davidsonlarge
COMMERCIAL LAW

ARTICLE: Two cases on dismissing an employee for gross misconduct

June 2010

Introduction

Dismissing an employee for gross misconduct can be a risky business. Although the statutory dismissal procedures do not apply any more, an employer is still obliged to follow a fair procedure in line with the ACAS code if they wish the dismissal to be fair. One recent case has shown how a fair dismissal for gross misconduct might be achieved, while another shows how following an incorrect procedure can render an otherwise fair dismissal unfair.

Dunn & Another v AAH Limited

The facts

The facts of *Dunn* are long and complex, taking up 26 of the 41 paragraphs of the Court of Appeal (CA) judgment. AAH Pharmaceuticals Limited (AAHP) was one of the UK subsidiaries of a company called Celesio AG which was based in Germany. Mr Davidson worked for AAHP as a finance director and also a board member. His line manager was the managing director, Mr Dunn. They were employed by AAH Limited, another UK subsidiary of Celesio.

The contracts of both Mr Dunn and Mr Davidson included a clause which allowed for summary dismissal on the grounds of "wilful neglect of duty". Celesio had also promulgated a document entitled "Risk Management Guidelines", which Mr Davidson received in December 2004. These Guidelines included the obligation to report twice a year in the form of a risk inventory as well as on an ad hoc basis in instances of "essential significance". These instances included information with a significant effect on the financial position of the company and any criminal transgressions of employees, particularly in the financial area. These reporting obligations were mandatory for all group companies and compulsory for board members and managing directors in order for Celesio to meet its obligations under German law.

In 2003, a former employee of one of Celesio's subsidiaries (Mr Condliffe) introduced a company called Waypharm to AAHP. The working relationship was fine for many years and AAHP received £27 million worth of stock from them. Payment was through a letter of credit and as part of the terms, Waypharm were able to substitute products of its own choice if the products ordered by AAHP were not in stock.

In 2006, AAH became concerned that Waypharm were using "diverted stock" which they had procured for a low price to export to Africa but then recycled into the UK market. AAH insisted that such stock should not be sent to them, and supplies began to dry up.

Mr Dunn and Mr Davidson became involved in October of that year when an order of £2.4 million was received consisting of substituted products all of which were non-pharmaceutical, eg. coffee, skincare products and household goods. In December, Waypharm drew down on the letter of credit for another £9.7 million for a further order of non-pharmaceutical products. Unfortunately for AAH, the bank advised them that they could not prevent this given the wording of the letter of credit.

Davidson Large LLP is a limited liability partnership, registered in England and Wales at the above address with registered number No. OC313174. Regulated by the Solicitors Regulation Authority. A list of members' names and their qualifications is available for inspection at the above office.

AAH sought to deal with these unwanted products by and getting Waypharm to broker an onward sale. When re-sales did not materialise by March 2007, AAH tried to get the goods delivered to their own warehouses so that they could organise the re-sales. It became apparent that not all the goods were accounted for and Waypharm refused AAH a full inspection. The chronology of events was then as follows:

- 12 April 2007 - the commercial director of AAHP and Mr Dunn agreed that solicitors should be instructed while a solution continued to be sought with Waypharm.
- 19 April - a fax was received from Celesio reminding Mr Dunn and Mr Davidson that their half-yearly risk inventory was due in May.
- 23 April - Mr Davidson was copied into an email to the solicitors, Charles Russell, where it was stated that there were major issues as to whether the stock actually existed, and that "this is a sensitive matter and a large amount of money is involved".
- 27 April - matters seemed to be looking up when Waypharm agreed to produce a full stock list by 7 May and deliver the goods and reimburse the cash value of missing stock by 31 May.
- 7 May - Waypharm's inventory showed a stock shortfall of £4 million.
- 11 May - the half yearly risk inventory was submitted to Celesio. The Waypharm matter was not mentioned.
- 25 May - Charles Russell wrote to AAHP stating that there was a significant risk of fraud. It was also suggested that Mr Condliffe, the original introducer, had been implicit in that fraud. A copy of this email was sent to Mr Davidson who forwarded it onto Mr Dunn.
- 6 July - following various investigations, Charles Russell reported that the principal of Waypharm had a recent criminal record in France for forgery and fraud. A link was also shown to exist between Mr Condliffe and Waypharm.
- 17 July - Charles Russell met with Counsel to formulate a legal strategy. It was only at this point that Mr Dunn said he decided to report this matter to Mr Mahr, his reporting manager at Celesio. He intended to report at their regular quarterly meeting in July but this meeting was cancelled.
- September – meeting between Mr Dunn and Mr Mahr arranged but cancelled.
- 25 October – meeting between Mr Dunn and Mr Mahr finally took place. Mr Dunn handed over a briefing note to Mr Mahr that had been prepared in August. Mr Mahr advised he wished to discuss the matter with a colleague.
- 9 November - both Mr Dunn and Mr Davidson were suspended on full pay and, following an investigation, were summarily dismissed.

Appeal and Court of First Instance
The employees appealed this decision. Mr Dunn and Mr Davidson argued that they had not

INVESTOR IN PEOPLE

Davidson Large LLP is a limited liability partnership, registered in England and Wales at the above address with registered number No. OC313174. Regulated by the Solicitors Regulation Authority. A list of members' names and their qualifications is available for inspection at the above office.

included the Waypharm matter in the 11 May inventory since they did not consider the matter significant and, at that time, had a solution to it. They also argued that they had sought a resolution to the matter in good faith, and had not reported the matter because of worries about confidentiality. It was claimed that "If the employees had made an error of judgment, it was not an error going to the root of the contract". They also pointed out that they made no personal gain by keeping silent and that, even if Celesio had been informed, it could not have altered the outcome.

The dismissals were upheld on appeal. It was noted that it was not the employees' responsibility to judge the seriousness of the matter. Their obligation was to report the matter and allow Celesio to decide what should be done.

The employees took the matter to the High Court and the judge held that they had been properly summarily dismissed for gross misconduct. From at least 25 May, there was a significant risk of fraud which the employees were obliged to report. The judge considered Mr Dunn's explanations of not reporting to Mr Mahr before October 2007 to be "frankly incredible".

The judge at first instance had noted the argument that Mr Dunn and Mr Davidson had managed other difficult problems for the company without reporting. However, he concluded that fraud was a different matter given the lack of control a victim has over events. He agreed with the outcome of the appeal that Mr Davidson had not suggested he had urged Mr Dunn to report and so he must bear the same responsibility for neglect as his colleague. It might have been a different outcome for him if he had favoured disclosure and Mr Dunn had overruled him.

The judge stressed that the ad hoc reporting was a significant feature of the Guidelines, and such reporting was to be considered as separate to the obligation to report twice yearly. It was in ignoring this ad hoc duty to report that the employees had acted with wilful neglect. Mr Davidson appealed, Mr Dunn did not.

The Court of Appeal's judgment

Since no new arguments were put forward, the CA spent much of its judgment recounting the facts and previous decisions. It began by reiterating that an act of gross misconduct "must so undermine the trust and confidence which is inherent in the particular contract of employment" that the employer was no longer required to employ the individual.

Counsel for Mr Davidson repeated the argument that he and Mr Dunn were entitled not to report since they had handled matters without reporting previously. In any event, Mr Davidson had fulfilled his duties by reporting to Mr Dunn and he had no personal responsibility if Mr Dunn did not report to Celesio. Any mistake made by Mr Davidson was merely an error of judgment.

The CA did not agree with these arguments. While it conceded that the commercial agreement reached in April might have justified leaving the matter off the risk inventory, it agreed that the date of 25 May was a crucial turning point when the employees should have reported the matter. The CA did not consider that Mr Davidson had fulfilled his duty just by reporting to Mr Dunn, commenting that there was nothing to stop either employee lifting the phone to Celesio to enquire whether further reports were necessary. Mr Davidson's appeal was dismissed.

Davidson Large LLP is a limited liability partnership, registered in England and Wales at the above address with registered number No. OC313174. Regulated by the Solicitors Regulation Authority. A list of members' names and their qualifications is available for inspection at the above office.

Dr Sameer Sarkar v West London Mental Health NHS Trust

The facts

The case of *Sarkar*, although only 10 paragraphs shorter than *Dunn*, is far more straightforward. Dr Sarkar had worked for the Trust for nearly 6 years before being summarily dismissed. A number of incidents in which he was involved between September 2006 and January 2007 caused various staff members to make complaints about him. These members of staff included a colleague with whom Dr Sarkar had had an extra-marital affair.

The allegations were investigated between January and April 2007, with a report being produced that concluded disciplinary action could be instigated, but warned that this may not resolve the current issues. With this in mind, the Trust asked Dr Sarkar if he would agree to resolve the matter under the Fair Blame Policy (FBP). Under the FBP, the greatest sanction which could be imposed was a final written warning. A clause allowed the matter to be dealt with under the formal process if the alleged misconduct turned out to be more serious than originally anticipated. Although the FBP did not apply to medical staff such as Dr Sarkar, he nevertheless agreed and further discussions took place.

Dr Fellow-Smith, the Trust's Medical Director, attended a meeting with Dr Sarkar on 17 May where he was told (for the first time) that as part of the FBP a report may have to be made about him to the GMC. Dr Sarkar rejected such a suggestion since it would have devastating effects on his career and the FBP negotiations broke down.

On 30 May, Dr Sarkar was suspended pending the outcome of a formal disciplinary investigation. On 30 and 31 July, a disciplinary hearing took place which not only took into account the incidents which were discussed under the FBP, but also additional allegations which had come to light. These included such incidents as a heated exchange with a colleague when Dr Sarkar parked his car in the incorrect place in the car park and an inappropriate email he sent to a colleague. He was dismissed for gross misconduct and brought a claim before the Tribunal.

The Employment Tribunal and Employment Appeal Tribunal (EAT) rulings

The Tribunal found that the dismissal was unfair for three reasons. Firstly, the initial use of the FBP had implied that the Trust considered the alleged misconduct to be of a relatively minor nature. Since the greatest sanction which could be imposed was a final written warning, obviously it wasn't appropriate where the Trust felt that matters might amount to gross misconduct. The Tribunal commented that they did not see how "these same offences can somehow properly come to be regarded as matters of such a grave and serious nature as to constitute gross misconduct" simply because the FBP discussions had been discontinued.

Secondly, those additional incidents and allegations which had come to light after the FBP were not of a nature to constitute gross misconduct either collectively or individually. In particular, the Tribunal commented on the car park incident: "whilst we accept that the Claimant was probably rude, aggressive and unhelpful… [this] should be seen in the context of a lengthy suspension… and the inevitable stress, worry and frustration that this would cause".

Thirdly, the FBP discussions had been intentionally frustrated by the Medical Director's proposed referral to the GMC. Whilst the Tribunal appreciated the Trust's difficult position, it also suggested that this position was partly the Trust's fault since they had suggested the FBP procedure in the first place. They could not then sabotage it and follow a formal

Davidson Large LLP is a limited liability partnership, registered in England and Wales at the above address with registered number No. OC313174. Regulated by the Solicitors Regulation Authority. A list of members' names and their qualifications is available for inspection at the above office.

disciplinary route at such a late stage.

The EAT overturned the Tribunal's decision, holding that the tribunal had erred in law by focussing on the procedure and substituting its own view of the seriousness of the incidents for that of the Trust. It held that the clause in the FBP allowed the Trust to initiate the more formal disciplinary procedure for matters being dealt with under the FBP. Dr Sarkar appealed to the Court of Appeal.

The Court of Appeal ruling
Dr Sarkar argued that since both the Tribunal and the EAT had agreed that the FBP was not an irrelevant circumstance, the Tribunal could decide what weight to attach to its use. It was entitled to conclude that using the FBP then sabotaging it showed unfairness and inconsistency of treatment by the Trust. In contrast, the Trust pointed out the EAT's reasoning that the Tribunal had focussed on the FBP too much and had essentially got "distracted" by it. Reasonableness should be considered in light of the procedure (including the disciplinary procedure) as a whole.

The Court agreed with the Tribunal and Dr Sarkar – by using the FBP, the Trust had implied that it did not consider Dr Sarkar's conduct serious enough to warrant gross misconduct. The Tribunal had not made a wrongful substitution, as one of the dismissing panel had given evidence that the subsequent incidents were of a "relatively minor nature".

Conclusion
There is a great deal to be learned from both these cases, both individually and taken together.

In *Dunn*, It is worth noting that, despite the staggeringly neglectful acts of the employees and the length of time it had taken them to report, they were still suspended and the mater investigated before dismissals were made. The employees were defeated at every turn not only because of their own actions, but undoubtedly because the employer had also followed a fair procedure before dismissing. There was no room for the employees to argue otherwise in this matter.

The case of *Sarkar* should not be considered a warning against trying to resolve workplace matters informally. The outcome might well have been different if substantial new evidence had come to light which justified moving from a low-key procedure to one carrying the risk of summary dismissal. A key flaw in *Sarkar* was that he was ultimately dismissed on the basis of original incidents which had already been investigated and inferred to be non-serious, together with new non-serious incidents. Informal dispute resolution can be very useful in a workplace, and should not be discouraged where it might help maintain working relationships.

In a situation similar to *Sarkar*, an employer should inform the employee at the outset if the charges are serious and warn if they might result in dismissal. It can then be emphasised that the informal procedure is a more lenient alternative and the option to run a formal disciplinary procedure if the informal one breaks down is being reserved.

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

Please note that this article is for guidance only and does not constitute legal advice.

Davidson Large LLP is a limited liability partnership, registered in England and Wales at the above address with registered number No. OC313174. Regulated by the Solicitors Regulation Authority. A list of members' names and their qualifications is available for inspection at the above office.