafone on notice of his condition (and

they said there was nothing which should have alerted them to it) at the time the decision to dismiss was taken. Vodafone also referred to an "off the record" discussion that Mr Daley had had with a member of HR in which he was alleged to have said: "if I had known it would have come to this, I would have hit him". However, Mr Daley was not given an opportunity to make representations about this matter during the appeal process.

Mr Daley brought a claim for unfair dismissal. The Employment Tribunal found that the decision to dismiss was fair, but the failure to allow Mr Daley to respond to the "off the record" comment rendered the appeal process unfair. However, it went on to find that this would have made no difference to the overall outcome and so no compensation award was made.

Mr Daley appealed to the Employment Appeal Tribunal.

What was decided?

Mr Daley argued that the appeal process was flawed because Vodafone should have investigated his mental health and medication, and the possible impact on his behaviour. Medical advice should have been sought and consideration should have been given to whether it amounted to a mitigating factor. Mr Daley argued that the Employment Tribunal failed to deal with this point when considering the quality of Vodafone's investigation.

The EAT agreed with Mr Daley. A new Tribunal will now have to consider whether Vodafone ought to have conducted these further investigations before rejecting Mr Daley's appeal against his dismissal. If a Tribunal decides that they should have done so, and this would have made a difference to the overall outcome, then the issue of compensation will have to be revisited.

What does this mean for employers?

Whilst a show of aggression towards a colleague will almost always amount to misconduct sufficient to justify dismissal, this case reminds us that employers still need to take the utmost care with the process. Here, potentially mitigating information was brushed aside on the basis that the employer didn't know about it at the time. Although other factors may have meant the dismissal should have been upheld (such as the lack of contrition and the alleged comment about physical violence), a fair process may still require further steps to be taken. Had the employer carried out such further investigations (e.g. obtaining occupational health advice), it is possible that the misconduct may have been viewed in a different light and a lesser sanction imposed.

Further, an employee in Mr Daley's position could also seek to bring a discrimination arising from disability claim, arguing that the dismissal was discriminatory because it was in response to misconduct connected to a disability. Provided that the employer knows – or should have known – about the disability, it is irrelevant whether they also know that the misconduct in question arose out of the disability. A good example of this was seen in the case of City of York Council v Grosset. The employee was a teacher who suffered from cystic fibrosis (and the employer was aware of his condition and that it was a disability). He showed an 18-rated film to a class of 15-year-olds. The employer dismissed him for gross misconduct. He maintained that his error in judgement was due to stress connected to his disability. He succeeded in a claim for discrimination arising from disability. Although the school was unaware at the time it decided to dismiss that the misconduct was linked to his disability, there was, in fact, such a link.

In practice, this means that it would be sensible for employers to pause to consider whether proposed negative treatment of an employee (e.g. disciplinary action or a performance improvement process) which is based on "something"

(e.g. misconduct, poor performance or sickness absence) could potentially have arisen out of a disability. Where there is a possible link, it would be wise to obtain medical evidence on the point and whether any relevant reasonable adjustments should be made before taking action.

Daley v Vodafone Automotive Ltd

If you would like to discuss any issues arising out of this decision please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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