

The impact of criminal charges on an employer's reputation

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This was precisely the position in the recently published EAT case of *Lafferty v Nuffield Health*. Mr Lafferty was employed as a hospital porter in Glasgow and his role included transporting anaesthetised (and therefore particularly vulnerable) patients to and from theatre. He was charged with assault to injury with intention to rape. Nuffield Health took the decision to dismiss the Claimant, deciding that the risk to its reputation of continuing to employ the Claimant was too great. The Employment Tribunal concluded that this dismissal was fair and its decision has been upheld on appeal.

This does not mean that it will always be fair and reasonable to dismiss in these circumstances and the EAT readily acknowledged that it had found this case to be a difficult one – perhaps made more so by the fact that Mr Lafferty had in fact been acquitted after the original Employment Tribunal hearing and before the EAT. However, some of the key take-away points from this case were:

The relationship between the criminal charge and the Claimant's role

The Claimant's role meant that he was responsible for patients in a highly vulnerable position during the period of transportation. The nature of his role therefore afforded him an opportunity to commit the kind of act with which he was charged. In such circumstances, there was a significantly higher risk of reputational damage than with an offence which did not impact on an individual's role.

Injustice to the employee is not the test

In line with the previous guidance given in *Leach v Ofcom*, although there was a risk of injustice to employees if employers rely on charging decisions where the employee is contesting that charge and has not yet had an opportunity to fully challenge those allegations, the relevant test when considering an unfair dismissal claim is not whether the employee has suffered an injustice – it is whether the conduct of the employer towards him was fair.

Take a critical view

The extent to which an employer can challenge information provided by the police, the CPS or another official body may well be limited, and employers will often not have the expertise or resources to realistically test the evidence provided. However, this does not mean that they should not take a critical view – some inquiry is required. Here, the employer did seek further information from the employee about the proceedings, including the likely timescales involved.

However, the EAT accepted that the employer here was not trying to rely on an assertion that the Claimant was guilty of the criminal misconduct alleged – it took the decision to dismiss because of the adverse effect that the fact of the charge could have on its reputation. The investigation was therefore justifiably more limited.

Carefully assess the risk of reputational damage

Here, the employer was entitled to take into account the particular scrutiny that it was facing within the charitable sector as a result of recent conduct in relation to employees engaging in sexual offences. It was also entitled to take into account the risk of reputational damage which would arise out of a suggestion that the employer had continued to place vulnerable patients at risk.

Consider alternatives

The employer in this case considered that the only other option potentially available to it was suspension. Given that this would involve full pay, and would be open-ended as the Claimant was unable to provide any timescales as to when his criminal trial would take place, the Respondent concluded that this would not be a reasonable expenditure, given its charitable status. This decision was held to fall within the band of reasonable responses open to a reasonable employer.

It is worth noting that the Respondent did in this case confirm to the employee that if was acquitted, he could return to work on the same terms and conditions and with continuity preserved. His post was held open in the interim, covered by temporary staff. The Claimant had in fact returned to his role after his acquittal. The outstanding issue was therefore in respect of the pay between his dismissal and reinstatement. As his dismissal was held to be fair, payment for this period was not required. However, the EAT did choose to point out that they were surprised that this matter could not have been resolved without recourse to the EAT.

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