Dismissal was fair despite deletion of part of the investigation report which was favourable to the employee

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Dismissal was fair despite deletion of part of the

investigation report which was favourable to the employee

Running a disciplinary investigation is a daunting prospect, particularly for a manager without experience of such processes. It's understandable that investigators may need support and guidance from HR or in-house legal. But what degree of guidance is permissible? Is it possible for such advice to prejudice the integrity of the process? The case of *Dronsfield v The University of Reading* considers these issues and reminds us of the proper parameters of a disciplinary investigation.

What does the law say?

In order to dismiss an employee fairly for misconduct, an employer must have carried out a reasonable investigation into the allegations. Investigators should produce a report summarising the factual findings of their investigation and give their views on whether the matter should proceed to a disciplinary hearing. However, they should not stray into the territory of expressing views on the employee's culpability or on the appropriate sanction – that is a matter for the disciplinary panel.

When preparing their report, it is legitimate for investigators to seek advice from HR and/or in-house legal on the relevant law and procedure, but the conclusions in the report should be their own. This point was highlighted in the case of *Ramphal v Department of Transport*, where the EAT found that excessive intervention by HR in a disciplinary investigation could potentially render the dismissal unfair.

What happened in this case?

Dr Dronsfield taught Fine Art at the University of Reading. Under the University's rules, he could only be dismissed from his role on conduct grounds if he had engaged in conduct of an 'immoral, scandalous or disgraceful nature incompatible with the duties of the office or employment'. He began a sexual

relationship with a vulnerable student, notably before he marked her dissertation and whilst he continued to supervise her. This was contrary to the University's guidance to academic staff.

A Professor and a member of HR were jointly appointed to investigate the matter. An early draft of their investigation report said that, in their opinion, the misconduct was not 'immoral, scandalous or disgraceful'. The University's in-house employment lawyer reviewed the draft report. She recommended that they omit this statement and leave it to any subsequent disciplinary panel to judge whether the conduct reached the threshold for dismissal. They accepted this advice and the finding did not appear in their final report.

Dr Dronsfield was ultimately dismissed for gross misconduct. By the time of the internal appeal, Dr Dronsfield had seen the earlier draft of the investigation report. He submitted that the investigators had been pressurised to change their findings and this was unfair. However the independent appeal chair rejected this argument and upheld the dismissal.

What was decided?

Dr Dronsfield brought an unfair dismissal claim. His principal argument was that the change to the investigation report meant that the dismissal was unfair. Initially, the Employment Tribunal found the dismissal to be fair, but this was overturned by the EAT on the basis that the Tribunal had not adequately probed why the deletions had been made to the report. The case was remitted to a new Tribunal.

However, the second Tribunal also found the dismissal to be fair. It said it was reasonable for the University's lawyer to advise the investigators to focus on whether there was a case to answer and to remove their opinions about Dr Dronsfield's conduct. In the Tribunal's view, the amended report fairly set out the investigators' position and did not

paint a false or incomplete picture. Dr Dronsfield appealed to the EAT again.

The EAT dismissed the appeal. They concluded that the Tribunal had adequately addressed Dr Dronsfield's arguments surrounding the changes to the report. The Tribunal had found that the report had been amended on the advice of the lawyer that it should not include an opinion on culpability. The investigators were genuinely persuaded that such decisions belonged to the disciplinary panel. This amounted to a correction of the scope of the report and did not undermine the fairness of the dismissal process.

What are the learning points?

This decision reassures us that investigators are entitled to seek and act upon appropriate advice from HR and/or in-house legal surrounding the correct application of the law or internal procedures. Acting upon such advice should not undermine the integrity of the process, provided that the report can still be described as the investigator's own work. Fairness will only be jeopardised when the advice suggests changing the substantive content of the findings, as was the case in *Ramphal*.

The decision also underlines the point that the proper role of the investigator is limited to gathering the facts and determining whether there is a case to answer. Investigators need to take care to avoid encroaching on the role of the disciplinary panel. For lay members of staff this distinction can be difficult to get grips with. It is, therefore, advisable for employers to provide in-depth coaching to those in scope to act as investigators and as members of disciplinary panels.

Dronsfield v The University of Reading

If you would like to discuss any of the issues raised in this article, please contact Amanda Steadman or your usual BDBF

contact.

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