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In cases of negligence, such as a road traffic or workplace accident, the standard which a defendant has to meet is that of “reasonableness”. The key questions are: Is there a duty of care? Was there a breach of that duty? Was harm caused to the plaintiff as a result of that breach of duty? Did the defendant do all things that the reasonable person would do in their situation? This “reasonableness” test was long ago expressed as including an enquiry as to what the “man on the Clapham omnibus” might think. This mythical figure was considered to be of reasonable intelligence but he did not possess any particular expertise. He represented the common man against whom the actions of others could be measured. To bring the test closer to home and up to date, when asked whether a person has acted reasonably one might well ask “what would the guy on the LUAS think?”

What, you may well ask, has this got to do with HR? Well, the point is that in very many situations where an employer is challenged as to its dealings with employees, the issue comes down to whether the employer has acted reasonably in all the circumstances. In general, the employer is considered to be the more powerful party in the relationship and the Courts are willing to accept that the employee needs to be protected. The key point to remember is that the actions of the employer will be judged by a Court or tribunal objectively in the cold light day and a very long time after the events took place. It is important to remember that in any claim there is likely to be an unspoken and often sub conscious bias in favour of the employee. Much of the legislation in the field of employment law is employee protection orientated. Indeed, the word “protection” appears in the title of many of the Acts and Regulations so it is hardly surprising then that a Court or Tribunal will expect the employer to behave in a way which does not take advantage of the employee. Solicitors representing employers will often urge a Court or Tribunal not to substitute its own decision for that of the employer but rather it should ask whether what the employer did fell within the range of reasonable responses which were open to the employer.

One circumstance which can often cause difficulty for employers is when they are dealing with a situation where they have reserved an absolute discretion as regards some aspect of the employee's terms and conditions. For example, a sick pay policy may state that any pay to an absent employee shall be at the employer's absolute discretion. An employer who relies on this absolute discretion runs the risk of a challenge where they have not exercised their discretion in a reasonable way. The Courts or Tribunals may imply into such contracts a requirement that any discretion not be exercised arbitrarily or capriciously. For example, if one employee is not paid while absent on sick leave and another is, the possibility arises that the first employee may challenge the employer on the ground that they are being discriminated against for some reason. In such a case the employer would need to have objective grounds for treating similar employees differently.

It often happens that in the heat of the moment an employee will say or do something rash, up to and including resigning on the spot. Some employers may sieze the moment and hold the employee to the resignation even though the employee may seek to change their mind. Who is right? The answer depends on the circumstances but will be determined by the reasonableness test. A court or tribunal may take a view that what happened was a one-off event that perhaps escalated out of control and that the resignation was not the employee's considered decision and it would expect the employer, as the more sophisticated and better resourced party, to have the ability to recognise what has happened and give the employee a cooling off period in which they would have an opportunity to reconsider.

The failure of an employee to meet targets is a common cause of disputes. An employer taking a black and white approach to this subject is skating on very thin ice. In order for failure to meet targets to justify a dismissal, an employer will have to establish that the targets were reasonable in the first place and that the employee had reasonable resources and back-up to enable him to achieve them. If circumstances change after the setting of objectives then the changed circumstances must be taken into account by the employer. The current economic downturn is an example of this as might be the arrival of new competition or a campaign of lower prices by an existing competitor. The employer should keep the targets under review and the employee should be told if there are any concerns about his performance and given a reasonable opportunity to correct matters.

Another common instance of employers not being reasonable is where there is a legitimate finding, after due process, that an employee has failed to meet the required standards and that a sanction is approriate but the sanction actually imposed is disproportionate. Employers often use a breach of discipline to justify dismissal whereas a tribunal may conclude that a warning or other sanction might have been an adequate punishment for the particular breach. The punishment must fit the “crime” and the employer will be required to look at an employee’s overall record and take proper account of previous good service.

Employers who wish to make changes in the working arrangements need to consult their employee’s contracts and/or employee handbooks to see whether there are any restrictions – in general terms and conditions can not be changed without the employees’ express written agreement. Where change is contemplated then the employer will, as an absolute minimum, have to ensure that reasonable notice is given to employees.

It is always well worth keeping in mind that if an employee has sufficient service to bring a claim under the Unfair Dismissals Acts then any dismissal is deemed to be unfair and the employer must therefore dislodge that presumption by establishing that it has substantial grounds to justify the dismissal. In addition, the behaviour of both parties will be examined in assessing what the level of compensation should be so an employer who acts in a particularly unreasonable manner runs the risk of a higher award to reflect the tribunal’s disapproval of its conduct.

The possible circumstances leading to employment law disputes are infinite and it it not possible to cover all aspects in this article but the reasonableness test is ever present. The moral of this story is that before any decision is taken which adversely affects employees, the employer should do some serious testing of its own position to try to see whether it can pass the reasonableness test. Very often this requires having the situation assessed by someone who is not too close to the issue and who can bring an indepentent perspective to bear on the issue. What would the guy on the LUAS think?

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