

Same behaviour, different consequences – the Employment Court revisits "disparity of treatment"

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When dealing with disciplinary matters, as a general rule of thumb, employers are best advised to treat like cases alike.

However, as has become apparent in a recent decision of the Employment Court, treating "like for like" is not always as straightforward as it seems.

The case concerned two employees, Mr Smith and Mr X, who found themselves in a physical altercation during a colleague's leaving function at a bar on Courtenay Place. The employer conducted a disciplinary investigation into the incident and found that both employees had engaged in serious misconduct. However, while Mr X only received a warning, Mr Smith was dismissed.

Mr Smith subsequently alleged that there had been an unexplained and unjustified disparity of treatment between him and Mr X, in particular:

- **Disparity of process:** During the investigation, Mr Smith took agreed leave, while Mr X continued at work
- **Disparity of outcome:** Mr Smith was dismissed, while Mr X was only issued with a warning
- **Disparity with an interconnected case:** Years earlier, Mr Smith was involved in another incident at a work-related social function, when he became agitated, threw sausages and swung a chair at a colleague. His employer did not investigate this incident or impose a disciplinary sanction in respect of it
- **Disparity with an unconnected case:** Mr Smith argued that his employer had failed to take disciplinary action in respect of other similar incidents.

The Employment Court held that, while there had been a disparity of treatment in this case, it could be adequately explained. This is because the investigation revealed that Mr Smith was the protagonist, and that Mr X had acted in self-defence – a key distinction. In addition, the Court was of the opinion that the employer was not bound by its previously lenient treatment. Mr Smith could not reasonably expect that any subsequent behaviour would be ignored.

In any event, any disparity was adequately explained such that the dismissal was justified in the circumstances. As the Court stated, "Mr Smith cannot have been in any doubt that, once it was established he had punched a colleague about a dozen times inflicting serious injuries, he was at risk of being dismissed".

The case serves as a useful reminder that, while employers must be cognisant of proportionality when dealing with employees, the same behaviour will not always lead to the same consequences. If the disparity can be adequately explained, it will not provide a barrier to a justifiable dismissal.

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