

HR Essentials

1. Whistleblowing and war in the workplace

Workers are entitled to make legitimate protected disclosures about their fellow colleagues - but to what extent will an employer be liable where this whistleblowing leads to all out war in the workplace?

The Court of Appeal has recently looked at this very tricky issue. In the case, an NHS trust took the decision to redeploy two whistleblowers after a 'dysfunctional' atmosphere developed in the medical centre where they worked following their whistleblowing about a colleague who had exaggerated his professional experience and qualifications. It was accepted that these two employees would not have been redeployed 'but for' their whistleblowing: however the Court accepted the Trust's argument that the *operative* reason for the move was to remedy the unworkable atmosphere that had developed, not to punish the whistleblowers - the 'but for' test would not be applied.

It is often extremely difficult to resolve workplace conflict that arises as the result of protected disclosures between fellow colleagues: this case does give some comfort to employers who might otherwise feel that they are in a 'no win' situation.

2. Can cost ever justify discrimination?

This has been a question vexing employers for some time with past case law suggesting that cost could never be the sole factor to justify a discriminatory step.

The EAT has recently looked at this area again and concluded that cost alone might be capable of justifying discrimination. In this case, the Foreign and Commonwealth Office withdrew a job offer to a senior deaf diplomat when it discovered that the cost of providing support for this employee in his new posting in Kazakhstan would be in the region of £250,000 per year.

Whilst this case does not give employers a green light to pursue cost based arguments alone when attempting to

The Essentials:

1. Employers can resolve workplace conflict caused by whistleblowing.
2. Cost considerations may be capable of justifying discrimination.
3. Similar disciplinary cases can be dealt with differently as long as an employer can explain reasons.

justify all potentially discriminatory decisions, it may give some assistance, particularly in cases involving disability or age discrimination where cost is very often a major factor.

3. Consistent inconsistencies

The EAT has recently ruled that an employee dismissed for gross misconduct was not unfairly dismissed even though he could prove that his employers had treated another employee in almost identical circumstances differently.

In this case, the employee seriously breached health and safety procedures when operating dangerous machinery. He was sacked for gross misconduct as a result. He pointed to another former employee who had done the same thing but had not been dismissed for gross misconduct. The employer explained that the reason for the difference was because the previous employee had so badly injured himself as the result of his negligence that he was, in fact, dismissed for sickness absence. The EAT accepted the employer's evidence that if the former employee had returned to work, he would then have been dismissed for gross misconduct.

Here the court was satisfied that the employer had given a sufficient reason as to why it had dealt with two very similar cases differently and that this was all that was needed to ensure a fair dismissal.

This case highlights, however, that it is not enough to consider the individual case in question when employers are considering whether to dismiss for misconduct. However carefully an employer considers the evidence and any mitigating circumstances, that is not the whole story. It is always relevant to consider how other employees have been treated in the past in similar circumstances.

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