Out of hours sex in the workplace justifies dismissal

Employers can rely on external consultants' recommendations on disciplinary matters

In GM Packaging v Haslem a tribunal found that dismissing an employee who had engaged in sexual activity with another employee on work premises was unfair. The EAT thought otherwise.

Facts

GM Packaging was a small employer, with only nine employees. The managing director had seen Haslem, a senior manager, engaging in sexual activity with a more junior employee on work premises outside office hours. A dictaphone recording had also been found in which both employees had spoken of the managing director in derogatory terms.

As the organisation was small and the managing director was aware that his evidence would be crucial, he asked an external HR consultancy to conduct the disciplinary procedure. Two consultants in turn then made recommendations to the managing director - the first that Haslem should be dismissed and the second that his dismissal should be upheld on appeal - both of which he accepted.

Tribunal

An employment tribunal ruled that Haslem had been dismissed unfairly. It found that the managing director's principal reason for the dismissal was the sexual activity on company premises and that dismissal on this basis fell outside the band of reasonable responses.

EAT

The Employment Appeal Tribunal found that the employment tribunal had made the following errors:

- It had found that all that mattered was the managing director's reason for dismissing Haslem, rather than the HR consultants' reasons for recommending dismissal, merely because he needed to sanction both the decision to dismiss and the appeal decision. In fact, as the tribunal had itself recognised, it was not surprising that consultants brought in to deal with such matters should have advised the managing director to dismiss the employee and asked permission to implement that decision. The decision had, therefore, been taken by the consultants.

- The tribunal had also got confused about the 'principal reason' test in section 98(1) of the Employment Rights Act 1996. This requires employers to show the reason for the dismissal or the principal reason if there is more than one. The potentially fair reasons for dismissal include conduct, capability, redundancy, and some other substantial reason. If the set of facts that cause an employer to dismiss involve both conduct and capability reasons, for instance, the question will be which was the principal reason. In this case the employment tribunal had wrongly applied this test to separate the sexual activity, which it regarded as the principal reason in the managing director's mind for the dismissal, from the derogatory remarks. As the EAT pointed out, however, these were both conduct issues and not one of the other potentially fair reasons. The tribunal should have considered them together in determining whether dismissal was within the band of

reasonable responses. The two consultants had made it clear they were relying on both misconduct complaints.

- The tribunal's third error had been to conclude that it was not within the band of reasonable responses for an employer to dismiss an employee for gross misconduct on the basis of sexual activity between consenting adults in the workplace but out of hours. The EAT held the tribunal had made the classic mistake of substituting its own views for that of the employer, rather than considering whether the decision had been within the band of reasonable responses.

Comment

This case provides a useful reminder, particularly for small employers, that organisations are entitled to rely on the recommendations of external HR consultants or other experts they ask to deal with disciplinary matters for them. It also confirms that the principal reason test applies only in limited circumstances, and that the band of reasonable responses test is quite generous to employers.

All employers large and small are likely to be relieved that the EAT found that consenting sexual activity in the workplace could justify a finding of gross misconduct.

Anthony Sakrouge is the head of the employment team at Russell-Cooke

www.russell-cooke.co.uk