

Previous “Bad Faith” Warnings and Delay in Constructive Dismissal Situations

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Two Questions

- At an appeal, what do you do if an employee argues that a previous warning was given in bad faith (even though they never argued this at the time)?
 - ♦ *Way v Spectrum Property Care Ltd* – 2015 - Court of Appeal
- What if an employee resigns and claims constructive dismissal because of events that happened more than 6 months ago?
 - ♦ Age old million dollar question...

Previous “Bad Faith” Warnings



- Dismissal
 - ♦ Gross misconduct
 - ♦ Series of warnings
- Tribunal’s view of previous warnings:
 - ♦ *Davies v Sandwell MBC (2013) CA*
 - ♦ *Wincanton Group Plc v Stone (2013) EAT*
 - ♦ Consideration of previous warnings can be relevant to the reasonableness test
 - ♦ Tribunal should only really consider a previous warning where it is “*manifestly unreasonable*”

Way v Spectrum Property Care (2015) CA

- Mr Way was given a final written warning relating to the inappropriate recruitment of a friend
- 12 month warning given in Dec 2010
- He did not appeal
- Summer of 2011 – concern re inappropriate emails – “email amnesty” offered – invited employees to come forward and confess
- Company reviewed emails and graded them – Mr Way’s emails deemed to be worthy of final written warning (NB he was still sending them!)

Way v Spectrum Property Care (2015) CA

- Mr Way – invited to a disciplinary hearing – Sept 2011 – dismissed – earlier warning taken into account
- Internal appeal against dismissal - not upheld:
 - ♦ Should have appealed against the earlier warning, but put off from doing so by MD
 - ♦ Line manager was fully aware of circumstances but covered this up to save his own skin
 - ♦ Company investigated and rejected these contentions

Way v Spectrum Property Care (2015) CA

- According to the Court of Appeal, the ET and EAT got very muddled
- Should have:
 - ♦ Decided whether dismissal was justified in its own right – new act of gross misconduct
 - ♦ If it wasn't – should have reached a decision, on the facts, regarding the final written warning and whether it was genuinely given in bad faith or not
- So....employer faced with this argument should be prepared to investigate and present evidence

Constructive Dismissal - Delay



- Employer's repudiatory breach
- Employee resigns in response to the breach – employee is said to “*accept*” the breach and treat the contract as being at an end
- Employee must not delay too long in accepting the breach – if they do, gives rise to the possibility of “*affirmation*” or “*waiver*”

How does this play out?

- Strictly speaking – the minute an employee turns up for work the next day - this could be a waiver
- Tribunals are sympathetic to the idea that it is a **BIG DEAL** to walk yourself into unemployment
- Acceptance of sick pay – suggests an acceptance that the contract is still “live”
- Continuing the relationship while you are seeking to resolve it
- Throw the doctrine of “*last straw*” into the mix

What do the cases say?

- *W E Cox Toner (International) Ltd v Crook* (1981) EAT
- *Waltons & Morse v Dorrington* (1997) EAT
- *Bliss v South East Thames Regional Health Authority* (1987) CA
- *Munchkins Restaurant v Karmazyn* (2009) EAT
- *Buckland v Bournemouth University* (2010) CA

What do the sickness absence cases say?

- *el – Hoshi v Pizza Express Restaurants Ltd* (2004) EAT – three months
- *Fereday v South Staffordshire NHS Primary Care Trust* (2011) EAT – six weeks
- *Hadji v St Luke's Plymouth* (2013) EAT – four months
- *Mari (Colmar) v Reuters Ltd* (2015) EAT – 19 months
- *Abbey National plc v Robinson* (2000) EAT – 16 months

So what should employers do?

Three options:

- Investigate – as a post-termination grievance
- Immediately settle - settlement agreement / COT3 via ACAS Early Conciliation Process
- Sit back and wait and see if there will be a claim

Conduct a Risk Assessment

- Length of service?
- Can you identify the repudiatory breach?
- If not, is the employee arguing “last straw”?
- Has the employee been “working under protest”?
- Has there been a grievance? Sickness absence?
- Where is the employee going and for how much?

Any questions?



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