Redundancy & Dismissal: Hints, Tips and Solution-Focused Answers for Employers

ONE: How do you lawfully evidence when an employee is taking fraudulent sick leave i.e. pulling a sickie?

TWO: Can you rely on a Facebook screen-shot of an employee actively partying or playing sport as evidence of misconduct and grounds for dismissal?

ONE: Dealing with fraudulent sick leave

In the case of *Metroline West Limited v Ajaj UKEAT/0185/15*, the Employment Appeal Tribunal (EAT) had to consider whether or not an employee was unfairly dismissed after pulling a "sickie" and consequently having his employment terminated.

Mr Ajaj was a bus driver and claimed that he had slipped and fallen at work and had been injured. He was absent from 26 February 2014 until his employment ended.

Metroline were concerned about the genuineness of the nature and extent of Mr Ajaj's injuries and, as a result, arranged for covert surveillance to take place around the time of his first sickness absence review on 18 March 2014.

Mr Ajaj attended a medical examination with occupational health on 9 April 2014. At this meeting, he advised the occupational health advisor that he could not run or walk quickly, get up or sit down quickly. He alleged that he could not shop and had difficulties with dressing and putting on shoes. He also attended a second sickness absence meeting on 15 April 2014. Again covert surveillance was taking place.

Mr Ajaj attended a third sickness absence meeting on 24 April 2014. At this meeting, Mr Ajaj was again asked about shopping and lifting and said that he could not do this unless the shopping was very light. He alleged that he could only shop for "chocolate, paper or sandwiches". At that point, during the meeting, Mr Ajaj's line manager showed him the surveillance footage.

The footage showed him carrying bread – the bags shown in the footage were big but not heavy. Additionally the footage showed him walking for well in excess of the five or six minutes which he alleged he could walk for.

Mr Ajaj was suspended on full pay and Metroline obtained a report from their occupational health advisor seeking their views on the covert recording. The report from their occupational health advisor said the following:

The covert recording demonstrated an anomaly between what Mr Ajaj was telling his employer and what was happening in practice.

On 2 May 2014, Mr Ajaj was invited to disciplinary hearing to discuss the allegations that (1) he had made a false claim for sick pay, (2) he had misrepresented his ability to attend work, and (3) he had made a false claim of an injury to work.

On 7 May 2014, Mr Ajaj was dismissed on the basis that each of the three allegations were made out and that each constituted a gross misconduct. Mr Ajaj was dismissed with immediate effect.

Although the employment tribunal at first instance found the dismissal was unfair because "the employer had not investigated sufficiently whether Mr Ajaj could actually work for them", on appeal this decision was overturned.

The EAT correctly stated that this was a conduct dismissal and had nothing to do with capability. The EAT concluded that the employer had investigated the matter, had evidence to support their reasonable belief that Mr Ajaj had exaggerated his injury and ability to work and that the dismissal was within the "band of reasonable responses."

The EAT stated "*an employee "pulls a sickie" is representing that he is unable to attend work by reason of sickness. If that person is not sick, that seems to me to amount to dishonesty and to a fundamental breach of the trust and confidence that is at the heart of the employer/employee relationship."*

The EAT confirmed that the BHS v Burchell test will still apply to such dismissals: at the time of the dismissal, the employer must believe the employee to be guilty of misconduct, it must have reasonable grounds for such belief, and the employer must have carried out as much investigation as was reasonable in the circumstances. A tribunal will then consider whether the employer acted within the band of reasonable responses in treating the misconduct as a sufficient reason to dismiss.

Naturally employers need to be cautious about using covert surveillance. Invariably such exercises will raise issues in relation to convention rights, particularly as to privacy and family life (Article 8). However the case of *McGowan v Scottish Water EAT [2005] IRLR 167 EAT* provides a good illustration of the relevant issues in such cases. In short, the key issue proportionality. Any invasion of Article 8 rights will need to be justified. In this case, which related to fraudulent timesheets, the fact that the employer had a strong suspicion and the criminal nature of the actions in question, tipped the balance in favour of the surveillance being lawful. I might suggest that while care needs to be taken, if an individual is suspected of fraudulently claiming sick pay, surveillance is a useful tool.

TWO: Facing up to Facebook fibbers and fakers: Four steps

There are four steps to assess whether or not an employer can rely on a Facebook screen shot of an employee actively partying or playing sport as evidence of misconduct and the grounds for dismissal.

Step 1: Examine potential evidence

An employer requires to first of all identify and capture evidence to support any suspicions as to misconduct. An employer who has evidence that an employee is being dishonest by claiming to be off sick when he or she is not may be able to discipline or dismiss for gross misconduct. Mere suspicions and rumours will not suffice to establish gross misconduct.

In the case of *Gill v SAS Ground Services Limited*, ET/2705021/09, Mrs Gill was employed as a Customer Service Representative for SAS Ground Services Limited. In her spare time, she pursued an interest in acting and modelling and maintained a Facebook page. On 11 July 2009, Mrs Gill was placed on full sick leave due to an impending surgery. However she was inconsistent with her employer regarding the level of progress and the potential return date remained ambiguous.

On 19 September, one of Mrs Gill's colleagues forwarded her an entry from Mrs Gill's Facebook page which showed her at Fashion Week between 15 and 19 September, the period when she was on sick leave and unable to work.

SAS Ground Services conducted an investigation into Mrs Gill's actions. Mrs Gill stated that her attendance at the fashion show was merely for social purposes. However the entry on Facebook made reference to her "auditioning 300 models" and choreographing a fashion show. On further investigation by the company, a Youtube video of an event during Fashion Week showed Mrs Gill presenting a bouquet of flowers to the fashion show designer.

SAS Ground Services concluded that her participation in Fashion Week was not simply for social purposes and that conducting other work whilst signed off sick was gross misconduct.

Mrs Gill claimed unfair dismissal. The tribunal held that her dismissal was fair on the basis that her employers had followed a fair procedure and there had been sufficient evidence from which the employer was entitled to reach that conclusion.

It will be for the employer to assess the credibility of the evidence retrieved from Facebook. It should be tested in the normal way: did the tip off come from an employer with a grudge? Has information been taking out of context? Are the dates of posting and times accurate?

Employers should be able to rely on Facebook posts however each case would need to be dealt with on its own merits.

Case law makes it clear that "fishing" exercises should be avoided.

Again employers should be aware of the recent case of *Barbulescu –v- Romania*. An employer must act in a proportionate way when balancing an individual's right to privacy with the employer's business interests and should consider whether there is a less intrusive way of achieving the employers aim. Can it be said there is a reasonable expectation of privacy when it comes to Facebook posts? Certainly in the realm of dismissals for offensive social media posts, tribunals have tended to dismiss such examples (see for example *Crisp v Apple Retail (UK) Ltd*)

Step 2: Is it conduct? Is it capability?

An employer should review whether there is solid evidence of malingering before starting disciplinary process.

Is it a "can't work" (capability) or is it a "won't work" (misconduct) scenario?

A lack of evidence of dishonesty does not mean that an employer is powerless to challenge an employee if they do not believe them. Employers should be ensuring that they carry out return to work interviews or even encourage line managers to probe further (or push for medical evidence).

For example, if speaking to an employee's GP, you could perhaps ask about the typical symptoms and development of the health condition and whether the individual is affected in an atypical or unusual way. A line manager may want to raise with the employee any discrepancies between the individual's stated condition of health, their presentation at interview and any previous reports or documentation. If faced with inadequate answers by the employee, you may want to get a report from your own occupational health provider.

Such probing should not be carried out in a rude or blunt manner. A line manager should take what the employee says at face value.

If probing goes too far, without reliable backup evidence, an employer may be faced with a claim of a breach of the implied duty of mutual trust and confidence and a claim for constructive unfair dismissal and/or discrimination.

Step 3: Investigate potential misconduct

An employer requires to give evidence which it believes supports the potential allegation of misconduct.

Remind line managers that employees do not require to be bed bound or even at home in order to be unfit for work.

An employee posting pictures of himself on holiday or doing sport or other leisure activities may still be generally unwell. Many health conditions do not improve as a result of lying in bed – for example mental

health issues or bad backs can improve with exercise. The employer requires to carry out as much investigation as is reasonable in all the circumstances of the case.

In *Perry v Imperial College Healthcare NHS Trust UKEAT/0473/10/JOJ*, a community midwife was signed off as unfit to work for Imperial College Healthcare as a result of a knee condition. Her role involved cycling to patients' homes and occasionally climbing stairs in high rise buildings.

During her absence, it came to her employer's attention that she was still working on her other job, which was office-based. She had received sick pay from Imperial College Healthcare during this time. Imperial College Healthcare invited her a disciplinary hearing on the basis that she had "intentionally defrauded Imperial contract of employment". She was dismissed.

The EAT found on appeal that the dismissal was unfair. There was nothing to stop an employee from claiming sick pay whilst medically unfit for one job and carrying on working for another job for which they are still fit. This employee was not being paid twice for the same hours.

If you compare this to the case of *Brito-Babapulle v Ealing Hospital NHS Trust UKEAT/0358/12/BA,* where a hospital consultant was signed off from her NHS role but still continuing to work in a private hospital whilst claiming sick pay from the NHS.

Ms Brito-Babapulle was invited to a disciplinary hearing and dismissed on the basis of gross misconduct. A tribunal found the dismissal to have been fair. However on appeal, the EAT held that the employer had failed to consider the employee's long-service, clean disciplinary record and the impact on her career of dismissal from the NHS and remitted the case back to the employment tribunal to determine again.

The Brito-Babapulle case highlights the importance of following a fair procedure however certain the allegations of misconduct may appear.

<u>Step 4: Reach a fair decision based on the correct factors</u>

.Before disciplining or dismissing, the employer requires to follow its own procedures as well as the ACAS Code of Practice

An employer will require to put the evidence to the individual, hear their explanation and consider if that explanation requires further investigation. If it does require further investigation, this investigation should be carried out before dismissal otherwise the employer has failed to comply with the BHS v Burchell case.

An employer should consider any mitigating points such as length of service and previous disciplinary history as well as how similar cases have been dealt with in the past.

In summary:-

- Beware of malingerers within your workforce
- Be aware of arguments under the Human Rights Act on privacy
- Be fair and follow the Burchell test for acting within the reasonable band of responses

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