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Practice Group(s):
Labor, Employment
and Workplace Safety

Case Alert: Employee Unfairly Dismissed for Going to Work Smelling of Alcohol

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What happened?

In *McElroy v Cambridgeshire Community Services NHS Trust*, an Employment Tribunal decided that the summary dismissal of a healthcare assistant for coming to work smelling of alcohol was unfair.

Mr McElroy was suspended pending investigation by his line manager following reports that he smelt of alcohol at work. The Trust's disciplinary policy gave being unfit for duty through the effect of alcohol as an example of gross misconduct. However, this was defined in the substance misuse policy as meaning that the employee was "incapable of functioning effectively at work". The investigation report noted that nobody had concerns about Mr McElroy's behaviour, nor had anybody reported that he had been acting as if drunk.

Mr McElroy's case was also referred to the Occupational Health department ("OH") who produced a report based on information provided by Mr McElroy. The report suggested that he was fit to return to work but, in the meantime, Mr McElroy's line manager became aware that he had been admitted to hospital for oesophagitis, a condition sometimes associated with excess alcohol consumption. She therefore sent additional questions to OH and asked Mr McElroy to attend another OH appointment, but he refused to do so.

Following a disciplinary hearing, Mr McElroy was dismissed. The Trust's reasons for dismissal included the original disciplinary charge of smelling of alcohol, but also included his failure to follow a reasonable instruction to attend a second OH appointment although no previous warnings had been issued to Mr McElroy in respect of this.

The Employment Tribunal found that it was reasonable for the Trust to find that Mr McElroy had attended work smelling of alcohol and to seek a second report from OH. However, the Employment Tribunal ruled that a reasonable employer would not have concluded that Mr McElroy was unfit for duty (as defined in the Trust's disciplinary policy) and would not treat smelling of alcohol as gross misconduct without some evidence of an accompanying impairment of performance.

The Employment Tribunal also decided that Mr McElroy's failure to attend a second OH appointment should not have been put forward as a reason for dismissal, given that (i) Mr McElroy was not made aware (either before or during the disciplinary process) that this was being considered as a disciplinary issue; and (ii) this contradicted the Trust's substance abuse policy which provided that refusal to participate in such steps would not, of itself, be a ground for disciplinary action.

What does this mean?

This case emphasises the importance of having procedures in place which adequately address the problem at issue. When such issues arise, employers must identify what action should be taken and then take the appropriate steps under the relevant disciplinary or substance misuse policy. Where a disciplinary issue is upheld, relevant

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warnings should be given and any sanctions imposed must be appropriate and reasonable.

What should we do?

Employers must ensure that they follow their procedures when dealing with issues in the workplace and apply them from the outset, thereby ensuring that a consistent approach is maintained throughout the disciplinary process. We recommend that employers implement tailored policies that deal with a variety of circumstances to remove any ambiguity or confusion as to what is and what is not acceptable in the workplace.

It is also important for employers to keep any disciplinary proceedings under review and keep the employee informed of the allegations against him. In particular, employers must be clear about whether such allegations constitute disciplinary issues if this is unclear or differs from the employer's relevant policies.

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