JANUARY 2024

UPDATE

Disparity of treatment in unfair dismissal claims

Update prepared by Laurie Child (Jersey).

The Jersey Employment and Discrimination Tribunal has considered the issue of when a dismissal might be found unfair due to instances of similar behaviour that resulted in more lenient treatment. Giving judgment in *Harrison v CT Plus Limited* [2023] TRE 142, the Tribunal set out the approach to be followed in cases where disparity of treatment is alleged, expanding on prior judicial guidance in this area.

Background

The Jersey law test to be applied in cases of unfair dismissal involving misconduct has been confirmed in numerous cases before the Jersey Employment and Discrimination Tribunal.

In short, the Tribunal will apply the principles emerging from the longstanding English authority of *British Home Stores Limited v Burchell*: before reaching the decision to dismiss, the employer must have held a genuine belief in the employee's misconduct, based on reasonable grounds, and carried out a reasonable investigation. Further, the Tribunal must determine whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case.

Less well canvassed are the principles arising where the employee complains that the same employer dealt with prior cases more leniently, citing disparity of treatment as a reason why their dismissal in the present case was unfair.

In *Harrison*, the claimant, a bus driver, was dismissed following an incident reported by a member of the public to the employer and to the police. The report suggested that whilst driving a bus in service, the claimant had performed a manoeuvre which involved overtaking a line of stationary traffic and crossing on to the opposite side of the road, going around a pedestrian island in the process. The employer spoke to the employee about the incident and indicated that he appeared to have performed a dangerous manoeuvre.

The claimant rejected the employer's concerns from the outset and maintained that position throughout the ensuing disciplinary process. After having been dismissed, the claimant then appealed, as part of which he complained that other drivers had been involved in incidents in the past that were equally if not more dangerous, and had not been dismissed as a result.

The employer considered those allegations as part of the appeal hearing and found that they were without merit. When the claimant subsequently brought an unfair dismissal claim, the issue of comparable incidents allegedly having been dealt with more leniently was key.

Tribunal's assessment of the issue

Referring to the previous Jersey case of *De Sousa v Caring Homes Healthcare Group Limited* [2020] TRE 127 and to earlier case law in the UK, the Tribunal said the core principle was that employers should deal with similar conduct in a similar way.

> *'Employers should therefore consider the sanction that has been imposed on other employees in the company in similar circumstances and act consistently with previous decisions where appropriate. An employer ought to be prepared to justify any difference in treatment, for example on the basis of mitigating circumstances.'*

Citing a line of English appellate decisions, in particular *Paul v East Surrey District Health Authority* [1995] IRLR 305, a decision of the English Court of Appeal, the Tribunal acknowledged that there may be cases in which (1) the employer has previously treated similar behaviour less seriously, such that employees have been led to believe that certain categories of conduct will be overlooked or will not lead to dismissal, or (2) where it can be inferred that the reason for dismissal given by the employer is not the real reason. The Tribunal also observed that it may be relevant if employees in 'truly parallel circumstances' arising from the same incident are treated differently.

The Tribunal went on to note that according to the English authorities, it would be rare for a dismissal to be unfair on the basis of inconsistent treatment alone, and that it was necessary to look at whether there really had been a disparity of treatment as alleged.

Ultimately, said the Tribunal, the test is to ask whether the employer's different treatment of the employees was so irrational that no reasonable employer could have taken that decision.

Decision on facts in *Harrison*

Applying those principles to the facts in *Harrison*, the Tribunal noted that the evidence of the manager who heard the claimant's appeal was that, as much as the incident itself, a fundamental consideration was the attitude of the employee.

On the information available, the drivers in the alleged comparable incidents relied on by the claimant had been contrite and willing to learn or show improvement. In contrast, the claimant's dismissive attitude meant that the employer could not be assured that a similar incident would not happen again in future.

The Tribunal decided that this contrast in attitudes was sufficient to render the previous incidents not comparable to the claimant's case since, according to the English case of *Paul*, a remorseful employee may be treated differently to one who is not.

The Tribunal added that the facts of the claimant's case were, in any event, not truly parallel to those in the incidents he relied on:

> *'In the comparator cases, the fault was unintentional whereas Mr Harrison's fault resulted from a deliberate decision to drive in the manner charged'*.

Comment

The issue of alleged disparate treatment may arise in any case where an employee is told that their misconduct is so serious as to make their ongoing employment unacceptable. The expanded guidance given in *Harrison*, by a first instance tribunal typically asked to rule on this type of disparity allegation, gives a clear indication of the scope (and limits) of relying on previous incidents that may appear similar to the present case.

A subtle but unmistakable point arising from the Tribunal's assessment of the legal principles in this area is that, on this Tribunal's approach at least, it is incumbent on *employers* to consider previous cases before reaching a decision to dismiss. In other words, the question of prior leniency does not appear to be for a judge to consider only, but arguably the employer (and its human resources advisers) should consider it within the internal process as well.

It is, however, clear that for a disparity of treatment issue to succeed, the facts of a previous example of leniency must align squarely with the case leading to dismissal. Differences both between the incidents themselves and the employees' attitudes to those incidents will be central. That is in keeping with the

principle that, ultimately, what matters is the overarching fairness of the dismissal in the circumstances of the case at hand.

CT Plus Jersey Limited was represented by Mourant in successfully defending the claim.

Contacts

Carla Benest
Partner I Advocate
Mourant Ozannes (Jersey) LLP
+44 1534 676 076
carla.benest@mourant.com

Laurie Child
Counsel I Advocate
Mourant Ozannes (Jersey) LLP
+44 1534 676 067
laurie.child@mourant.com

Toby Mann
Associate I Solicitor (England & Wales) non-practising
Mourant Ozannes (Guernsey) LLP
+44 1481 739 358
toby.mann@mourant.com

2021934/89426353/1