

Bulletin 168

May 2010

DEALING WITH THE DISCIPLINARY PROCESS PENDING POLICE INVESTIGATION

In *The Secretary of State for Justice v Mansfield* the EAT decided that where an employee is being investigated both internally by his employer and by the police in relation to an alleged criminal act, the employer has a wide discretion whether to postpone or continue with the disciplinary investigation pending the outcome of the criminal investigation.

The Facts

The Claimant, a prison officer, was suspected of orchestrating violence amongst prisoners and planting drugs on a prisoner. The employer commenced its investigation in April 2006 and suspended the Claimant in May 2006. The police began conducting a criminal investigation into the allegations and the employer decided to postpone its own internal investigation and await the outcome of the criminal prosecution. The trial was concluded in April 2007 and the claimant was found not guilty.

The employer resumed its internal investigations by which time, a year had passed since the act had taken place. There was a further 3 month delay when the employer resumed its investigations and the investigation was not concluded until October 2007. The disciplinary hearing began in late January 2008 and the Claimant was informed that he was dismissed in early February 2008.

The Employment Tribunal found that the Claimant had been unfairly dismissed due to the lengthy and unacceptable delay in the proceedings leading up to the dismissal and because the employer did not hold a genuine belief that the claimant was guilty of the alleged misconduct.

The EAT found that the postponement was not unreasonable and the Claimant had suffered no prejudice.

The EAT also found that the Employment Tribunal had erred in confusing the lack of honest belief in the alleged misconduct with the lack of reasonable grounds for such belief. It was not for the ET to say who they believed in respect of the misconduct, and they had slipped into the "substitution mindset" (*London Ambulance Service v Small* (2009)) i.e. they had wrongly put themselves in the mind of the employer, instead of focussing on whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal.

Practical Tips

The EAT's decision confirms that an employer has a wide discretion but it may not be advisable to delay proceedings in all matters where the police are involved. Employers should exercise discretion in all such cases to determine whether continuing with the disciplinary proceedings would prejudice the criminal proceedings, if so then the employer should delay the disciplinary process. Often the police will request that the employer delays any internal investigation until after the criminal trial. In practice employees facing criminal charges are invariably advised by their own solicitors not to co-operate in any internal disciplinary investigation to avoid inadvertent self incrimination.

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Once the criminal case has concluded the employer should immediately resume its investigation without putting itself at risk of an unfair dismissal claim, resulting from lengthy and unjustifiable delays.

If you require any specific advice in connection with the material contained in this bulletin, or on any other Employment Law issues, please contact: Paul Chamberlain in Manchester on 0161 836 8864, Andrew Cross in Liverpool on 0151 600 3062 or Kevin James in Preston on 01772 229847.

If you no longer wish to receive the bulletin please let us know by return e-mail to helen.calvert@brabnerscs.com

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