Was it fair to dismiss despite the dismissing manager not holding a final disciplinary hearing with the employee?

It was in *Charalambous v National Bank of Greece*, says the EAT.

By Jo Laxton
3PB Barristers

***Charalambous v National Bank of Greece* [2023] EAT 75**

Introduction

1. The EAT has recently looked at an appeal against a Tribunal's finding of fairness where the dismissing manager did not meet the employee in a disciplinary hearing before communicating the decision to dismiss.

Background

2. Ms Charalambous (the Claimant) was employed by the National Bank of Greece (the Bank). On 23 January 2019, the Claimant wrote an email to her manager, Mr Vathis, copying in other managers. The email noted the circumstances of two of her colleagues, and sought a promotion. Notably, the Claimant attached a spreadsheet which contained a breakdown of the Banks' private clients as at 31 December. She blind copied her trade union representative, Mr Saunders, as well as blind copying her Solicitor, Mr Johnson. Neither Mr Johnson nor Mr Saunders were employed by the Bank.

3. The email was plainly confidential – not only did the body of the message refer to the employment details of two other bank employees, but the attachment contained personal information. Notwithstanding the email's apparent nature, on 24 January the Claimant then sent the same message to her brother, an employee with another bank. Shortly after that, she sent it on to the Bank's HR manager, again copying in Mr Saunders.

Meetings with Mr Vathis – Line Manager

4. Mr Vathis spoke to the Claimant on 24 January regarding the first email sent. At the time, the Bank was not aware that the Claimant had copied her solicitor, nor that she had since sent the message to her brother. Mr Vathis asked the Claimant if she realised that she had sent confidential information to Mr Saunders. The Claimant said she had made a mistake and did not realise what she had done. The Claimant was suspended pending a disciplinary investigation, and Mr Vathis made a report to the Financial Conduct Authority regarding a data breach.

5. Mr Vathis then held an investigation meeting with the Claimant on 28 January. A note taker was present. The Claimant asserted that she wished to be transparent but did not account for the fact that the email had been sent more widely than the Bank understood at that time. She also took the opportunity of the meeting to lobby for a promotion.

6. At Mr Vathis request, the Claimant wrote a written account of her actions on 31 January. The Claimant said that sending the spreadsheet with client information had been an innocent mistake and that she had been busy and under pressure. She reiterated her request for a promotion (but didn't take the opportunity to share with the Bank the wider nature of the disclosure).

"Disciplinary Meetings" with Mr Hood

7. A disciplinary hearing was arranged for 12 February, and was chaired by Mr Hood, another manager. The Claimant accepted that disclosure of confidential information to third parties without prior authority or consent could be gross misconduct. It was suggested that it was difficult for the Bank to accept that what had happened was an accident, given that the email had been sent twice. The Claimant answered this by asserting that she had been tired. She added that she was being targeted by the Bank, and that the report to the FCA about the matter had been malicious.

8. After the meeting with Mr Hood, it came to light that the Claimant had blind copied her Solicitor and further sent the email on to her brother. A further meeting was conducted by Mr Hood given the new information. This meeting was recorded and a transcript was prepared. The Claimant was given the chance to put forward her side of the story – she asserted that she had not acted intentionally, and that having spoken to the Information Commissioner's Office a caseworker had said it sounded like an accident.

Decision to dismiss taken – Mr Vathis

9. The Bank's disciplinary process required that decisions to dismiss be taken by the Country Manager, in this case, Mr Vathis. Mr Hood sent his notes and gave advice to Mr Vathis, who also sought input from the Bank's Data Compliance Officer as well as from Internal Audit.

10. On the basis of the material before him, Mr Vathis wrote to the Claimant and summarily dismissed her. In his letter, Mr Vathis recorded that the explanation that the disclosure had been made by mistake was unsatisfactory, given that the disclosure had been made on three occasions, to three different third parties, and where the covering email specifically referred to the spreadsheet having been attached.

Appeal – Mr Armelinios, HR Director

11. The Claimant appealed. She alleged that the decision to dismiss was too harsh, that she was targeted on grounds of her race and or because of previous protected disclosures she had made. She also alleged that the email was being used as a pretext to end her employment.

12. The appeal was heard by the Banks' HR Director, Mr Armelinios, who was senior to Mr Vathis. Before the appeal meeting, the Claimant sent a nine-page letter with several attachments in support of her appeal. She raised a significant number of matters in mitigation.

13. The Claimant was accompanied at the appeal hearing and had the chance to make representations. Focussing on the decision to dismiss, the appeal was rejected. Mr Armelinios determined that dismissal was reasonable in the circumstances and that the claimant's mitigation was not a sufficient excuse for such a serious data breach. He considered that the claimant's allegations about other matters, such as whistleblowing and race discrimination, were no more than "excuses" and that they were, in any event, management matters for the London office to deal with.

Employment Tribunal

14. The Claimant commenced Employment Tribunal proceedings, alleging unfair dismissal, race discrimination and whistleblowing. The discrimination and whistleblowing claims were not upheld. In considering the fairness of the dismissal, the Employment Tribunal considered the role played by Mr Vathis, and whether there had been a fair procedure.

15. The Tribunal noted that the process was '*less than ideal'* given the ambiguity in the roles undertaken by Mr Hood and Mr Vathis. However it concluded that the meetings held by Mr Hood, although described as disciplinary meetings, were more akin to an investigation. In handing over to Mr Vathis, the Tribunal found that *"he must have handed over in effect a recommendation for dismissal."*

16. Accordingly, the Tribunal concluded that there had been two stages to the process. It found that there had been two separate meetings at which the Claimant had had the opportunity to set out her case, comment on the evidence, and advance mitigation. While Mr Vathis had been the decision maker, he had the benefit of the notes of these meetings when he took the decision to dismiss.

17. In considering the appeal, the Tribunal noted that while 'perfunctory' the appeal manager had been provided with a good deal of information in advance of the appeal meeting and the Claimant had had the chance to set out her position in full. The Tribunal found that the appeal manager had been more senior to Mr Vathis and had formed an independent view.

18. The Tribunal concluded that imperfections identified with the process at the investigation/ disciplinary were corrected on appeal. On that basis the Tribunal concluded that the procedure did fall within the range of reasonable responses and the dismissal was fair.

Employment Appeal Tribunal

19. The Claimant appealed this decision. It was argued on her behalf that as a starting point at the least, a dismissal must be unfair if the manager making the decision to dismiss does not hear directly from the employee, citing *Budgen & Co v Thomas [1976] ICR 344.*

20. In defending the appeal, it was argued for the Bank that this decision should be read in light of the later ruling of the EAT, in *Parker v Clifford Dunn Ltd [1979] ICR 463*, in which the decision in *Budgen* was questioned. It was also argued that subsequent case law, such as *Taylor V OCS Group Limited [2006] EWCA Civ 702, [2006] ICR 1602,* required that the question of procedure should be taken as a whole.

21. The EAT first considered whether *Bugden* is indeed authority for the proposition that a procedure will be unfair if there is no meeting with the employee. The facts of that case (where an employee was dismissed based on a report to management made over the telephone by a local security guard) did involve an unfair dismissal. The rationale for that finding was that *"it is… always necessary that [the employee] should be afforded some*

opportunity of explaining himself to those persons in the management who will in the first instance take the decision whether or not he is to be dismissed".

22. It found that *Budgen* does not establish that a procedure can only be fair if there is a meeting between the employee and the dismissing manager. The EAT noted that the case establishes that the employee has to have the opportunity to *"say whatever he or she wishes to say"* to the person dismissing. Further the EAT concluded that the authorities do not preclude (in principle) such communication being made "*in writing or by way of a report to the dismissing officer".*

23. In the matter before, it, the EAT noted that the Tribunal had found that the Claimant '*had two formally recorded disciplinary meetings at which she was represented by her trade union representative and was able to set out her case, comment on the evidence and advance mitigation, all of which was recorded*'.

24. The Tribunal also found that the officer who had conducted the hearing, Mr Hood, had given Mr Vathis what it described as "*in effect a recommendation for dismissal*".

25. With regards the subsidiary criticism of the Tribunals' findings on the appeal process, the EAT also noted that per the Court of Appeal in *Taylor v OCS Group Ltd*, the process of dismissal must be looked at as a whole, including the appeal process. The Tribunal had found that, insofar as it had identified as "imperfections" at the first stage of the process, the appeal process had corrected them. The appeal officer, Mr Armelinios, did have a meeting with the Claimant, and he could not have been in any doubt about the argfauments being raised by her as to why she should not have been dismissed. He was senior to the dismissing officer, and was found to have formed his own independent view of the case, reaching his own conclusion that the circumstances merited dismissal.

26. Accordingly, the Tribunal's conclusion that the appeal process was sufficient to correct any imperfections in the decision to dismiss was one that was open to it to reach, and the Appeal dismissed.

Comment

27. This decision restates what the authorities require - the employee has to have the chance to state their case. On the facts of the matter at hand, the employee did so, and had the chance of asserting her position on appeal.

28. Importantly, while upholding the fairness of this particular decision, both the Tribunal and the EAT support what might be regarded as a more conventional approach – the Tribunal described the investigation and disciplinary procedure as '*less than ideal'*. Further the EAT noted that "*it is desirable that such a meeting between the employee and the dismissing officer should take place. It is good practice and something which many employers' disciplinary procedures will expressly require*".

29. This case should not be taken as an invitation to dispense with important aspects of procedure; indeed employers who do adopt such 'less than ideal' processes still leave themselves open to criticism, and risk that an important aspect of fairness is overlooked.

31 July 2023

Jo Laxton

Barrister
3PB

01865 793736
Joanna.laxton@3pb.co.uk

3pb.co.uk