Case Digests - Unfair dismissal | Monday, 05 December 2011

Dundee City Council v Sharp

Sickness dismissal: no link between reasonableness of investigation and employee's length of service

A tribunal was wrong to find that an employer should have followed a particular procedure as regards medical enquiries before dismissing an employee who had been off sick for a year. And while it may be reasonable to take long service into account when deciding to dismiss, length of service is irrelevant when considering the reasonableness or otherwise of the employer's investigation.

Mr Sharp had worked for Dundee City Council (DCC) as a joiner for 35 years before his 'capability' dismissal in September 2009. He'd been off work with depression and anxiety since September 2008 and at the time of his dismissal he was not fit to return to work. In October 2008 Mr Sharp started counselling and he still receiving it when he was dismissed. He was referred to an independent occupational health (OH) service used by DCC in January 2009. Regular reports from OH said that he was unfit for work, was getting the right treatment and would continue to be off sick. After each OH report Mr Sharp was asked to a meeting with DCC to review his progress. One such meeting took place on 12 August 2009 and Mr Sharp had a sick note from his GP which would expire on 14 September. DCC gave him a return to work date of 14 September and a letter advised him that 'any period of absence is not conducive to the efficient operation of the service'. He was told he could appeal against this date but he didn't do so. He was reviewed again by OH where a consultant physician advised in a report of 14 September that Mr Sharp was improving but would not be fit to return to work immediately. The OH physician did not consider him permanently incapacitated and thought that he should be able to return to work in between one and three months. Mr Sharp didn't return to work on 14 September as requested. He was called to a meeting at which he was warned that dismissal was an option. Believing that there was little likelihood of Mr Sharp returning in the near or foreseeable future and that a line had to be drawn, DCC dismissed him on the grounds of capability. His appeal was dismissed. A tribunal found Mr Sharp's dismissal to be unfair and DCC appealed.

The EAT allowed DCC's appeal. As regards the applicable law, it said that in cases of ill health an employer must consult with the employee and consider the medical evidence. This does not require a higher standard of enquiry than is required in a misconduct case, nor are any particular procedures required. What is more, as was stressed in DB Schenker Rail (UK) Ltd, the decision to dismiss is a management, and not a medical, one.

The tribunal had set the bar too high in deciding that because there was further enquiry which *could* have been made by DCC, this made Mr Sharp's dismissal unfair. Such further enquiry would not in any event have given a more accurate indication of when Mr Sharp was likely to return to work. By adopting a technical and over-analytical approach the tribunal failed to stand back and ask whether DCC had consulted with Mr Sharp (to which the answer was 'yes, repeatedly'), had carried out a reasonable investigation and had a reached a reasonable view on the issue of whether or not it was reasonable for them to wait longer before deciding whether or not to dismiss. There is no absolute rule that, in the case of sickness absence, dismissal will be unfair unless the employer has sought and obtained all 'relevant' facts. That begs the question of what, in any particular case, is relevant and that is something on which reasonable employers might reasonably differ. Further, the overall fairness of a decision to dismiss is not determined by reference to whether or not there was something else that an employer might have done that might have produced a different result. To approach matters as if there was such a rule involves the risk of too high a hurdle being set for the employer to overcome.

The tribunal was also influenced, when deciding whether DCC had carried out a reasonable investigation, by the fact that Mr Sharp was a long-serving employee. This was irrelevant. An employer is not obliged to carry out a more detailed investigation in the case of a long-serving employee nor is he entitled to carry out only a casual investigation in the case of an employee whose length of service is short. An employee with only 2 years' service would, in Mr Sharp's position, have been entitled to the same level of investigation as in Mr Sharp's case and Mr Sharp was not entitled to extra investigation because of his 35 years' service.

Dundee City Council v Sharp

Comment

Edward Wanambwa, a partner in the employment team at Russell-Cooke solicitors, comments: '*This decision provides helpful guidance for employers who are considering whether to dismiss an employee on long-term sick leave. However, there is no "one-size-fits-all" solution for establishing what constitutes a reasonable "waiting period" or investigation. Therefore, employers should consider each instance of long-term sick leave on a case-by-case basis. Of course, the procedures that should be followed are only one part of a matrix of relevant factors that should be considered when contemplating dismissing an employee on long-term sick leave. Other factors that should be considered before dismissing include:*

- *whether the absence is caused by a disability, in which case the law relating to "reasonable adjustments" will need to be considered, irrespective of length of service*
- *whether the absence is caused by work-related stress and, if so, how best to manage the risk of a negligence claim and comply with the duty of care owed to the employee*
- *whether the employee is covered by a permanent health insurance policy and, if so, how to proceed given that dismissing the employee before establishing whether there would be an entitlement to PHI cover if they remained on sick leave, or whilst already in receipt of cover, could entitle the employee to bring a potentially very high-value breach of contract claim, for having been wrongfully deprived of benefits under a PHI policy. In some cases, it is necessary for employers to keep an employee "on the books" for a potentially very long period to avoid a breach of contract claim*'.

Additional resources

- Checklist - Intermittent short-term absences
- Checklist – Long-term ill health
- Sickness and sick pay section of Policies and Documents for various specimen letters, contract clauses, forms and policies and procedures