BUDDLEFINDLAY

Legal update - Treating like for like

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While we wait keenly for the Court of Appeal's guidance on fair process in the *H v A Ltd* case (the appeal will be heard in May next year), there is one issue in the case which has largely gone unnoticed. The issue is disparity of treatment.

We anticipate this is partly because the disparity finding is not being appealed, and partly because disparity is seldom an issue that troubles employers – there are always factual differences between different situations, and employers are able over time to change their approach to an issue.

Disparity has however been raised recently with some of our clients, and *H v A* is worth noting.

The law on disparity

Consistency of treatment is relevant when assessing whether a dismissal is justified. When disparity is alleged, the Employment Relations Authority and courts ask three questions:

- Is there disparity of treatment?
- If so, is there an adequate explanation for the disparity?
- If there is no adequate explanation, is the dismissal nevertheless justified?

The comparison in H v A Ltd

Mr H was alleged (among other things) to have entered the hotel room of a young flight attendant, sat alongside her on the bed and touched the inside of her leg in a sexual way. This was found to amount to sexual harassment and Mr H was summarily dismissed.

Mr H's situation was compared to Mr M's, who four yearsearlier was issued with a final warning by A Ltd for holding his hand against a flight attendant's stomach and poking his fingers into another flight attendant's lower abdomen. This was found to be touching just short of sexual harassment, and was upheld as misconduct rather than serious misconduct. The final warning also concerned two instances of workplace bullying that amounted to serious misconduct.

A Ltd said Mr M's situation was different because Mr M's conduct was not sexual harassment, occurred in a public environment and not in an employee's hotel room, and did not have the same impact on the employees concerned.

The Employment Court disagreed. It said that Mr M's conductwas *"just as serious as that involving Mr H"*:

It is correct that the complaints which arguably amounted to sexual harassment concerning Mr M did not occur in the flight attendants' private rooms; but the central point is that they were inappropriate and offensive acts which caused distress, as is the case with any allegation of sexual harassment if established. This explanation does not provide adequate explanation for the disparity.

The Court also said that it did not matter that disparity was not raised as an issue during the disciplinary process. A Ltd's Disciplinary Procedures and Guidelines required that there be "*consistency across the group for similar offences"*. Even without the policy this must be so. It is the employer's responsibility to ensure there is consistency – or at least good reason for taking a different approach. Ultimately the Court found:

...a fair and reasonable employer should have considered the earlier case; and would have concluded that the two offences were so similar to Mr H's conduct that dismissal...could not be justified.

Comment

Many employers already consider consistency as part of their disciplinary processes. If you don't, you should. If you do, especially for large employers, it is worth reflecting on your systems. How do you capture the necessary information across a range of decisions and decision-makers to ensure there is consistency?

It is important as well to focus on the conduct, more so than the outcome. The different impact on the employees in Mr H's

and Mr M's cases was not material. Publicity is another example. It is the conduct itself and the *potential* for adverse publicity or 'disrepute' that is most relevant. Two employees who commit the same misconduct should not be treated differently simply because one of them was unlucky enough to make it into the media.

H v A is a reminder that the conduct need not be the same. The issue is whether the conduct is sufficiently similar. In close-run cases, the comparison should arguably be put to the employee for comment. This is not common practice, but is something that we have seen employees asking for.

Finally, employers are able to change their approach. If you want to take a sterner approach to a certain type of conduct, you should communicate this to employees. The passage of time may not be enough by itself.

Thanks

Thanks again for all your support. From the Employment Team at Buddle Findlay, we wish you and your families a happy and safe Christmas and holiday. See you in 2016!

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