Driving home the importance of appropriate misconduct investigations

LNB News 31/03/2015 120

Employment analysis: How will the courts apply the 'reasonableness test' in relation to an investigation into employee misconduct? Nicholas Lakeland, partner at Silvermen Sherliker LLP, examines the decision in Shrestha v Genesis Housing Association Ltd.

Original news

Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94, [2015] All ER (D) 207 (Feb)

The employment tribunal had found that an employee had not been unfairly or wrongfully dismissed in circumstances where the employer had reasonably found him to have committed an act of dishonesty in respect of his expenses claims for mileage. The Court of Appeal, Civil Division, dismissed the employee's appeal as the tribunal had not failed to consider whether the employer had conducted a reasonable investigation into his response to the disciplinary investigations, where, what mattered, was the reasonableness of the investigation as a whole.

What was the background to this case? What were the previous findings concerning the investigation conducted prior to the dismissal for misconduct?

The appellant, Mr Shrestha**,** in his professional role as a 'floating support worker', had to travel by car to attend clients' home addresses. He was entitled to reclaim mileage expenses for work travel. In 2011 the appellant sought payment of an 'essential car user allowance', worth £1,000 a year, which was paid on top of mileage expenses where an employee drove at least 2,500 business miles in a financial year. His claim aroused suspicion because he hadn't previously reached that mileage limit, prompting an audit of his claims for May to July 2011. The audit compared the mileages claimed against AA route-finder information relating to the journey distances. The journeys were all within the area of East London and were recorded as being between two and eight miles but the mileages claimed were consistently much higher than the AA figures.

On 30 August 2011 the employer's area manager, Miss Duffy, held an initial investigation meeting with the appellant. Following the meeting the appellant submitted a statement in which he corrected Miss Duffy's mistake in thinking that the mileages claimed were for one-way trips whereas in fact they were for return journeys. With that correction, the mileages claimed were still almost twice the journey distances on the AA route-finder. The appellant argued that the higher mileages claimed were due to a number of factors:

o difficulty in parking

o one-way road systems, and

o road works causing closures or diversions

On 9 September 2011 the appellant attended a disciplinary hearing, chaired by Mr East. The management's case was presented by Miss Duffy who confirmed that she had checked sets of figures from the AA and RAC that the appellant presented and that they were both lower than the mileage claimed by the appellant for the same journey. Mr East accepted that he didn't discuss every single trip with the appellant but discussed only two individual ones. The appellant again suggested parking issues or road works as reasons why he was

over the recommended RAC/AA mileage. Mr East decided that he needed to investigate some of these issues and adjourned the hearing.

During the adjournment Mr East considered the difference between the RAC and AA mileage. His conclusion was that there was very little difference between the two and compared to either, the appellant's return journey mileage exceeded the recommended mileage. Mr East also carried out an analysis of the claims submitted by the appellant in June and July 2011 compared to the same journeys in November and December 2010. In all cases the later journeys claimed higher mileage than the earlier journeys and all journeys shown were greater than the AA figures. Mr East confirmed that no other investigation was carried out.

In the employment tribunal in cross-examination Mr East was asked why he hadn't put each specific journey to the appellant. His explanation was that as every single journey the appellant had made was above both the AA/RAC suggested mileage, it wasn't plausible that there was a legitimate explanation for each and every journey. As to the appellant's explanation about parking issues and road closures, he was also asked in cross-examination why he had not sought to further investigate these, perhaps by carrying out some of the journeys in question. He explained that it wasn't possible to later recreate the same conditions so as to make the exercise a reasonable one.

Mr East's explanation was that one-way systems could not be a legitimate reason--the AA calculates mileage including one-way roads. As to parking, the appellant made the same journey several times and would get to know where to park and Mr East rejected the appellant's explanation that parking could therefore account for increased mileage. Mr East did accept that road closures could be an explanation in respect of some journeys, however, he didn't consider it plausible for this to explain why every single journey was greater than the recommended mileage. He felt that the appellant's explanation simply did not stack up.

Mr East wrote to the appellant on 4 October 2011 to inform him of the finding that he had been over-claiming mileage fraudulently and was guilty of gross misconduct, for which he was dismissed with immediate effect. The appellant appealed against that decision. The appeal hearing took place on 4 November 2011 and was chaired by Mr Macdonald. On 7 December 2011 Mr Macdonald wrote to inform the appellant of the appeal panel's decision to uphold the dismissal. The letter stated that the panel could find no viable explanation why every journey examined in the investigation was considerably higher than the AA and RAC estimated mileage. The appellant brought a claim of unfair and wrongful dismissal against Genesis Housing Association Limited. The dismissal was upheld in the employment tribunal and Mr **Shrestha**'s appeal to the Employment Appeal Tribunal was dismissed and he appealed to the Court of Appeal.

What were the issues raised in this case?

The court had to consider the application of the 'reasonable investigation' test laid down in *British Homes Stores Ltd v Burchell* [1978] IRLR 379 and whether the tribunal had failed to consider whether the respondent had undertaken a reasonable investigation into the alleged misconduct and the appellants response to the allegations. It also had to examine the question of the fairness of the dismissal for misconduct.

What were the findings regarding the test of reasonableness in investigations?

The previous case of *J Sainsbury plc v Hitt* [2002] EWCA Civ 1588, [2002] All ER (D) 259 (Oct) clarified that the need to apply the objective standards of the reasonable employer (sic) applies as much to the question of whether the investigation into the suspected misconduct was reasonable in all the circumstances, as it does to the reasonableness of the decision to dismiss for the conduct reason.

The appellant argued that there is a difference between the reasonableness of the employer's investigation into the original allegations and the reasonableness of its investigation into the employee's response to those allegations. The appellant put to the court that if an employee raises several lines of defence, the employer must investigate each of them, unless they are manifestly false or unarguable, in order to pass the reasonableness threshold.

In this case the appellant tried to explain the excess mileage claims through a number of interrelated explanations including:

o parking difficulties

o road works

o road closures, and

o one-way streets

The employer did not carry out an investigation into those defences, and the employment tribunal did not consider whether those failures to investigate took the investigation outside the range of investigations open to a reasonable employer.

To put it another way, the tribunal appears to have considered the reasonableness of what the employer did do, without considering how the overall reasonableness was affected by what the employer did not do. This was the position both in relation to the dismissal stage and to the internal appeal stage.

In the Court of Appeal decision Richards LJ did not accept these submissions and said that to do this was to adopt a too narrow approach in relation to the *Burchell* test. The Court of Appeal judge confirmed that the investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the *Burchell* test will depend on the circumstances as a whole. In this case the issue was whether the appellant had over-claimed mileage expenses. His explanations as to why the mileage claims were abnormally high had to be assessed as an integral part of the determination of that issue, what mattered was the reasonableness of the overall investigation into the issue.

The Court of Appeal judge concluded that the employment tribunal judge, although dealing relatively briefly with the question whether a reasonable investigation was carried out, as a whole did consider all the points advanced before her and correctly found that there had been a reasonable investigation.

What was the finding as regards the fairness of the dismissal?

The well-known key case of *British Homes Stores Ltd v Burchell* established that the correct approach towards assessing the fairness of dismissal for misconduct under the legislation was as follows:

'Whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time.'

To break this down, the employer (who is laden with the burden of proof) had to establish three things:

o the employer did believe

o the employer has in his mind reasonable grounds upon which to sustain that belief

o the employer, at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case

The employment tribunal judge in this case directed herself by reference to *Burchell*, noting that for an employer to demonstrate that it had reasonable grounds for belief, it will have to establish:

o that it conducted an appropriate level of investigation

o that the degree of investigation required very much depends on the circumstances, including the strength of the prima facie case against the employee, and

o the seriousness of the allegations

The employment tribunal judge in this case found that 'a sufficient initial investigation had been carried out by Miss Duffy'. The judge concluded that during at the later stages of the disciplinary process, first Mr East and second Mr Macdonald both had a genuine belief that the appellant had claimed mileage he had not driven.

What should practitioners advise clients following this decision?

They should be impressing on their clients that in relation to any disciplinary procedures, investigations conducted should be to an appropriate level, the degree of investigation depends on the circumstances, the

strength of the prima facie case and the seriousness of the allegations. Disciplinary investigations need only go as far as what would be considered reasonable to the reasonable employer, and what matters is the reasonableness of the overall investigation into the issues at hand.

Interviewed by Diana Bentley.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

Document information

Published Date
31 March 2015
Jurisdiction
England & Wales