

EAT holds that mentally ill employee dismissed for gross misconduct must be culpable

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The EAT has remitted a case to the tribunal to consider whether a mentally ill employee could be considered culpable

for his actions which led to his summary dismissal for gross misconduct. It emphasised that the conduct must have been wilful and that the mitigating circumstances of the illness must be taken into account.

Mr Burdett was employed by Aviva Employment Services Ltd as a senior approval specialist from 2006. In 2007 Mr Burdett was diagnosed with paranoid schizophrenia for which antidepressants and anti-psychotic medication were required. Mr Burdett stopped taking his medication on medical advice in 2008; as a consequence, he was hospitalised after suffering from hallucinations and having sexually assaulted members of the public. He received a police caution for the assaults, but did not notify Aviva of it. In 2010, Mr Burdett again discontinued his medication, though without having taken medical advice. In 2011, Mr Burdett sexually assaulted two Aviva employees and a member of the public. He was arrested and detained under the Mental Health Act 1983. Aviva suspended Mr Burdett and commenced a disciplinary investigation, during which Mr Burdett admitted to the assaults and explained that he had made a "serious error of judgment" with regards to his medication. A disciplinary hearing held in January 2012 was adjourned pending medical evidence.

In April 2012, Mr Burdett pleaded guilty to the assaults and was made subject to a three-year mental health treatment requirement. The disciplinary hearing was continued in May 2012, following which Aviva summarily dismissed Mr Burdett for gross misconduct. Having been unsuccessful with an internal appeal, Mr Burdett brought claims for unfair dismissal and discrimination arising from disability.

The EAT agreed that the reason for dismissal was the sexual assaults and Mr Burdett's decision to discontinue his medication. However, the EAT found that Aviva did not have reasonable grounds for a belief of gross misconduct because it had not properly considered whether Mr Burdett was culpable for his actions. In determining culpability, account needed to

be taken of the effect of Mr Burdett's mental illness. Though Mr Burdett admitted to making a "serious error of judgment", it must be shown that this was done wilfully, which necessitates consideration as to the reasons why Mr Burdett ceased his course of medication.

The EAT also considered that Aviva did not properly consider Mr Burdett's suggestion that he work from home in order to minimise future risk of harm to other employees.

This surprising decision emphasises that, where an employer is considering dismissing an employee for gross misconduct, it should first satisfy itself that the employee is culpable for those actions. This will be particularly relevant where the employee suffers with mental illness, as the mitigating features of that illness will require full consideration. Employers also ought to consider all the options open to it when determining the appropriate sanction and be open to viable alternatives to dismissal.

Burdett v Aviva Employment Services Ltd UKEAT/0439/13

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