Employment

Risky business

Chris Bryden & **Michael Salter** report on how employers should deal with allegations of criminal misconduct

IN BRIEF

- The issues facing employers arising out of criminal accusations or convictions are significant.
- Employers must at all times bear in mind the mantras of fairness and reasonableness and should not simply assume that a criminal accusation or conviction means that employment legislation ceases to apply.

An employer faced with misconduct committed by its employee either inside the workplace or outside of it, where the misconduct complained of could amount to a criminal offence, is faced with a tricky series of considerations when deciding how to conduct any disciplinary procedure. The ACAS Guide: *Disciplinary and Grievances at Work 2009* makes it clear that conviction for, or being charged with, a criminal offence, is not in and of itself grounds for dismissal. However such conduct by the employee has important ramifications for employers and the procedures that they may wish to adopt when considering or conducting a disciplinary procedure.

The first matter that an employer must consider is to assess the nature of the conduct: does it impact upon the claimant's employment? If it is clear that this is not the case, then there is a good likelihood that the employer will not properly be able to conduct a disciplinary investigation. Impact on the employee's employment is, necessarily, a matter that can only be determined on a case-by-case basis, and depends upon a combination of factors which singly or together will usually make it clear whether or not there is such an impact. Examples include the nature of the offence; the nature of the employment and the status of the employee.

Once an employer has properly concluded that the criminal offence does impact upon the employment of the employee, then, after assessing the nature of the conduct, to defeat any unfair dismissal claim the employer will have to show it satisfied the *British Home Stores v Burchell* [1978] IRLR 379 guidance applicable to any dismissal for misconduct. In essence therefore the employer will need to be able to demonstrate in order for the dismissal to be fair, that it conducted a reasonable investigation; has drawn reasonable conclusions from that investigation; and the dismissal must have been a reasonable sanction following on from those reasonable conclusions.

On remand

There will clearly be circumstances whereby allegations of, or conviction for, criminal conduct may mean the employee is not available for work (for example because they are on remand or in custody, or if the conditions of their bail do not allow them to carry out their role). In such circumstances consideration should be given to assessing whether there is a capability argument for dismissal; the question that the employer should ask itself being, if the needs of the business require someone present and active in that role, then can the employee's job be held open?

An example of this argument succeeding involved a computer engineer, who had been arrested on suspicion of possessing indecent images of children. His job required him to have access to the IT equipment and servers of his employer, which included by necessity access to systems that would allow him to use the internet. A condition of his bail was that he not come into contact with equipment that would allow him to access the internet. His employers took the view that it was not possible for him to carry out any part of his role subject to such a condition, having considered whether it was possible to isolate any of the computer systems to allow them to be disconnected from the internet and reasonably concluding that they could not. An employment tribunal struck out the claimant's claim for unfair dismissal on the basis that it had no prospects of success.

The employer's genuine belief in guilt can, obviously, be established by a guilty plea by the employee at a criminal hearing: *P v Nottinghamshire County Council* [1992] IRLR 362, and such an admission will, if the disciplinary procedure has been delayed pending the outcome of the criminal prosecution, result in a limited investigation being required by the employer in order to satisfy the *Burchell* threshold: *RSPB v Croucher* [1984] ICR 604.

Staying silent

Where an employee refuses or is unable to cooperate with the employer's investigation then the employer should not be deterred from taking action. Indeed, the fact that the employee, on advice, refuses to give evidence or an explanation to his employer does not inhibit the employer from making up its mind. The Court of Appeal in *Harris v Courage (Eastern) Ltd* [1982] ICR 530, affirmed Slynn J's (as he then was) comment in the Employment Appeal Tribunal in that case that: "It does not seem to the majority of this appeal tribunal that there is a hard and fast rule that, once a man has been charged, an employer cannot dismiss him for an

alleged theft if the employee is advised to say nothing until the trial of the criminal proceedings." However the employer must act reasonably, and inform the employee that unless he involves himself in the investigation and disciplinary process, a decision will be taken on the basis of the information available to the employer at the time.

Under the Disciplinary and Dismissal Procedures contained in the Employment Act 2002 and the Employment Act 2002 (Dispute Resolution) Regulations 2004 (SI 2004/752), after an employee had failed to attend two scheduled meetings, the employer was entitled to proceed in his absence and still avoid a finding of automatic unfair dismissal. The more permissive regime introduced by the Employment Act 2008 and now in force has a different emphasis. Under the new provisions, it will not amount to a breach of the Guide, for an employer to proceed in the absence of an employee where the employee is: "repeatedly unable or unwilling to attend".

When considering whether this provision applies, an employer should consider all the facts and come to a reasonable decision as to how to proceed. After such a decision is made, it would appear that it is only when an employee: "continues to be unavailable to attend a meeting" that the employer may conclude that a decision will be made on the evidence available. It is notable that the word "unavailable" is used here whereas two different terms are used earlier in the Code. The potential conflict between these provisions may well give rise to judicial comment in due course.

Delay

Criminal proceedings, particularly when the defendant is on bail, can take time to progress. An employer must weigh against a desire to resolve the potential disciplinary matters quickly, the factor of whether it would it be reasonable to wait for the resolution of the criminal proceedings. The Court of Appeal in *Harris* considered that the employer should ask itself whether there is sufficient material, which is strong enough to justify disciplinary proceedings, without waiting. If the employer has doubts, then it is likely to follow it would be fair to wait. If the evidence however is sufficiently indicative of guilt, in the absence of any clear explanation, then it may be reasonable to proceed. The issue of delay has been recently revisited by the Employment Appeal Tribunal in *Secretary of State for Justice v Mansfield* UKEAT/0539/09/RN where the EAT (Bean J) found that prejudice to the employee arising from delay may be a ground of challenge to the fairness of the decision to dismiss, even in the absence of other prejudice. On the facts of that case a delay of a number of years was not felt to prejudice the claimant's dismissal.

After the verdict

There is no "double jeopardy"-type argument that an employee can run if they are dismissed after having been acquitted: *Saeed v Greater London Council* [1986] IRLR 23. Thus a dismissal is not unfair simply because the criminal courts do not convict. However equally it is not automatically fair to dismiss an employee who is found guilty of an offence. The touchstone of dealing with disciplinary and dismissal issues remains as always, fairness. NLJ

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