

## Court of Appeal clarifies extent of employer's knowledge in unfair dismissal cases

In *Orr v Milton Keynes Council* the Court of Appeal held that when deciding whether it is reasonable to dismiss an employee, provided a fair and reasonable investigation has been held an employer cannot be deemed to have knowledge of all facts known to its employees. It is only the facts that are known to the decision maker that are significant in deciding whether a dismissal was fair. The Employment Tribunal should consider the reasonableness of the employer's conduct, not the injustice to the employee.

The Council took disciplinary action against Mr Orr (a youth worker of Jamaican origin) in relation to 2 incidents: discussing a sexual assault contrary to specific instructions and being rude and aggressive during a discussion with his manager, Mr Madden. An investigation into the incidents was carried out and Mr Cove, a senior manager, dealt with the disciplinary hearing. Mr Orr did not attend the disciplinary hearing. Mr Cove decided that both incidents had occurred and that each of them constituted gross misconduct

Mr Orr brought a claim for unfair dismissal and race discrimination. It became apparent during the Tribunal case that Mr Orr's outburst had happened after Mr Madden had tried to reduce his working hours without his agreement. Mr Orr became upset and used Jamaican patois to which Mr Madden replied "you lot are always mumbling... I can't understand a word you lot are saying".

The Tribunal held that Mr Orr's dismissal was fair and non-discriminatory despite Mr Madden's comments amounting to direct race discrimination. At the time Mr Cove reached his decision to dismiss he had not known of Mr Madden's comments as Mr Madden had not disclosed his behaviour to the investigation. The Tribunal also held that the reason for Mr Orr's rude and aggressive behaviour during the discussion was Mr Madden's attempt to reduce his working hours without his agreement.

Mr Orr appealed to the EAT, who upheld the tribunal's decision. He subsequently appealed to the Court of Appeal. The Court of Appeal by a majority upheld the EAT's decision that the dismissal was fair. They held that before reaching its decision to dismiss Mr Orr, the Council had taken all reasonable steps to acquaint itself of the relevant facts and had formed the view on reasonable grounds that he had behaved in a way that warranted his dismissal. Ultimately, the decision to dismiss Mr Orr fell within the band of reasonable responses.

### Practical Tip

It is often the case with large employers, such as the Council, that managers have delegated responsibility for making decisions about employment matters. Consequently, it should only be the knowledge of the individual decision maker at the time at which the decision to dismiss is made that is pertinent. This knowledge should be held to be the "employer's knowledge". However, a fair and reasonable investigation does need to be carried out (as happened in this case) which would give the employee an opportunity to raise any mitigating factors, such as a manager's behaviour. These were unusual circumstances in that Mr Orr had not attended either the disciplinary or appeal hearings to put forward his case and highlight Mr Madden's behaviour.

If you require any specific advice in connection with the material contained in this bulletin, or on any other Employment Law issues, please contact: Paul Chamberlain in Manchester on 0161 836 8864, Andrew Cross in Liverpool on 0151 600 3062 or Kevin James in Preston on 01772 229847.

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