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WARNING SIGNS: RELYING ON PRIOR WARNINGS IN UNFAIR DISMISSAL CLAIMS

EMPLOYMENT

Well-drafted disciplinary procedures typically provide for a range of possible sanctions to reflect the wide range of misdemeanours encountered in the workplace. Managers are often faced with repeat offenders, guilty of misconduct where a final written warning is still live on their file. In many cases, a dismissal in those circumstances will be fair, but three recent unfair dismissal claims have examined the law on previous warnings, with important risk management reminders for employers.

WHAT IF THE EMPLOYEE THINKS THE FINAL WARNING WAS UNFAIR?

Unfair dismissal claims need, obviously, a dismissal. Challenging the imposition of a warning, or any sanction short of dismissal, is very difficult in the Employment Tribunal unless the employee can point to some form of discrimination or retaliation. Employees often try to get round this difficulty by asking the Tribunal to examine their entire disciplinary history when they are eventually dismissed. Regrettably, many Tribunals have traditionally been willing to embark on this sort of lengthy investigation, resulting in long trials and the inevitable costs and lost management time that they involve.

Is this practice about to change? Yes, if Tribunals obey a recent decision of the Court of Appeal. In *Davies v Sandwell Metropolitan Borough Council*, the Court underlined the following points:

- Tribunals should not be drawn into lengthy examinations of irrelevant material surrounding an employee's previous disciplinary record.
- Tribunals are not empowered to decide whether a warning should have been given or not.
- They can only examine whether a warning was:
  - given in bad faith, or for an oblique or improper motive; or
  - manifestly inappropriate.
- Unless a warning was given in bad faith or manifestly inappropriate, it will have been validly issued.
- If the warning was valid, Tribunals should then assess whether it was reasonable for the employer to take it into account when deciding to dismiss.

This approach can cause difficulties in practice, however, as the scope of the Tribunal's enquiries into whether a warning was validly issued or not can be hard to limit with precision. A good example is the recent case of *Simmonds v Milford Club*.

Mr Simmonds was employed by a private social club, and was responsible for dealing with the club's banking. He was given a final written warning for allowing his wife to deposit the club's takings while he stayed in his car, and was subsequently dismissed for having given Christmas bonuses in cash instead of in kind, as he had been instructed. The Employment Tribunal was split on the outcome: one member of the Tribunal thought the warning had been unreasonable, but the majority concluded that the warning had been validly given, and although Mr Simmonds would not have been dismissed for the Christmas bonus issue alone, the dismissal was fair when one took into account the final written warning.

Mr Simmonds appealed. The Employment Appeal Tribunal (EAT) found that the level of investigation by the Tribunal had been inadequate as it had considered whether the warning was reasonable whereas it ought only to have considered whether the warning had been issued in bad faith or was manifestly inappropriate. The case was sent back to the Tribunal for a fresh hearing.

Interestingly, the EAT went on to note that a discrepancy between the illustrative sanctions for different types of misconduct contained in a staff handbook, and the sanction actually imposed in a particular case might be enough for a Tribunal to suspect that the warning was inappropriate. This would then entitle it to embark on a detailed analysis of the disciplinary procedure and the specific facts leading to the warning being given.

WHAT IF THE FINAL WARNING IS FOR A DIFFERENT SORT OF MISCONDUCT?

Mr Simmonds' case involved two acts of misconduct, both for disobeying the employer's rules. But what if the warning and the dismissal are for very different sorts of act? Should the earlier warning be taken into account? Frustratingly, the EAT's answer in *Wincanton Group plc v Stone and Gregory* is: it depends.

Mr Stone was a driver. He objected to a new working arrangement the employer wanted to introduce, which would require him to work from two sites rather than one. He was issued with a first written warning. Some time later, but while the warning was still live, he drove out of a loading bay incorrectly, injured a colleague, and was dismissed.

The Employment Tribunal found that the warning had been validly issued, but it had been unreasonable to take account of the warning because there was no similarity between the two incidents, so that the dismissal was therefore unfair.

The EAT decided the Tribunal's approach was wrong. Having found the warning was valid, the only question was whether it had been reasonable to rely on it when deciding what sanction to impose for the subsequent misconduct. The case was sent back to the Tribunal for a further hearing, but the EAT then took the opportunity to stress that the following factors are all relevant for a Tribunal to consider:

- whether or not a warning is under appeal;
- the degree of similarity between the circumstances leading to the warning and those leading to the dismissal; and
- how other employees have been treated in similar cases.

If those are relevant for the Tribunal when reviewing an employer's actions, they should be taken into consideration in the disciplinary hearing too.

CAN EXPIRED WARNINGS EVER BE TAKEN INTO ACCOUNT?

Warnings are usually expressed to remain "live" for a specified period, typically 6 or 12 months. But what is the position if an employee receives a warning, and then goes on to commit a second, very similar, act of misconduct soon after the warning has expired? Can the employer take the spent warning into account when deciding to dismiss?

The answer depends on whether the second act of misconduct is serious enough to justify dismissal on its own. In the 2006 case of *Diosynth Ltd v Thomson*, the employer would not have dismissed on the grounds of the second act of misconduct alone, but decided that dismissal was appropriate taking into account the expired warning. The Scottish courts decided that was unfair. That is in line with the ACAS Code of Practice which confirms that spent warnings should normally be disregarded.

However, the Court of Appeal concluded in the 2008 case of *Airbus Ltd v Webb* that spent warnings can sometimes be taken into account. The facts of that case were quite unusual, and concerned a group of employees who were all found guilty of gross misconduct. That would have entitled the employer to dismiss them all, but four were only given final written warnings on the basis that their clean disciplinary history was a mitigating factor. The fifth was dismissed, and the employer took into account the fact that a warning for a similar act of misconduct had expired only three weeks earlier. The Court found that was a relevant point for the employer to consider, such that the dismissal was judged fair.

CHECKLIST FOR MANAGERS

Drawing these threads together, managers chairing disciplinary hearings should bear the following points in mind:

- Check the disciplinary policy, and ensure you understand the sanctions available to you under the policy for the misconduct in question.
- Check what sanctions have been imposed on other employees in similar circumstances.
- Where the employee has a live prior warning, consider whether the facts are similar – similar or repeat offences tend to justify a harsher approach.
- Where the employee has an expired prior warning, this should normally be disregarded, but may in exceptional circumstances be a relevant factor to take into account.
- Ensure the letter confirming your decision is as clear as possible, and sets out (as a minimum):
  - the misconduct being alleged, and how that is categorised in the disciplinary policy;
  - the scope of the investigation carried out;
  - your findings on each allegation, with a note of your reasoning, and what evidence you took into account to reach each finding;
  - the sanction being imposed, with a clear explanation of why this level of sanction has been chosen. If you intend to impose a more severe sanction than is available under the policy, make sure the reasons for this are clearly set out; and
  - the right of the employee to appeal, and the mechanism for doing so.

CONTACT DETAILS

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