

Managing disciplinary procedures in tandem with external processes

Clodagh Hogan and Shannett Thompson consider the lessons from two recent cases in which employees being disciplined were also subject to scrutiny by outside bodies



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'The EAT agreed that it had not been unfair for the bank to rely on the tribunal's credibility findings against the claimant without carrying out further investigation before the disciplinary hearing.'

Two recent employment cases have shone light on the tricky issues that can arise for employers carrying out a disciplinary procedure when an external body becomes involved. This may be a regulatory body, the police, a court or a tribunal. The issues may become more acute when the employee is a regulated individual (such as a doctor or architect). The employer will need to make many decisions. Should it suspend the employee? With or without pay? Should it pause the internal procedure pending the outcome of the external process? Or do the findings of the external process simplify the internal procedure so that the employer can proceed straight to a disciplinary hearing and dismissal?

The two decisions referred to below provide employers with useful guidance to ensure they act fairly.

Radia v Jefferies International Ltd [2019]

In *Radia*, an investment bank dismissed a regulated financial services executive for gross misconduct. It had not carried out its own disciplinary investigation but instead had relied on an employment tribunal's finding that the employee was dishonest as the basis for dismissal.

Mr Radia was a senior regulated employee who during his employment had brought a disability discrimination claim against his employer. This was unsuccessful. The employment tribunal criticised his credibility as a witness, finding that his evidence was 'not credible in many respects' and 'on lots of occasions evasive'. It also found that he

had not told the truth or had misled the tribunal in various respects. By contrast, it held that the bank's witnesses were credible and honest throughout.

The bank then suspended Mr Radia pending a disciplinary investigation and notified the Financial Conduct Authority (FCA) of the suspension, as required. The allegation against him was that he had 'materially and fundamentally breached' his employment contract 'by acting dishonestly'.

Without further investigation, the relevant manager proceeded straight to a disciplinary hearing. He told Mr Radia that the tribunal's credibility findings were the starting point but that he should make such representations as he wished. On hearing Mr Radia's representations, the manager concluded that three out of four of the tribunal's criticisms of the credibility of Mr Radia's evidence were justified.

The disciplinary manager had to decide whether Mr Radia's conduct was consistent with his continued employment at managing director level as an analyst. He held a regulated position and that required a high degree of honesty and probity. In making his decision, the disciplinary manager considered the relevant section of the FCA handbook. This states that when assessing a person's honesty, integrity and reputation, an employer should take all relevant

North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387
Radia v Jefferies International Ltd [2019] UKEAT/0123/18/JOJ

matters into account, including whether a person has been criticised by a court or tribunal. The disciplinary manager concluded that Mr Radia's behaviour 'was not compatible with his being a fit and proper person'. He accordingly dismissed him for gross misconduct.

used the words 'dishonest' or 'lie', it had found Mr Radia's evidence not credible in many respects, which was very damaging for him. There was no need for the employer to prove deliberate dishonesty by Mr Radia.

Although the bank allowed Mr Radia a right of internal appeal against dismissal, the relevant manager considered it on the papers, without holding an appeal hearing.

Mr Radia unsuccessfully brought various claims against the bank and subsequently appealed to the Employment Appeal Tribunal (EAT).

The EAT agreed that it had not been unfair for the bank to rely on the tribunal's credibility findings against the claimant without carrying out further investigation before the disciplinary hearing. While it was true that the first tribunal had not

Mr Radia did, however, succeed on one point: although the bank allowed him a right of internal appeal against dismissal, the relevant manager considered it on the papers, without holding an appeal hearing.

North West Anglia NHS Foundation Trust v Gregg [2019]

In *Gregg*, the Court of Appeal considered an employer's handling

of an internal disciplinary process where the employee was under regulatory and police investigation.

North West Anglia NHS Foundation Trust employed Dr Gregg as a consultant in anaesthetics. The trust had concerns over the circumstances of two patients' deaths while in Dr Gregg's care. It commenced an investigation and excluded him from duty on full pay. At the same time, he was facing regulatory and police enquiries into the patients' deaths. The Interim Orders Tribunal of the Medical Practitioners Tribunal Service imposed an interim suspension order on Dr Gregg. This meant that for 18 months his registration was suspended and his licence was withdrawn. The trust lifted his exclusion but suspended his pay.

Dr Gregg successfully obtained an injunction from the High Court. This prevented the trust from continuing its investigation until the police had completed their investigation and the Crown Prosecution Service (CPS) had decided whether to charge him. The High Court found that the

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trust was in breach of contract by not paying Dr Gregg's salary while he was suspended. The trust appealed to the Court of Appeal.

Withholding pay during suspension

The Court of Appeal (the court) upheld the High Court's decision that the trust was not entitled to withhold Dr Gregg's pay during his interim suspension. It held that there was nothing in Dr Gregg's contract, express or implied, which permitted the deduction of pay in these circumstances. It remarked that such suspensions are now a feature of medical practitioners' professional lives, so if the trust intended to withhold salary, the contract would have said so. There was also no evidence of any custom and practice in this respect.

The court also looked at the common law doctrine of 'ready, willing and able' to work. If an employee is not at work, for example due to a suspension, they have to show that they are ready, willing and able to perform that work if they wish to avoid a deduction to their pay. The court determined that Dr Gregg was ready, able

and willing to work; it was the tribunal's suspension of his registration and withdrawal of his licence which prevented him from working. The court held that imposing a suspension, which is not voluntary, does not justify deducting an employee's pay.

The judgment was definitive that where the contract is silent on the issue of deducting pay during a suspension, the default position is that pay should continue. Only exceptional circumstances, such as a complete or part admission of guilt, might justify a deduction.

Postponing disciplinary proceedings

The court also found that an employer does not usually need to wait for the conclusion of any criminal proceedings before dismissing an employee or commencing or continuing internal disciplinary proceedings. A court will usually only intervene if the employee can show that continuing the disciplinary process will give rise to a real danger (and not merely a notional danger) of a miscarriage of justice in the criminal proceedings.

In the court's view, the facts of this case did not justify it interfering with the trust's management of its own employees. It held that the

High Court's decision to prevent the ongoing disciplinary process and postpone it while awaiting the outcome of the police investigation amounted to micro-management.

The court concluded that the trust did not breach the implied term of trust and confidence. The trust's conduct, in wanting to progress its own internal disciplinary investigation without waiting for the conclusion of the separate police investigation, was not calculated to destroy or seriously damage its relationship with Dr Gregg. Further, the trust had reasonable and proper cause to follow its disciplinary procedure in accordance with its contract with Dr Gregg. There was also no evidence that the internal disciplinary process would have any effect on the criminal investigation, let alone give rise to a real danger of a miscarriage of justice.

The trust, and those who fund it or use its services, should not, the court pointed out, have to wait for a separate organisation to conclude its investigation, which could take months or years. There was no rational basis in this case for tying the contractual, internal investigation to the conclusion of the ongoing police investigation. ■

Lessons for employers

Together, these two decisions provide clear guidance to employers on how to act when an external process, be it a regulatory or criminal investigation or a critical court judgment, calls an employee's conduct into question.

Suspension is an option but it must be on full pay

When an employee comes under investigation by a regulatory body or by the police, their employer may want to suspend them during its own investigation of the matter. Critically, the suspended employee should remain on full pay throughout the suspension. The only exceptions are if their contract of employment expressly provides for a deduction of pay in this situation or exceptional circumstances arise, such as the employee admitting to being guilty of misconduct.

No requirement to pause internal disciplinary proceedings

An employer may have already instigated its own internal disciplinary procedure or it may wish to commence the process having learnt of an outside investigation into an employee. The employee is likely to attempt to halt the internal investigation pending the outcome of any parallel investigation. The employer is nonetheless entitled to progress and conclude its own disciplinary procedure, even going so far as to dismiss the employee, without waiting for the conclusion of the other proceedings.

The external process may simplify the internal process

Where a court or tribunal makes findings against an employee, such as negative findings about their credibility as a witness, an employer may rely on those findings to proceed straight to a disciplinary hearing. It does not have to carry out its own investigation first.

The other aspects of the disciplinary process must still be fair

The fairness of the overall process is of paramount importance and employers should not overlook this. In *Radia*, the employer fell down because although it had allowed the employee a right of appeal against dismissal, there was no appeal hearing. So, even though an employer may be able to continue its own processes while an external investigation is ongoing, this does not mean that other aspects of the procedure can be lackadaisical.