

Why employers should check internal policies and take care over use of surveillance against employees

In the case of *Mr A Jones v Pilkington UK Ltd*, a Tribunal has upheld Mr Jones' claim of disability discrimination, unfair dismissal and breach of contract, after Pilkington relied on surveillance evidence to support a gross misconduct dismissal and failed to follow their internal sickness absence policy. This article looks at what happened in this case, and how employers can avoid falling into a similar trap.

How will this case affect employers going forward?

This case serves as a reminder that employers should only use surveillance against employees where it is reasonable and proportionate to do so. Employers should consider whether there are less intrusive ways to investigate concerns, before instructing any surveillance company.

If surveillance is used, employers should record the matters they have considered in concluding that the use of surveillance is reasonable in the circumstances, and ensure that they give clear instructions to the surveillance company in terms of the scope of the instructions. Here, Pilkington Glass were not expecting the surveillance company to delve into Mr Jones' property ownership and credit history, and this did go too far.

Any surveillance relied upon should be disclosed to employees at the investigation stage, where they should be given the opportunity to review the footage and comment on it throughout the disciplinary process. In this way, employers can deal with any comments by the employee that their conclusions about the footage are wrong. In Pilkington Glass, Mr Jones was not shown the footage until shortly before the decision to dismiss was communicated to him, and he was not given adequate opportunity to explain the footage.

This case does not prevent employers from using surveillance where reasonable, however, care should be taken to ensure it is used in the right way.

This case also serves as a reminder both of the importance of following internal policies carefully and of using medical advice in support of any suspicion that an employee is exaggerating their condition. If Pilkington Glass had obtained medical advice to confirm its view that the surveillance footage showed Mr Jones engaging in activity which was inconsistent with his shoulder injury, it is likely that they could have justified their decision to dismiss. Alternatively, medical advice may have confirmed that there were no inconsistencies, which would have avoided a disciplinary process at all.

The facts

Mr Jones worked for Pilkington Glass from March 1983 until his dismissal for gross misconduct on 14 October 2019. Pilkington Glass is a major UK company in the UK and a large employer. It has access to significant inhouse occupational health and HR support.

Pilkington Glass have a very generous sick pay scheme in place, and due to Mr Jones' length of service, he was entitled to 56 weeks' paid sickness absence. The sickness absence procedure included the following section:

"Employee Conduct Whilst Absent

During any period of absence a major objective will be a speedy return to fitness and work. Therefore, employees will be required to conform to the following guidelines:-

- (a) Not to participate in any sports, hobbies or social activities that are in any way inconsistent with, or could aggravate the illness or injury, which could delay recovery.*
- (b) Not to undertake other employment, whether paid or unpaid.*
- (c) Not to engage in any work around the home in terms of home improvements which could aggravate the illness or injury.*
- (d) Not to engage in any activity which is inconsistent with the nature of the illness or injury."*

In addition, the sickness policy included the following provision:

"Abuse

Entitlement to Company Benefit may cease if the employee behaves in a way which, in the opinion of a designated Medical Adviser, may hinder recovery or if they refuse suitable employment. Abuse of the scheme may lead to disciplinary action and restrictions on the benefits available."

In the 1980s, Mr Jones developed Hodgkins Lymphoma and undertook a high dose of radiotherapy, which successfully put his cancer into remission. After this, he had very little sickness absence and good service.

In 2006, Mr Jones developed an issue with his shoulder which was a side effect of the radiotherapy treatment he had received, called radiation induced neuropathy. Unfortunately, there is no cure for this progressive condition and the treatment is management of the pain.

From 2018, Mr Jones developed a mental health condition because of the physical issues, and a test found his depression "severe" and his anxiety "moderate to severe".

From 5 November 2018, Mr Jones was off sick due to his shoulder injury and provided regular fit notes covering his absence. During this time, he also notified Pilkington Glass about his depression. He attended regular ill health reviews with Pilkington, but was not provided with notes from any of the meetings.

On 7 February 2019, he was referred to occupational health, who agreed he was unfit to work due to his shoulder condition.

Sometime in March 2019, an unnamed employee informed management that they had seen Mr Jones in a local cycle shop wearing work boots and management became concerned that he had a second job. As a result, Pilkington Glass management decided to instruct a surveillance company to follow Mr Jones for four days during May 2019.

Pilkington Glass relied on two days of footage sent to them, on 8 and 10 May 2019, which included footage of Mr Jones holding a standard retail size bag of potatoes and attending deliveries with a farmer and younger man, and, on another occasion, passing a hosepipe to the same farmer. Pilkington Glass remained suspicious that Mr Jones had a second job and invited him to an investigation meeting on 30 July 2019. No mention was made of the surveillance footage. The meeting also started off as an ill health review before moving on to the allegations, with no clear distinction between the two.

In the meantime, Mr Jones had received CBT sessions and taken a holiday to Australia which seemed to help. On 3 April 2019, Mind Matters (who had been overseeing Mr Jones' care) wrote a letter indicating both his depression and anxiety scores had dropped to normal levels. Mr Jones remained asymptomatic until he learned of the disciplinary investigation into his activities while off sick. Around that time, he started treatment again for depression. On 3 August 2019, Mind Matters wrote a letter to Mr Jones encouraging his involvement on a community farm as it assisted his mental health issues.

The disciplinary process was long and fraught, with Mr Jones diverting questions or not answering them directly. There were a number of meetings arranged and postponed or adjourned. At no time did Pilkington accept that Mr Jones had a mental health condition which amounted to a disability for the purposes of the Equality Act.

On 14 October 2019, after several adjournments over August, September and early October, Mr Jones was finally given the opportunity to review the surveillance footage. It was during this disciplinary hearing that the allegations changed from working on a second job to undertaking physical activity which was inconsistent with Mr Jones' injury. The hearing was adjourned for 15 minutes, after which the disciplinary manager delivered a full judgment verbally which concluded that Mr Jones had undertaken physical activity at his friend's farm when he had claimed he was incapable of work and in receipt of occupational sick pay. It was also found that he had breached the duty of trust and confidence between employer and employee. Mr Jones was dismissed for gross misconduct.

He appealed, but the appeal officer failed to deal with the appeal as a rehearing of the issues, despite one ground of appeal being that the allegations changed during the disciplinary hearing, and the original decision was upheld.

The decision

The Employment Tribunal was highly critical of the surveillance used in this case, in particular, that there was no evidence that Pilkington Glass had considered less intrusive ways of investigating their concerns prior to placing Mr Jones under surveillance. Here, the surveillance went further than Pilkington Glass expected, as the company investigated Mr Jones' property ownership and credit referencing, as well as following him for 4 days. The Tribunal felt that this interfered with Mr Jones' human rights and his reasonable expectation of privacy. In their view, surveillance should only be used in a "limited, necessary and proportionate way".

In any event, the footage had not shown any real physical activity and, crucially, Pilkington Glass had not sought medical advice on whether the activity was inconsistent with the nature of his injury. This was in contrast to Pilkington Glass' sickness policy which specifically referred to "*in the opinion of a designated Medical Adviser*".

In terms of the dismissal, the Tribunal were also critical of the process followed by Pilkington Glass. They criticised Pilkington Glass for the length of time between receiving the footage (May 2019) and starting the investigation (30 July 2019). They also noted that Mr Jones was not told about the surveillance until much later in the process, and then took too long to actually show him the footage.

The Tribunal found that HR had put the disciplinary manager under a lot of pressure to make a decision quickly at the hearing on 14 October, and that it was very unlikely that the disciplinary manager had prepared his outcome during the 15 minute adjournment, given the issues he needed to consider, his lack of experience and the length of the oral decision he delivered.

The Tribunal accepted that Mr Jones had both a physical and mental impairment, and that he was disabled for the purposes of the Equality Act. However, it was only the physical impairment that was relevant to his claim.

They considered Pilkington Glass' legitimate aim, to ensure that the sickness absence procedure was adhered to in order to try and ensure that employees have a reasonable period of recovery time and to safeguard employees during this recovery time by preventing them from undertaking activities which could further exacerbate their alleged symptoms, hinder their recovery and increase their length of time off work, and found it was a legitimate aim.

However, while Pilkington Glass did have a legitimate aim, they failed to apply it in a proportionate way as they failed to seek the view of an appropriate medical expert in accordance with their internal policy and rashly made assumptions about perceived inconsistencies between what Mr Jones had told them in the ill health reviews and the footage obtained under surveillance. This amounted to discrimination arising from disability.

Mr Jones succeeded in all his claims. In addition, the Tribunal awarded a 15% uplift due to the failures in the disciplinary procedure. However, they also awarded 20% contributory fault as they found that Mr Jones had been difficult during the disciplinary process.