In the case of *Ajaj v Metroline West Ltd*, the Employment Appeal Tribunal (EAT) has overturned a decision of the Employment Tribunal (ET) and found that an employee ‘pulling a sickie’ can amount to gross misconduct.

**Facts**

Mr Ajaj was employed by Metroline West Ltd (Metroline) as a bus driver. On 26 February 2014, Mr Ajaj reported that he had slipped on water at a Metroline depot and injured himself. As a result, Metroline referred Mr Ajaj to Occupational Health. Metroline was concerned about the genuineness of the nature and extent of Mr Ajaj's injuries and arranged for covert surveillance of Mr Ajaj to take place on 18 March 2014, at around the same time he was due to attend for a sickness absence review. Metroline believed the footage obtained was inconsistent with Mr Ajaj’s account of his injuries.

A second medical examination and second sickness absence review took place in April 2014 and again Mr Ajaj was placed under video surveillance. At a third sickness absence review on 24 April 2014, Metroline showed Mr Ajaj the two surveillance reports and put to him that the reports were inconsistent with Mr Ajaj’s account of his injuries. Metroline also sent the surveillance reports to Occupational Health for their comment.

In May 2014, Mr Ajaj attended a disciplinary hearing regarding allegations of making a false claim for sick pay, misrepresenting his ability to attend work, and making a false claim of an injury at work. The allegations were upheld and Mr Ajaj was dismissed for gross misconduct with immediate effect.

Mr Ajaj then brought a successful claim before the ET for unfair dismissal.
At the ET, Metroline argued that it had fairly dismissed Mr Ajaj based on its reasonable belief of Mr Ajaj’s misconduct.

Whilst finding that the Metroline had genuinely held beliefs as to matters of Mr Ajaj’s misconduct, the ET held that the fairness of the dismissal should be based on ‘capability’ considerations and that a reasonable employer, before dismissing the employee, should have regard to the specific duties the employee was required to perform when determining the employee’s capability of performing those duties based on his real (rather than exaggerated) symptoms.

EAT Decision

Metroline’s appeal against the finding of unfair dismissal was upheld. The Honourable Mrs Justice Simler DBE, sitting alone in the EAT, found that where an employee ‘pulls a sickie’ but is not sick, it is dishonest and a fundamental breach of trust and confidence between the employer and employee.

Mrs Justice Simler stated that “the Employment Judge assessed the Respondent’s genuine belief in the Claimant’s misconduct by reference to capability considerations that were irrelevant and impermissibly substituted his own view”. Having held that Mr Ajaj had exaggerated the effects of his injury “it was perverse for the Employment Judge to [then] hold that the dismissal [for misconduct] was unfair and wrongful”. The EAT therefore overturned the finding of unfair dismissal.

Learning point

The decision of the ET was somewhat surprising in that the Employment Judge applied standards relevant to capability dismissals rather than applying the established procedures and standards for misconduct dismissals. The EAT has now clarified this situation and the case is a useful reminder that employers need to be clear from the outset as to the reasons why an employee is being dismissed and follow the appropriate steps in affecting that dismissal.

Whilst used by Metroline in this matter, employers need to be cautious when using covert surveillance on their employees to prevent possible breaches of the Data Protection Act 1998.

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