New Case Law Update for Employment Committee Meeting 4th November 2015

MBNA Limited v Jones UKEAT/0120/15- Disparate treatment of employees who were not in "truly parallel circumstances"

Mr Jones was employed by MBNA Limited from February 2006 until December 2013. In November 2013, MBNA held an event at Chester Racecourse and confirmed to staff that it was a work event, and that normal standards of behaviour and conduct would apply. Any misbehaviour would be subject to MBNA's procedures and guidelines.

Mr Jones attended the event along with another employee, Mr Battersby, and Mr Battersby's sister. Both Mr Jones and Mr Battersby drank alcohol before, and during, the event. At one stage in the evening, Mr Jones had his arm around Mr Battersby's sister which seemingly led Mr Battersby to knee Mr Jones in the leg. Mr Jones retaliated by punching Mr Battersby in the face.

Mr Jones subsequently left the event and went to a club. While at the club, Mr Battersby waited outside and sent Mr Jones seven texts threatening him with physical violence. In fact, Mr Battersby did not carry out his threats and there was no further incident between Mr Jones and Mr Battersby.

After an investigation and disciplinary hearings, Mr Jones was dismissed. MBNA accepted that Mr Battersby kneed him, but said that this was not done with any force or aggression. It was not "substantive provocation" for Mr Jones punching him. Mr Battersby, on the other hand, was given a final written warning for sending text messages of an "extremely violent" nature but he was not dismissed on the basis that MBNA found that they were made as an immediate response to Mr Jones punching him.

Mr Jones brought a claim for unfair dismissal.

The tribunal found that the decision to dismiss Mr Jones but not Mr Battersby was unreasonable and that the "defence of provocation" was applied differently to the two men during their disciplinary hearings. This particular disparity was also unreasonable, so for both those reasons the Tribunal Mr Jones's dismissal was unfair. The employer appealed.

In the 1981 case of *Hadjioannou v Coral Casinos Ltd [1981] IRLR 352*, the EAT had given guidance on consistency, stating that an employer's previous decisions not to dismiss employees for the same misconduct will only make a dismissal unfair in two types of case:

- Where the employer has previously treated similar behaviour less seriously, often referred to as condonation, so that:
    - employees have been led to believe that certain categories of conduct will be overlooked or will not lead to dismissal; or

    - it can be inferred that the employer's asserted reason for dismissal in this case is not the real reason.

- Where employees in "truly parallel circumstances" arising from the same incident are treated differently.

The EAT in **MBNA Limited v Jones** clarified that the relevant question is still whether the employer has acted reasonably towards the employee who has been dismissed, regardless of what sanction has been applied to the other. Disparity of treatment will occasionally be relevant to reasonableness, but the circumstances need to be "truly parallel". With respect to provocation, the EAT said that there is no such "defence" and that provocation would only be a mitigating factor, to be weighed by the employer.