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No. 69

HR Broadcast – Refusing to return after dismissal is overturned

Imagine this scenario; an employee has been invited to attend a disciplinary hearing and has as a result been dismissed, but on subsequent appeal the dismissal has been overturned in favour of a final written warning. However, rather than accept this decision and return to work, the employee has notified you that they will not be returning to work, and instead they intend to claim unfair dismissal.

As you will be aware, as part of any fair disciplinary procedure, the employee must be offered the right of appeal against any sanction that is imposed. This is part and parcel of the ACAS Code of Practice. Where an employee is dismissed and subsequently exercises that right, it might be concluded at the appeal hearing that the earlier dismissal decision should be overturned. This may be because the Chairman of the appeal may disagree with the Chairman of the original hearing, perhaps because he considers that dismissal was too harsh an outcome, or there were procedural errors in the initial stages of the disciplinary proceedings, or he simply didn't feel dismissal was appropriate.

Where a dismissal decision is overturned, the employee has the right to return to work and, whilst a lesser disciplinary sanction might have been imposed instead, their continuity of employment is fully protected. By that I mean that the employee is treated as if the dismissal never occurred. However, what happens if the employee then refuses to return to work, instead preferring to go to a Tribunal claiming unfair dismissal?

This was considered recently in the Employment Appeal Tribunal (EAT) in Folkestone Nursing Home Ltd v Patel 2016. In this case Patel (P) had been accused of sleeping whilst on duty and falsifying residents' records. Following disciplinary proceedings he was sacked. P's internal appeal was upheld and the decision to overturn his dismissal communicated to him in writing. That letter accepted P's explanation that he was on an unpaid break, but didn't mention anything about the falsified records allegation.

P was dissatisfied with this response and believed that he was entitled to a full explanation of the appeal findings in relation to the falsification of records allegation. When this wasn't forthcoming, he refused to return to work (as was his legal right) and claimed unfair dismissal. The tribunal decided that he had been dismissed and could therefore pursue a claim for unfair dismissal. Understandably, the employer was unhappy about this decision and appealed to the EAT.

The EAT noted that:

(1) unless there is an express provision to the contrary, an employment contract is always revived if the employee successfully appeals against a dismissal;

(2) the letter to P clearly stated that the dismissal had been overturned and he was entitled to return to work.

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Therefore, even though the employer hadn't set out full details of the appeal findings, it had reinstated P. He therefore had no right to bring a claim for unfair dismissal.

Therefore, you should always notify the employee of the outcome of an appeal against a disciplinary sanction, in writing, and also provide reasons for your appeal outcome decision, particularly where the original decision is upheld or partly upheld. However, a failure to do so will not be a fatal error where a sanction is overturned and, in some cases, it might be better to refrain from giving explicit reasons.