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## Summary dismissals and repudiatory breaches--does timing matter?

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**Employment analysis:** Does the court's judgment in *William v Leeds United* serve to clarify whether an employer has the ability to summarily dismiss an employee during a notice period for acts of misconduct discovered after their original termination? Nicholas Lakeland, partner and head of the employment and pensions team at Silverman Sherliker LLP, discusses the issues raised by the case relating to the timing of summary dismissal and the discovery of gross misconduct.

### Original news

*Williams v Leeds United Football Club Ltd* [2015] EWHC 376 (QB), [2015] All ER (D) 218 (Feb)

The claimant was employed by the defendant football club until he was summarily dismissed for gross misconduct on the basis of breach of an implied term of his contract. He brought a claim in damages for unpaid wages and benefits for his notice period. The Queen's Bench dismissed the claim on the basis that the behaviour in question had amounted to gross misconduct for which the defendant was entitled to dismiss him.

### What were the issues examined by the court in this case?

The issues examined by the court were essentially:

- o Did the forwarding of an email containing pornographic images by the claimant to a female junior employee of the club, and two male acquaintances five years prior to his dismissal amount to a sufficiently serious breach of the implied duty of mutual trust and confidence so as to amount to a repudiation of the contract entitling the club to dismiss the him without notice on 30 July 2013?
- o If not, and if the football club were not entitled to terminate the claimant's contract without notice, what loss has the claimant suffered by reason of any wrongful dismissal?

The judge decided that the conduct of the claimant was a sufficiently serious breach of the duty of implied trust and confidence as to amount to a repudiation of the contract. The judge reached this decision for the following reasons:

- o the conduct is incompatible with the role and duties of a senior manager
- o the images were capable of causing offence
- o the sending of these images to a junior female employee by a senior manager with significant influence over her career might have caused offence and would have left the club vulnerable to a claim for harassment under the then applicable Sex Discrimination Act 1975, s 4 (SDA 1975) and it would, of itself, be a sufficiently serious breach of the contract of employment to amount to repudiation of the contract by the claimant
- o the sending of obscene images to people active in professional football might itself have led to media interest and possibly publication of potentially negative press coverage

For all these reasons, the claimant's conduct was found to amount to a breach of the term of trust and confidence implied in the contract of employment.

Another important issue, related to point one above, was examined by the court, namely the ability for an employer to summarily dismiss an employee during the notice period for acts of misconduct discovered after the dismissal. The court applied the principle under which the employer may justify summary dismissal by reference to such conduct, even if the conduct was not known to the employer at the time of termination but was discovered only subsequently.

Regarding the second main issue, the court affirmed that normally, if an employer gives notice to terminate, the contract ends at the expiry of that notice period and the employee is entitled to receive salary and benefits provided by the contract. However, if the employer lawfully summarily dismisses an employee during the notice period, no salary or benefits would be payable after the summary dismissal and immediate termination of the contract.

### **What was the finding in relation to termination of employment on the grounds of misconduct and the timing of that misconduct and the time of termination?**

The misconduct happened on 28 March 2008, when the claimant received the email with the photographs attached that he later forwarded first to a female, junior employee and then to two male football acquaintances.

On 23 July 2013, the club decided to give the claimant notice of termination of his contract of employment on grounds of redundancy with three months' notice. It was subsequently found that his notice period was in fact agreed with the then chairman of the club as being 12 months.

It was found that managing officers at the club decided by at least 18 June 2013 that they would start investigations in relation to a number of senior managers (including the claimant) to find evidence to justify a dismissal on grounds of gross misconduct and therefore carried out an exercise of looking for evidence which could allow them to dismiss the senior managers in the club.

Shortly after giving notice of termination, the managers saw the email and wrote the letter dated 24 July 2013 making disciplinary allegations against the claimant. The club then dismissed him summarily during the course of his serving out his notice period based on having found one of the three offending emails.

### **What was the relevance of the club's internet policy and providing notice of it to the employee?**

This matter didn't have any relevance on the final decision--according to the court, even if the claimant had not been provided with the club's internet policy, it should have been obvious to a person in a senior management position (such as the claimant) that the club's email system should not be used to send obscene and pornographic images.

### **How was the employer's lack of knowledge of gross misconduct prior to serving notice of termination of employment dealt with?**

The claimant submitted that if the club knew that the claimant had forwarded the emails to the female employee and his two male acquaintances prior to deciding to dismiss, then the letter of 23 July 2013 would amount to an affirmation of the contract of employment and that the club could not thereafter rely on those facts as justifying dismissal.

The court asserted that from the evidences, no one involved with the decision to terminate the claimant's contract of employment on 23 July 2013 knew of the email to the first male acquaintance prior to that decision. Furthermore, it concluded that, even if someone involved in the dismissal did know of the email to the first male acquaintance prior to that decision, they did not know then that the email had also been forwarded to the female employee. The court pointed out again that the forwarding of the email and attached images to the female employee would, of itself, be a sufficiently serious breach of the contract of employment to amount to repudiation of the contract by the claimant.

### **Were there any precedents of note that the court relied on in this case?**

The cases of *Boston Deep Sea Fishing and Ice Company v Ansell* (1888) 39 Ch D 339, [1886-90] All ER Rep 65 and *Cavenagh v William Evans Ltd* [2012] EWCA Civ 697, [2012] All ER (D) 225 (May) were cited to assert that even if some of the acts of misconduct had been discovered after the dismissal, the employer is still entitled to rely upon those acts to justify the summary dismissal.

The court also cited *Henderson v London Borough of Hackney and others* [2011] EWCA Civ 1518, to point out the irrelevance of a written policy or rule prohibiting a gross misconduct.

### **What should practitioners bear in mind in advising clients as a result of this case?**

I think that the relevant aspects of this case are the following:

#### *The consequences of a summary dismissal during a notice period*

In relation to contracts of employment, if an employer gives notice to terminate, the contract will, in normal circumstances, end at the expiry of that notice period. If, however, the employer dismisses the employee summarily during the notice period, that dismissal will bring the contract to an end immediately and the employer will not, after that dismissal, be liable for any further salary.

#### *The discovery of a repudiatory breach after commencement of the notice period*

Moreover, if the employer discovers after commencement of the notice period that, at an earlier point in time, the employee had engaged in conduct amounting to a repudiatory breach, the employer is entitled to rely upon that conduct as justifying the summary dismissal during the notice period.

Furthermore, the court confirmed the principle that the existence of a written rule or policy and the concrete knowledge of it by the employee are not necessary to define a misconduct as a 'repudiatory breach which justified the termination without notice if the misconduct is gross', whenever the misconduct is manifestly unacceptable.

#### *The High Court approach versus a tribunal approach*

The misconduct complained of was five years prior to the dismissal and the approach of Mr Justice Lewis in the High Court was robust and one is left wondering whether if these same facts had come before an employment tribunal the decision would have been less harsh and the outcome would have been a better one for the claimant.

*Interviewed by Diana Bentley.*

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