

## **ARTICLE: Employee not washing hands was contributory conduct resulting in no unfair dismissal award**

**June 2010**

### **Introduction**

Although an older case originating in October 2009, *Kristapaitis v Thistle Seafood Limited* shows that whilst it is important for an employer to follow correct disciplinary procedures, the conduct of the employee is also important. In this case, Mr Kristapaitis' conduct resulted in him receiving no award. The facts make it a case of interest to the hotel and leisure industry.

### **The facts**

Thistle produce fish related products for the retail food market and Mr Kristapaitis worked at their premises in Peterhead. He is a Lithuanian who speaks Russian.

Given the nature of their work, Thistle considered hygiene to be of paramount importance. Not only did it have several booklets and notices posted around the workplace in several languages, it also employed two bacteriologists to conduct random swab testing to monitor hygiene. Thistle also ensured that special anti-bacterial soap was provided for workers, specifically to target any E-coli bacteria.

In September 2008, the managing director wrote a letter to all employees in all relevant languages stating that it had been brought to his attention that some employees were not washing their hands after using the toilet. In order to prevent an E-coli infection, the letter made it clear that any staff found with E-coli on their hands or observed leaving the toilets without washing their hands, would be instantly dismissed.

On 16 September, Mr Kristapaitis was seen by the bacteriologists leaving the toilet with dripping wet hands. They took a swab test from him and the results showed by far the highest contamination of E-coli the bacteriologist had ever seen. It was concluded that Mr Kristapaitis had, at best, failed to use the special anti-bacterial soap and, at worst, had failed to wash his hands properly. He had already received a verbal warning earlier in the year for having poor hygiene standards and so Thistle dismissed him without following steps 1 or 2 of the statutory procedures. Mr Kristapaitis appealed, but this was rejected given his previous warning, the very high level of E-coli found on his hands and his lack of remorse. He took his case to the tribunal.

### **The Employment Tribunal and Employment Appeal Tribunal (EAT) rulings**

The tribunal had little hesitation in finding that Mr Kristapaitis' dismissal was automatically unfair since Thistle had failed to follow the statutory procedures. However, they made no monetary award since they felt Mr Kristapaitis' conduct had contributed 100% to his dismissal. Legislation gave them the discretion to reduce an award where they felt it was just and equitable to do so.

In reaching this conclusion, the tribunal took into account the fact that Mr Kristapaitis' witness was very vague and "quite hopeless in assisting in the establishment of any facts".

Mr Kristapaitis appealed on various points, including raising objections that his translator in the tribunal was not up to scratch. The EAT rejected all his grounds of appeal.

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Mr Kristapaitis argued that there had been a contradiction in the tribunal's judgment. They had held on the one hand that the bacteriologists had discovered him with dripping wet hands, yet on the other hand that he had failed to wash his hands. Mr Kristapaitis argued that having wet hands was proof that he had washed them. The EAT robustly rejected this, commenting that "The fact that a person's hands are wet only shows that he has had his hands in or under water. It does not, of itself, give rise to the conclusion that he has washed them with soap. In particular... with anti-bacterial soap." Such findings were backed up by the results of the laboratory tests.

### **Conclusion**

Although the statutory dispute resolution procedures have been abolished, a tribunal may make reduce an award for unfair dismissal or make no award at all where the employee has contributed to his own dismissal or the tribunal considers it just and equitable to do so.

Applying the principles and facts of this case to the current law, it would appear that where an employer gives clear and consistent workplace warnings that are accessible to all staff, that employer will have a stronger defence to any subsequent unfair dismissal claims, although it will clearly be sensible to follow a disciplinary procedure or the ACAS Code of Practice. In the hotel and leisure industry, it will usually be the case that a lack of hygiene is unacceptable in the employees and *Kristapaitis* shows that tribunals will take a robust approach.

If you would like further information on this case or the issues addressed within it, please contact David Hill at [dhill@davidsonlarge.com](mailto:dhill@davidsonlarge.com) or Lucy Bond at [lbond@davidsonlarge.com](mailto:lbond@davidsonlarge.com).

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