

# Unfair dismissal: Disciplinary investigations

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The removal of an investigator's evaluative conclusions from an investigation report following legal advice did not mean that the dismissal was unfair.

## THE FACTS

Dr Dronsfield was a professor at the University of Reading. A complaint was made about a sexual relationship between him and a student. The University of Reading had detailed guidance on relationships between staff and students. However, Dr Dronsfield could only be dismissed for conduct of an "immoral, scandalous or disgraceful nature incompatible with the duties of the office or employment". A disciplinary investigation was conducted. There were several drafts of the investigation report. The final draft stated that "In essence, there is no evidence to suggest that the conduct of Dronsfield constituted an immoral, scandalous or disgraceful nature." Following legal advice from the University's in-house lawyer, this was removed from the version of the investigation report that was provided to the Disciplinary Panel. The Disciplinary Panel decided that Dr Dronsfield's conduct was of an "immoral, scandalous or disgraceful nature" and he was dismissed for gross misconduct. He brought an internal appeal, which was conducted by an independent barrister. As a result of a Freedom of Information request, the barrister hearing the appeal had access to the various versions of the report and heard arguments about the impact of the removal of the investigators' evaluative comment. She did not consider that the report had been changed in order to make dismissal more likely, nor that the investigators had been pressured by anyone to change the report. She overturned some of the Disciplinary Panel's decisions, but still concluded that dismissal was the only appropriate sanction.

Dr Dronsfield unsuccessfully claimed in the employment tribunal that he had suffered sex discrimination. The tribunal's finding on this was not appealed. The tribunal held that his dismissal had been fair. He appealed this finding to the EAT, which remitted the claim to the employment tribunal. The second employment tribunal also held that the dismissal was fair. Dr Dronsfield again appealed to the EAT. The principal ground of appeal concerned the tribunal's approach to the removal of the investigators' opinion about Dr Dronsfield's conduct from the investigation report. The EAT found that the second tribunal had properly concluded that the University's approach to this had not been unfair and the appeal was dismissed.

Important points arising from the various judgments are:

- It is usual and reasonable for a lawyer to advise on a complicated investigation.
- It was reasonable for the lawyer to advise that evaluative judgements should be left for the Disciplinary Panel, rather than the investigator.
- It was reasonable for the investigators to follow the legal advice and change their approach in relation to including evaluative judgements in the report, and they were entitled to do so.
- This was not a change of opinion following legal advice, but a change in approach.
- The report fairly set out the investigators' position. The amendments did not mean that a false or incomplete position was set out in the report.
- There was no suggestion that the lawyer had improperly put pressure on the investigators to change their opinion or approach.
- The barrister hearing the internal appeal had specifically rejected the suggestion that the amendment had been made in order to make dismissal more likely.
- This was not a change of opinion following legal advice, but a change in approach.
- The Disciplinary Panel had access to all the evidential material, including notes of the investigation meeting with Dr Dronsfield. Dr Dronsfield's version of events had been accepted by the investigators.

## WHAT DOES THIS MEAN FOR EMPLOYERS?

HR and legal advisors should be very careful when they advise on grievance and investigation reports. Useful points to remember are:

- It is critical that the investigators' views are their own, and that they are prepared to stand by them if challenged.
- Any pressure on investigators to change their findings of fact to put forward the most favourable case for the employer may well come back to bite the employer further down the line.
- Care needs to be taken when amending versions under legal privilege, in particular where there is an external investigator.

- Terms of Reference should make clear whether investigators are expected to give evaluative views, or just make findings of fact.
- Investigation reports must not include recommendations on disciplinary sanctions: this must be left to the decision maker.

Dronsfield v The University of Reading UKEAT/0255/18

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