

White Paper Conference on Dismissal

Mental health considerations in gross misconduct dismissals

21 February 2023

Paul Fontes

Partner



The Question

To what extent should the decision manager consider an employee's mental health when hearing their disciplinary case concerning a gross misconduct matter?



Key principles

Key Principles

What is "gross misconduct"?

- conduct must be repudiatory, i.e. so serious that it goes to the root of the contract
- conduct must be deliberate and wilful or amount to gross negligence

What are the risks?

Principal risks

- unfair dismissal
- disability discrimination
 - direct discrimination
 - discrimination arising from disability
 - indirect discrimination
 - duty to make reasonable adjustments
 - harassment
 - victimisation

Unfair dismissal

Key questions to consider when dismissing for gross misconduct

- Did the employer genuinely believe that the employee was guilty of the misconduct?
- Did the employer have reasonable grounds for that belief?
- Was the belief based on a reasonable investigation?
- Was dismissal within the range of reasonable responses open to a reasonable employer?

NB – only facts available at the time of the decision to dismiss are relevant

Unfair dismissal

Was the decision to dismiss within the band of reasonable responses?

- a dismissal may be outside the band of reasonable responses even when there has been a finding of gross misconduct
- a finding of gross misconduct should not automatically lead to dismissal
- take account of all circumstances and consider mitigating factors
- what mitigating factors may there be?

Disability Discrimination

Is the employee a disabled person?

- Definition: a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities
- Examples of mental health conditions that may meet definition:
 - depression
 - PTSD
 - anxiety disorders
 - bipolar
 - psychotic disorders (schizophrenia)

Disability Discrimination

Discrimination arising from disability

- Two elements:
 - employer treats employee unfavourably because of something arising in consequence of employee's disability
 - employer cannot show that treatment was objectively justified as a proportionate means of achieving a legitimate aim
- If an employee can link their misconduct/behaviour to their mental illness, then dismissal may amount to discrimination arising in consequence of a disability
- Balancing exercise between discriminatory effect on employee and legitimate aims of employer

Case law

Burdett v Aviva (2014)

Summary of Facts

- 2006 B started employment in as senior approval specialist
- 2007 B went on sick leave for stress and depression. Referred to OH and diagnosed with paranoid schizophrenic illness for which he required medication
- April/May 2008 B discontinued medication on medical advice
- September 2008 B admitted to hospital after sexually assaulting members of the public. B received a police caution but he did not disclose this or the assaults to Aviva
- 2010 B again stopped taking medication, this time without medical advice
- April 2011 B sexually assaulted two female employees and threatened to assault security guard. On leaving building he assaulted a member of the public and attempted to assault another
- B was arrested and detained under the Mental Health Act and charged in respect of the assaults
- A suspended B pending investigation. B accepted that he had made serious error of judgment in deciding what level of medication to take
- Medical reports obtained but doctors could not guarantee that B would continue to take medication
- April 2012 B sentenced in relation to the assaults to which he pleaded guilty
- May 2012 B dismissed following disciplinary hearing. Appeal not upheld

Burdett v Aviva (2014)

Decision

- ET decision:
 - Unfair dismissal: fair dismissal for gross misconduct
 - Discrimination arising from disability: dismissal was proportionate and necessary to ensure appropriate standards of conduct and safety of Aviva's employees
- EAT decision: allowed appeal on both claims
 - Unfair dismissal:
 - ET had to consider whether there were reasonable grounds for concluding that B had committed acts wilfully or in a grossly negligent way taking into account his mental illness and whether B's decision to stop taking medication was wilful behaviour (or grossly negligent) making him culpable for incident
 - dismissal not necessarily within band of reasonable responses just because acts = gross misconduct
 - Discrimination arising from disability:
 - ET had not carried out appropriate assessment of employer's balancing act
 - No consideration of B's suggestion of WFH to address concerns over employee safety

Plowright v Sky-in-Home Services (2019)

Summary of Facts

- P employed since 2007 as field engineer installing satellite dishes
- Sky's disciplinary policy included "any action that puts you or anyone else's health and safety at risk" as an example of gross misconduct
- 17 Feb 2018 – Claimant found working at the top of a double-section ladder without any safety equipment or having secured the ladder according to his training. Claimant said his mind was elsewhere due to personal issues
- 8 March 2018 – Claimant invited to conduct meeting
- 9 March 2018 – Claimant informed employer of anxiety and depression diagnosis. Led to initial conduct meeting being cancelled
- 23 March 2018 – OH report found him unfit to work
- 25 May 2018 – Disciplinary hearing took place. Claimant dismissed

Plowright v Sky-in-Home Services (2019)

Decision

- Discrimination arising from disability
 - Working unsafely at height arose in consequence of his disability
 - Dismissal was not necessary means of achieving legitimate aim
 - Disadvantage to employee outweighed needs of business
- Disability discrimination – reasonable adjustments
 - Application of policy to health and safety breaches put P at substantial disadvantage compared to non-disabled employees
 - Sky had failed to make reasonable adjustments
- Unfair dismissal
 - Dismissal not within range of reasonable responses because tainted with discrimination
 - P was not culpable or blameworthy

Daley v Vodafone Automotive Ltd (2021)

Summary of facts

- D was a warehouse supervisor from 2014
- October 2018 – argument between D and another employee, A. A complained that D had been offensive and threatening which D denied
- V investigated the matter and dismissed D summarily for gross misconduct
- D appealed and said for first time that had had been suffering from severe depression since April 2017. He said that he was taking strong medication that made him angry and frustrated. V rejected the appeal
- ET held the dismissal to be fair
- EAT upheld appeal on the grounds that ET had failed to consider adequacy of employer's investigation into whether misconduct may have been caused by either D's depression or the effects of his medication
- Case remitted to ET to determine

Metropolitan Police Commissioner and others v Eioyaccu (2009)

Summary of facts

- E employed as police community support officer
- Complaints received about E's behaviour which suggested E may have mental health condition
- Referral to OH concluded that E had some "eccentricities" but was not suffering from mental health issues
- E then suspended after complaints of inappropriate, lewd and sleazy behaviour towards shop staff
- Investigation conducted and attempts made to refer E to OH to consider his mental health
- E refused referrals and said he was in good health
- E then dismissed for gross misconduct after complaints by shop staff were upheld

Metropolitan Police Commissioner and others v Eioyaccu (2009)

Decision

- ET held that dismissal was unfair because:
 - invitation to disciplinary hearing did not warn him of possibility of dismissal
 - P had failed to take reasonable steps to ascertain E's state of mind
 - P had failed to consider medical suspension
- EAT allowed P's appeal:
 - invitation letter in conjunction with gross misconduct procedure document made it clear that dismissal was a possibility
 - ET had found that E would not have complied with further attempts to ascertain his mental health
 - dismissal was within band of reasonable responses. ET had erred in stepping into shoes of employer and substituting its decision for that of the employer

British Telecommunications plc v Daniels (2011)

Summary of facts

- D was employed as customer service engineer from 2002
- Relations between D and line manager became strained
- D affected by depression and stress
- D accused of:
 - unauthorised use of company vehicle
 - misuse of company fuel card
 - abuse of stores ordering process (i.e. ordering excessive items for which D had no work requirement)
- At disciplinary and appeal hearings union officials referred to D's history of depression as mitigating factor and referred to medical evidence from D's doctor
- Allegations were upheld and D was dismissed for gross misconduct
- Appeal was dismissed

British Telecommunications plc v Daniels (2011)

Decision

- ET found that:
 - D was guilty of misconduct
 - belief was based on reasonable grounds following reasonable investigation
 - BUT:
 - there was evidence before the appeal manager that D was not well
 - BT should have commissioned an OH report before proceeding to determine appeal
 - BT was a global business with substantial resources
- BT appealed arguing that the ET had substituted its own view for that of the employer
- EAT upheld ET's decision
 - evidence from D's doctor that D was behaving irrationally
 - open to ET to say that this was material that should have prompted referral to OH

City of York Council v Grosset (2018)

Summary of facts

- G was Head of English at school
- G suffered from cystic fibrosis which school was aware of
- G's workload increased causing stress which exacerbated condition
- G showed an "18" rated film to 15/16 year olds
- G suspended and later dismissed for gross misconduct
- Disciplinary panel did not accept that error of judgment had been caused by stress
- ET held that G had not been unfairly dismissed – dismissal was within range of reasonable responses - but considered that G had been treated unfavourably for reason arising from disability
- EAT dismissed council's appeal

City of York Council v Grosset (2018)

Decision

- CA dismissed council's argument that it was not liable unless G could show that council had appreciated that behaviour was a consequence of disability
- CA held that tribunal should consider:
 - whether employer treated employee unfavourably because of a particular matter
 - whether that particular matter arose in consequence of employee's disability
- In this case ET had found that:
 - council had dismissed G because he had shown the film to 15/16 year olds
 - G had shown the film due to exceptional stress arising from his disability
- As a result, council had treated G unfavourably because of something arising from his disability
- Dismissal was not proportionate because ET had found that council had not made reasonable adjustments to relieve work pressures on G

Key points

Ways to mitigate risk

- Consult with employee
- Ask employee if there are any mitigating factors
- Investigate any apparent mental health issues
- Consider whether employee's actions could have been a consequence of mental health issues
- Assess whether employee was "culpable"
- If necessary, obtain medical evidence before reaching decision
- Consider other options and alternatives to dismissal (e.g. FWW and time off to allow employee to receive treatment)



EVERSHEDS
SUTHERLAND

[eversheds-sutherland.com](https://www.eversheds-sutherland.com)

This information pack is intended as a guide only. Whilst the information it contains is believed to be correct, it is not a substitute for appropriate legal advice. Eversheds Sutherland (International) LLP can take no responsibility for actions taken based on the information contained in this pack.

© Eversheds Sutherland 2021. All rights reserved.