Browne Jacobson

Fair conduct dismissal: Guidance from the Court of Appeal

01 April 2025 Claire Rosney

In the recent case of Hewston v OFSTED (Office for Standards in Education, Children's Services and Skills) [2025] EWCA Civ 250, the Court of Appeal considered the law relating to conduct dismissals.

This case summary will be of interest to managers and HR professionals involved in disciplinary hearings as the Court of Appeal has given a useful restatement of the principles applying to conduct dismissals.

What happened?

This case concerned the dismissal of an OFTSED inspector for gross misconduct. During a school inspection visit a group of school children came in soaking from the rain. The claimant briefly touched a pupil's head to wipe away rain that was dripping down the pupil's face, lightly touched the top of the pupil's shoulder and asked if the pupil if they were ok. The respondent accepted that the claimant had not acted to harm the pupil and the case did not give rise to any safeguarding risks. The claimant was dismissed, and the Employment Tribunal found the dismissal was fair. The claimant appealed to the Employment Appeal Tribunal (EAT) who overturned the decision and substituted a finding of unfair dismissal. The respondent subsequently appealed to the Court of Appeal.

What did the Court of Appeal decide?

The Court of Appeal upheld the EAT's decision. The claimant did not appreciate, and could not reasonably be expected to appreciate, that a single incident of physical contact, which did not raise any safeguarding issues, constituted gross misconduct and could result in summary dismissal. There was no written policy or rule about physical contact and the claimant had never received any guidance or training regarding what was and was not appropriate. The Court of Appeal also agreed with the EAT that it was not reasonable, in a case where the misconduct itself did not justify dismissal, for the employer to 'bump up' the seriousness of the conduct because the employee had failed to show proper remorse or insight for their actions.

What does this mean for employers?

There are three key points for employers.

1. Clear disciplinary policies

Employers should be clear in their disciplinary policy about what act or misconduct they consider to be gross misconduct. This is particularly important in respect of acts or misconduct where the employee would not have a reasonable expectation that they could be summarily dismissed for that act or misconduct. If in doubt, the employer should list the act or misconduct. However, if an act or misconduct is not listed as being gross misconduct in the disciplinary policy, it does not necessarily follow that a dismissal for that act will be unfair. However, the employee must have a reasonable expectation that the act or misconduct in question could lead to dismissal.

2. Failure to admit wrongdoing

If the substantive misconduct does not justify dismissal, the employee's failure to admit wrongdoing or show remorse, will not increase the seriousness of the misconduct so that the employer can treat it as a breach of trust and confidence therefore justifying dismissal.

However, where an employee's persistent lack of insight or remorse means there is a genuine risk they may commit repeated or more serious misconduct in the future, dismissal may be justified.

3. The importance of process

The case is a good reminder of the importance for employers to follow their own disciplinary procedures and the ACAS Code of Practice on disciplinary and grievance procedures. Employees should be provided with copies of all documents relevant to anything in dispute in the disciplinary process prior to any decision being reached. Any failure to do so could render the dismissal procedurally unfair.

Contact

Claire Rosney

Professional Development Lawyer

claire.rosney@brownejacobson.com

+44 (0)3300452768

Related expertise

Services

Employment

Employment and pensions for public sector

Employment services for corporates

Employment services for financial services and insurance

Employment services for healthcare

HR services

HR services for health and social care

HR services for schools and academies