

Newsletter - Employment Law Update February 2025

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1. Managing Gross Misconduct Cases

A worker was awarded £52,093.08 compensation for unfair dismissal, as well as £8,700.96 in damages and a basic award of £15,504 totalling £76,298.04, following a flawed investigation that resulted in him being dismissed for use of offensive and abusive language.

The worker was employed by Network Rail from 1 May 1995 as a signaller at Thames Valley Signalling Centre.

The site had a policy that any food left in the fridge without a name and date should be thrown out by cleaners on Fridays, but this had upset the Employee and his colleagues.

On 29 January 2021, the Employee confronted an agency cleaner, in the kitchen, allegedly calling him a “f***king Polish Nazi food thrower”.

On the same day James Hillman told Annalise Guelbert, both part of the management team, that he had witnessed the Employee saying this.

Managers decided not to suspend him, as they only had third-hand information that could have been misinterpreted, so they decided to conduct an investigation the situation the following week.

The issue of suspension was never considered and the Employee continued working.

On 1 February the Agency Cleaner was interviewed and stated that someone had said “f**k you” to him but that he had not heard anything else because the person was “moving away”.

The Employee attended an investigation meeting on 24 March 2021, almost two months after the incident. He admitted to telling his colleague, that it was a “f**king disgrace”. However, he denied calling anyone a Nazi.

Hillman gave a different account to the Investigating Officer from the version he told Guelbert, and was “equivocal and unreliable”, the tribunal found.

The Investigating Officer concluded that the case should progress to a disciplinary hearing, stating that, if the allegations were proven, they would constitute gross misconduct.

The Cleaner was again interviewed by the Officer, who had a colleague act as interpreter. He said he was cleaning the fridge and an unspecified man walked off and shouted “fuck you Mr B” and then called him a “fucking Polish Nazi food thrower”, before coming back a few hours later and apologising.

The identity of the man who swore at him, or who apologised, was not resolved and it was not clear whether they were the same man.

The disciplinary officer, summarily dismissed the Employee in a letter date 1 February 2022, one year after the incident, with the reason being the use of the “Nazi” phrase.

Panel’s Judgement

The Employment Judge was not satisfied on the balance of probabilities that the Employee said the “Nazi food thrower” phrase. They said: “We accept that he swore coming out of the kitchen, saying ‘f**king disgrace’. There are several witnesses who refer to the claimant being loud, and acting that way.”

They found swearing was “not uncommon” on the operations floor, and so using the term “f**king disgrace” was not beyond the realms of normal, and thus not blameworthy.

They said; “No specific act of harassment other than the [Nazi] phrase was put to the claimant. Therefore, if the dismissal was to be said to be on the grounds of behaviour regardless of the use of the phrase, there was not a reasonable investigation into that broader allegation.”

Additionally, the panel found that the order of interviewing, which left the Employee at the end, “coloured” the Investigating Officers interpretation of the events, and her view of the events had already been “crystalised” by the time she reached the claimant.

Key Points

1. There was no hard and fast evidence of the allegation. The Employer could have argued that although the evidence prior to the Hearing wasn’t conclusive, something could have emerged during it. However, that didn’t happen, and there was no hard evidence that linked the offensive behaviour to the Employee. Despite this a decision to dismiss was still taken.
2. The process took too long. ACAS Guidelines state that disciplinary issues should be addressed promptly and without undue delay. This process was too long, and coloured the reliability of witness statements.
3. The accused Employee should have been interviewed as quickly as possible so that their recollection of events was still fresh, not at the end of the investigation.
4. There was no suspension. To dismiss someone for Gross Misconduct required an Employer to show that the Employee had willfully and deliberately set out to cause harm. Obvious examples being theft, violence, breaching health and safety.

Under these circumstances it would be reasonable to dismiss someone without prior written or final written warnings, due to the risk of keeping them in the workplace.

If someone is such a risk, keeping them at work while the allegations are investigated would be perverse. It is perfectly permissible for the Employer to remove them so as to remove that risk. In this case there was no suspension, and the Employee remained at work for twelve months prior to dismissal.

2. Minimum Wage from April 2025

Workers aged 21 and over (National Living Wage)	£12.21
Workers aged 18 – 20	£10.00
Workers under 18, apprentices under 19, or over 19 in first year	£7.55

PROFILE

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