

Dismissal for gross misconduct arising out of employee raising vexatious and frivolous grievances was fair

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Hope v British Medical Association EA-2021-000187-JOJ

Summary of facts

1. Mr Hope, the Claimant (“C”), brought numerous grievances against senior managers of his employer, the British Medical Association (“R”). These were concerned with, amongst other issues, the failure of senior managers to include him in meetings which he thought he should be attending. Management considered that decisions as to who should attend were a matter for them.
2. The grievances could not be resolved at the informal stage, in part because C wished to discuss them informally with his line manager who had no authority to resolve concerns about more senior managers. However, C refused to progress any of the grievances to the formal stage, instead seeking to retain the ability to do so, and neither did he withdraw the grievances.
3. C had raised around 7 grievances (by the 3rd of which one of the senior managers was beginning to feel that C’s repeated criticisms of her management amounted to bullying) and accordingly a formal grievance hearing was arranged. However, C refused to attend despite being informed that attendance at the grievance hearing was considered to be a reasonable instruction. The grievance hearing proceeded in C’s absence.
4. R concluded that C’s behaviour, in insisting that informal concerns that had not been resolved should remain informal without progressing to the formal stage of the process and in refusing to attend the grievance meeting, was frivolous and vexatious. C’s repeated instigation of the grievance process without following through was found to amount to an

abuse of process. The grievances were dismissed. The disciplinary procedure was invoked.

5. C was invited to a disciplinary hearing to answer 3 allegations: (1) that he had submitted numerous frivolous grievances; (2) that he failed to follow reasonable management instructions in relation to attendance at meetings; and (3) that there was a fundamental breakdown of the working relationship between C and senior management. External independent Counsel chaired the disciplinary hearing. Each of the charges were found to be made out and that C's actions amounted to gross misconduct. C was dismissed and given payment in lieu of notice. C's appeal was dismissed and he issued proceedings claiming unfair dismissal.

Employment Tribunal Judgment

6. The ET found that it was reasonable for R to conclude that C's conduct was vexatious and unreasonable, that the conduct of the disciplinary investigation and the appointment of external independent Counsel were reasonable, and that the sanction of dismissal was within the band of reasonable responses. Accordingly, C's claim of unfair dismissal was dismissed. C appealed.

Grounds of appeal

7. The principal ground of appeal was that the ET had erred in failing to consider whether the conduct relied upon was capable of amounting to gross misconduct in the contractual sense¹, but also that the ET's conclusions were perverse.

Employment Appeal Tribunal Judgment (Choudhury P)

8. In dismissing C's appeal, the EAT held that the starting point must always be section 98 of the Employment Rights Act 1996 ("ERA")².
9. S.98(2) refers to "conduct" as being a permissible reason for dismissal, rather than "misconduct", gross or otherwise – it being well-established that "conduct" for these

¹ Paragraph 19a of the Judgment.

² Paragraph 24 of the Judgment.

purposes need not be “reprehensible” or “culpable” in order for it to be a potentially fair reason for dismissal³.

10. Whether or not dismissal by reason of conduct is fair or unfair within the meaning of s.98(4) depends not on the label attached to or characterisation of the conduct as misconduct, but on whether, in the circumstances, including the size and administrative resources of the employer’s undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee⁴.
11. It is equally well-established, held the EAT, that the determination of that question involves, in a case where the reason for dismissal is said to be the employee’s misconduct, the 4 stage analysis summarised in **JJ Food Service v Kefil [2013] IRLR 850**, namely: (1) whether the employer had a genuine belief in the misconduct; (2) whether it had reached that belief on reasonable grounds; (3) whether that was following a reasonable investigation; and (4) whether the dismissal of the Claimant fell within the range of reasonable responses in the light of that misconduct⁵.
12. There is no requirement in that 4 stage analysis to determine whether conduct amounts to “gross misconduct”, which involves a separate contractual concept: **West v Percy Community Centre UKEAT/0101/15**⁶.
13. Whether an employee is in breach of contractual obligations is a potentially relevant consideration in that that is merely one of the circumstances to be taken into account in considering whether the dismissal was fair or unfair within the meaning of s.98(4): **West v Percy** (above) and **Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09**⁷.
14. Finally on the principal ground of appeal, the EAT held that the present case was not a case where any contractual analysis was necessary: the claim was not one of wrongful dismissal and R did not seek to rely upon any contractually stipulated act as amounting to gross misconduct. In particular, it was not necessary in the circumstances of the case, to determine whether C’s conduct amounted to a “wilful contradiction of the contractual terms” or was “grossly negligent”. Instead, R relied upon the numerous grievances raised

³ Paragraph 25 of the Judgment.

⁴ Paragraph 26 of the Judgment.

⁵ Paragraph 26 of the Judgment.

⁶ Paragraph 27 of the Judgment.

⁷ Paragraph 33 of the Judgment.

by C which were considered to be frivolous or vexatious and the failure to comply with reasonable and lawful instructions⁸.

Commentary

15. This case essentially just confirms previous appellate authority, namely that: (1) there is no requirement in the 4 stage analysis of dismissal for misconduct pursuant to s.98 ERA whether conduct amounts to “gross misconduct”, which involves a separate contractual concept: West v Percy⁹; (2) where an ET does consider misconduct there is no requirement that it must do so by reference to the contractual tests adumbrated in Westwood¹⁰; and (3) whether an employee is in breach of contractual obligations is a potentially relevant consideration in that that is merely one of the circumstances to be taken into account in considering whether the dismissal was fair or unfair within the meaning of section 98(4)¹¹.

16. However, the case is also interesting because it seems to provide some helpful pointers to employers as to how they might reasonably deal with employees who make grievances which they consider to be frivolous and / or vexatious.

17. In the part of the judgment dealing with the perversity grounds of appeal, Choudhury P states:

“...the purpose of a grievance procedure is to resolve concerns about colleagues or the workplace; it is not a repository for complaints that can then be left unresolved and capable of being resurrected at any time at the behest of the employee. The employer cannot be expected to leave concerns unresolved for unlimited duration as this would destroy its ability to address legitimate concerns promptly and to ensure the well-being both of the employee raising the grievances and of those who may be the subject of the grievance. It was clearly permissible for the tribunal in this case to consider that the employer was acting within the range of reasonable responses in regarding repeated attempts to subvert that purpose as vexatious.”¹²

⁸ Paragraph 34 of the Judgment.

⁹ Paragraphs 26 to 28 of the Judgment.

¹⁰ Paragraphs 29 / 30 of the Judgment.

¹¹ Paragraph 33 of the Judgment.

¹² Paragraph 37 of the Judgment.

18. Specifically in this case, it appeared to Choudhury P that C was seeking to use the grievance procedure as a repository of unresolved complaints upon which he could draw at a time of his choosing, and without any thought or consideration given to the effect that such complaints had on others¹³.
19. Whilst, of course, each case will be decided on its own unique facts, It seems it can quite reasonably be gleaned from this judgment that there was no criticism of R for imposing a reasonable deadline on C by which date he had to decide whether he wished to proceed to the formal stage with his grievance(s) or not – else presumably it / they would reasonably have been treated as withdrawn or closed.
20. Furthermore, in circumstances in which a claimant has raised an informal grievance, but refuses to withdraw it or pursue it to the formal stage, it seems that an employer will be likely to be found to have given an employee a reasonable work instruction by inviting him / her to a grievance meeting. By an employee failing to comply with such an instruction (i.e. by attending the meeting), that same employer is likely to be justified in bringing disciplinary action against that employee.

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¹³ Paragraph 38 of the Judgment.