



HR Broadcast – Dismissal for “urinating in the yard” was unfair

I recently read, with interest, about a case that went to the Employment Appeal Tribunal (EAT) which agreed with the Employment Tribunal (ET) that a male employee who was sacked because he urinated in a loading yard was unfairly dismissed by his employer. This case demonstrates the important need not only to hold an investigation, but also to ensure that the investigation is fair and thorough.

Mr Raymond (R), who is diabetic, began working for Asda Stores Ltd (A) as a lorry driver in October 2001. On 29 March 2016 R drove to a loading yard used by various companies at the Harlow shopping centre on A’s behalf. On leaving his lorry, A felt an urgent need to urinate and relieved himself in what he later described as a “discreet part of the loading yard”. However, R was seen by a security guard who subsequently reported him to A’s Bedford depot transport manager.

No statement was ever taken from the security guard and a verbatim record of the telephone call reporting the incident was not made either. These omissions are both obvious flaws in the investigation.

A later appointed Mr Godliman (G) to investigate the matter and he was provided with CCTV footage taken on the day in question. On 4 April 2016 G approached R, without any prior warning, and immediately commenced an investigation meeting. R informed G that he was diabetic and how this affected him, but G didn’t look into this issue any further; he ignored it - another very obvious flaw.

Following the investigation, R was informed that he would face disciplinary proceedings as his urinating in the Harlow loading yard was considered to be “a serious breach of trust and confidence, resulting in a breakdown in the working relationship” and a “deliberate and serious breach of H&S (Health and Safety Regulations) that could endanger self or others or bring the Company’s name into disrepute” .

R was sacked and claimed unfair dismissal and disability discrimination. The tribunal held that the investigation was flawed because G didn’t:

1. Look at the incident from R’s perspective and his reasons for his actions;
2. Obtain any medical evidence despite the relevance of R’s diabetes (it would be vital in the investigation to examine the link between diabetes and the urgent need to urinate);
3. Measure the distance from the yard to the nearest available toilet. This would help determine whether it was reasonable for R to urinate in the yard or find a nearby toilet.

It will be no surprise that R won both claims.

A then appealed to the Employment Appeal Tribunal and the EAT has upheld the tribunal’s decision noting that: “It was simply not reasonable for [A] to claim that trust and confidence was lost in a situation where R’s



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disability was the operative cause of the dismissal”

So the learning from this case has to be;

1. When a misconduct allegation is made, always look at things from the employee’s perspective (not just your own). Look for the mitigating factors and whether the employee had an alternative course of action? If a medical condition is, or might be, relevant its implications must always be taken into account too.
2. If a non-employee makes a misconduct allegation about a staff member, keep a record of the initial report and arrange to take a witness statement from them.
3. Where you believe that health and safety laws have been breached, explain how exactly.