

THE MISSING PIECE



Welcome....

to the latest issue of *The Missing Piece*, the monthly legal bulletin from *In House Lawyer*. *In House Lawyer* is my individual and exclusive legal service with strong ideals and a bespoke approach.

In this issue I'll be discussing when different penalties might be justifiable for employees involved in the same disciplinary incident.

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Normally the worst outcome of a work night out is a hangover which can usually be resolved by a bacon roll the next morning. But when a fight breaks out between employees, the outcome for the individuals may be far more significant, and could result in disciplinary sanctions including dismissal. In a recent case involving an altercation at an office function, the Employment Appeal Tribunal (EAT) held that where the two employees involved have behaved differently then it will not necessarily be unreasonable to apply different sanctions.

Background. The case of *MBNA Limited v Jones* considered conduct which had taken place in November 2013 at a racecourse event held by MBNA for its employees. MBNA had told its employees in advance that normal workplace guidelines and disciplinary procedures would apply.

Two employees, Mr Jones and Mr B, attended the event together with Mr B's sister, and engaged in what was described as "fun banter" which included Mr Jones licking Mr B's face and Mr B kneeling Mr Jones in the back of his leg. The evening progressed, and on seeing Mr Jones with his arm around Mr B's sister, Mr B again knelt Mr Jones. Mr Jones responded by punching Mr B in the face. Mr Jones and some others then went on to a club. Mr B waited outside, sending seven threatening texts to Mr Jones. None of these threats were carried out and Mr B eventually left without seeing Mr Jones again.

Both Mr B and Mr Jones were subject to disciplinary hearings chaired by the same disciplinary hearer. These hearings resulted in Mr Jones being dismissed on the basis that he had not been substantively provoked by Mr B, but had started the whole affair by licking Mr B and then over-reacted by punching Mr B.

Mr B, on the other hand, was given a final written warning, on the basis that the kneeling was not done with any force or aggression and while the threatening texts amounted to gross misconduct they were made as an "immediate response" to Mr Jones punching him in the face.

Mr Jones claimed that he had been unfairly dismissed, and complained to the Employment Tribunal. It was held that MBNA had acted unreasonably by applying the "defence of provocation" differently in each case.

The decision. However, the EAT overturned this judgment, holding that the two employees' conduct had not been "truly parallel" as there were important distinctions between the two cases. MBNA was therefore entitled to treat the allegations differently. Its lenience in the case of Mr B did not mean that the dismissal of Mr Jones for gross misconduct was unfair as dismissal in Mr Jones' case was clearly within the range of reasonable responses.

The EAT also found that while provocation is not a total defence, it can be a mitigating factor to be considered by the employer.

What can we learn from the case? As MNBA reminded its employees before the racecourse night took place, employer-organised events are normally an extension of the working environment and usual rules continue to apply. Before work nights out, employers would be wise to ensure that they have appropriate guidelines and disciplinary procedures in place, that the rules are communicated to employees, and that they are implemented fairly.

This case does provide some comfort to employers. If employees have behaved differently in relation to the same incident, employers should consider each allegation of misconduct individually and in considering if a disciplinary sanction is appropriate, take into account each employee's own actions and any relevant mitigating circumstances. It also reinforces the leeway that employers have in choosing what sanctions to impose for misconduct, provided they carry out a fair and thorough investigation, go through a fair disciplinary process, and consider carefully the appropriate sanction to punish the misconduct. However, if different disciplinary sanctions are applied to employees who were involved in the same incident, employers should clearly explain the distinguishing features in order to lower the risk of a challenge on grounds of inconsistent treatment.

THAT'S ALL FOR THIS MONTH...

If you have any queries, comments or request for future bulletins then get in touch, I would be delighted to talk to you or meet at your convenience.



+44 (0) 7525 810 444



+44 (0) 1244 318 470



edelgado@inhouselawyer.uk.com



www.inhouselawyer.uk.com

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