



ADVISORY
Industry Information

Not All Plain Sailing

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The Guernsey Employment Tribunal has recently considered a case involving allegations of gross misconduct. This article considers the case and what can be learnt from the Tribunal's approach.

The Facts

The employee, who worked as a yacht compliance officer at a specialist aviation and marine administration business, was dismissed following allegations relating to bribery and the deliberate concealment of wine on board a yacht with the intention of avoiding tax duties whilst transiting the Suez Canal.

The employer relied on evidence from two co-workers to dismiss. They claimed to have overheard the employee speaking on the telephone with the captain of the yacht and telling him to *"hide everything under the bunks, in the jacuzzi and put the cover on"*. Evidence was also given of a conversation between the employee and the yacht owner's PA. The employee was alleged to have said that the PA should *"ensure the captain has sufficient funds on board to pay the crew and any bribes necessary"*.

The employee did not deny speaking to the captain or referring to bribes. However, he claimed that he had simply parroted back the terminology used by the captain during the phone call. According to the employee, the "bribe" was in fact a "baksheesh", or gift, customarily demanded (indeed expected) by Egyptian authorities for doing nothing more than their job, not a payment to get something extra or on the side. He had, he said, given the captain advice on how to store the wine to avoid petty pilfering. He denied having spoken to the PA about wine storage.

Tribunal's Findings

Allegations concerning bribery and deliberate concealment of goods to avoid duty are extremely serious and could potentially justify dismissal for gross misconduct.

The more serious the allegations, the more serious the potential consequences for the employee and therefore the greater the need for a fair procedure prior to making any disciplinary decision. In particular, any case where there are disputed allegations of criminal behaviour demands:

- » an extremely careful and conscientious enquiry;
- » where practicable, an independent person to carry out the investigation if there is no suitable employee available to do so (eg due to conflict of interest);
- » the need for an even-handed approach to the investigation and disciplinary process, including ensuring that all relevant witnesses are interviewed and that information supportive of the case both for and against the employee is gathered;
- » that the employee is given access to relevant information;
- » a consideration of the employer's policies in relation to the behaviour complained of and the extent to which the employee was aware of and had been trained in these policies; and
- » where it is a case of one person's word against another, that there is sufficient corroborative evidence of the alleged wrongdoing to be able to make a finding against the employee.



In this case, the fairness of the investigation and disciplinary process was undermined by the fact that the investigating officer was also a principal witness to the alleged telephone conversations and that the captain and PA were not interviewed. This, combined with a lack of corroborative evidence of the alleged wrongdoing or any evidence of bespoke training in country risk assessments, led the Tribunal to favour the employee's version of events.

It is also worth noting that the Tribunal appeared critical of the original timeframe allowed to the employee between the conclusion of the investigation and the date set for the disciplinary hearing (six days) and the effect of suspension which it felt placed the employee at a disadvantage in obtaining information for his defence.

Takeaways

The employer in this case conducted an investigation, held a disciplinary hearing and afforded the employee a right of appeal. However, flaws in the process identified by the Tribunal still meant a finding of unfair dismissal.

It is clear from the judgement that the Tribunal expects employers to approach allegations, in particular serious allegations of a criminal nature, with an open mind and to act even-handedly.

If you find yourself faced with a similar situation make sure you:

- » ensure that the person conducting the investigation is unconnected with the events. If not, and you have the resources to do so, appoint an independent investigator;
- » aim to interview all relevant witnesses as part of your investigation. If a key witness refuses to co-operate, consider whether other evidence is available before proceeding to a disciplinary hearing;
- » allow the employee access to the witness statements or, if requested (and they agree), to the witnesses themselves;
- » don't limit your investigation to what supports the case against the employee - look for evidence to support their version of events also;
- » provide copies of all materials relied on to the employee;
- » if you suspend the employee, ensure they are offered the opportunity to access information to support their case, under supervision if necessary;
- » if you find there is a case to answer, allow sufficient time between the conclusion of the investigation and the disciplinary hearing for the employee to prepare for the hearing;
- » maintain contact with the employee during suspension and reinforce in all your actions that suspension does not presuppose "guilt".

How to manage gross misconduct was the theme of Walkers Annual Employment Conference 2017. Click here to access our [Advisory and Memo](#) on suspension and conducting the investigation.

Contacts

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