Repeated postponement of dismissal of long-term sick employee was not unreasonable and did not make the eventual dismissal unfair

In *Garcha-Singh v British Airways plc*, the EAT has ruled that an Employment Tribunal was entitled to find that the dismissal of a long-term sick employee was fair. The fact that the dismissal was postponed seven times over the course of a year was to the employee's advantage and the employer had not acted unreasonably.

What happened in this case?

The Claimant worked for British Airways as a member of cabin crew. He went on long-term sick leave in August 2016. In August 2017, he was given notice that his employment would terminate on 5 January 2018. However, the termination date was extended six times to allow him further time to recover and return to work. It was extended for a seventh time to allow settlement discussions to take place. His employment was eventually terminated on 21 December 2018, well over two years after he first went off sick.

The Claimant brought claims for wrongful and unfair dismissal and race and disability discrimination. The Employment Tribunal dismissed all of his claims. He appealed to the EAT. He argued that the repeated extensions to the termination date amounted to a breach of BA's contractual absence management policy and were also unreasonable, meaning

his dismissal was unfair. He also argued that failure to allow him to appeal the decision to terminate on 21 December 2018 was a further breach of BA's contractual absence management policy.

What was decided?

The EAT dismissed the appeal.

First, the EAT said the repeated extensions to the termination date did not breach the absence management policy. The policy set out the minimum standards required from BA in absence management cases. Provided BA did not act contrary to those standards, it had leeway to adapt its approach to a particular case, including postponing the termination date where appropriate. In any event, the Claimant had agreed to each extension of the termination date.

Second, it was clear that the extensions *advantaged* the Claimant as they afforded him more time to recover and return to work and avoid termination of his employment. BA's actions in this respect were reasonable. It was not unreasonable to not extend the termination date again. By that point, it had already been extended seven times over the course of a year. Further, BA had made reasonable efforts to understand the Claimant's condition and prognosis. The Claimant failed to provide any new information which would have suggested a further extension might be appropriate. In the circumstances, BA had reasonable grounds for believing that the Claimant would continue to remain off sick.

Finally, the EAT said that BA had not breached its absence management policy by not permitting an appeal of the final decision to terminate. It was true that the policy did provide for an appeal, and an appeal was heard in relation to

the original decision to terminate taken in 2017. The decision to proceed with termination on 21 December 2018 was not the termination decision – rather it was a decision to go ahead and not postpone for an eighth time.

Overall, the Tribunal was entitled to decide that BA had acted within the range of reasonable responses and the dismissal was fair.

What does this mean for employers?

Had the employee been dismissed in January 2018 as originally planned, it seems likely that BA would have faced criticism from him for dismissing too swiftly and not allowing a further opportunity to recover and return to work.

Here, the employee was given more time, but complained that the postponements were unreasonable and left him living under the shadow of dismissal. It is true that employers seeking to dismiss on capability grounds typically allow time for recovery *before* serving notice of dismissal. However, as the EAT recognised, the extensions were to the advantage of the employee and he was essentially in the same position as any employee being managed under a capability procedure who knew that termination was the ultimate outcome.

Employers considering dismissal of a long-term sick employee should ensure that they complete the following steps to limit the risk of unfair dismissal and disability discrimination claims:

- Ascertain the up-to-date medical position.

- Consult with the employee.
- Consider making reasonable adjustments to the employee's role.
- Consider the availability of alternative roles.
- Consider how long you can keep their role open – this may involve consideration of the availability and cost of temporary cover, the administrative costs involved in keeping the employee on the books and the size of the organisation.
- Consider whether the ill-health was caused at work. If it was, then the general rule is that the employer should go further and keep the job open for longer than would usually be the case.
- Consider alternatives to dismissal, for example, applying for permanent health insurance cover or ill-health retirement where these options are available.

Employers should also ensure they abide by their own absence management policies, but as the EAT noted here, these do not constrain you from taking additional reasonable steps in any particular case.

Garcha-Singh v British Airways plc

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