

# Previous warnings

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Jamie Hamnett, Addleshaw Goddard LLP

## Question 1

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)?

## Starting point: the law

- ▶ **Section 98(4) Employment Rights Act 1996**
- ▶ Would it be **reasonable** for the employer to treat the reason, taken together with the circumstances of the prior final written warning, as sufficient to dismiss the claimant?
- ▶ If yes, fine. If no, unfair dismissal.

# When might you be expected to reopen a warning?

## Co-operative Retail Services Ltd v Lucas (1993) EAT

Where a final warning was clearly unreasonable, and it contributes to a later dismissal, the dismissal *may* be unfair...

# When might you be expected to reopen a warning?

## Davies v Sandwell Metropolitan Borough Council (2013) CA

BUT only **rarely** will it be legitimate for tribunals to 'go behind' a final warning given before dismissal.

### Three key questions:

- ▶ Was the original warning issued in **good faith**?
- ▶ Were there **prima facie grounds** for imposing it?
- ▶ Was it '**manifestly inappropriate**'? ***NB: BBC v Bandara, (2015) EAT***

# When might you be expected to reopen a warning?

## General Dynamics IT Ltd v Carranza (2015) EAT

In limited circumstances (e.g. **bad faith or manifestly improper**) an earlier stage of a disciplinary process may require revisiting.

Otherwise an employer is entitled to proceed on the basis of what has already been decided.

# What if a warning was issued in bad faith?

## 1. Wincanton Group plc v Stone (2013) EAT

- ▶ Tribunals should take into account earlier warnings issued in good faith.
- ▶ However, if a tribunal considers that a **warning was issued in bad faith, it will not be valid and cannot be relied upon** by the employer to justify any subsequent dismissal.

## 2. Way v Spectrum Property Care Ltd (2015) CA

- ▶ Where it is alleged that a warning was given in bad faith, the tribunal **must** hear evidence on the point.

## But, the employee did not appeal at the time?

- ▶ If there is no appeal against a final warning (or where appeal has been launched or not pursued), there would need to be **exceptional circumstances** for a tribunal to reopen the matter.
- ▶ *Davies v Sandwell Metropolitan Borough Council (2013) CA*
- ▶ However, the fact that an employee did not appeal against the final warning does not prevent the tribunal from concluding that no reasonable employer would have given a final warning in the particular circumstances.
- ▶ *Co-operative Retail Services Ltd v Lucas (1993) EAT*

# What's the solution?

**What is the business' preferred outcome?**

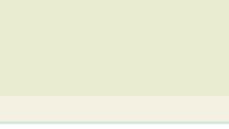


**Assess the risks and discuss with stakeholders**

**Legal / Commercial / Financial**



**Execute**



## Question 2

What if an employee resigns and claims constructive dismissal because of events that happened more than 6 months ago?

## Starting point: the law

- ▶ Constructive dismissal = fundamental breach of contract
  - ▶ Series of minor breaches or a “big bang”
  - ▶ Breach of mutual trust & confidence ‘inevitably’ fundamental
  - ▶ Actual / anticipatory breach that cannot be cured
- ▶ Employee must “accept” the employer’s breach and resign in response to it
- ▶ **Employee must not delay – doing so will usually affirm the contract which will kill their claim**

## Affirmation of contract?

- ▶ An employee:

*“...must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged”*

- ▶ *Western Excavating (ECC) Ltd v Sharp (1978) CA*
- ▶ Re-affirmed in: *Bournemouth University Higher Education Corporation v Buckland (2010) CA*

## Working under protest?

Mere delay by itself does not constitute affirmation of the contract, but if delay goes on for too long it could be very persuasive evidence of an affirmation.

*WE Cox Toner (International) Ltd v Crook (1981) EAT*

If employees can point to **special circumstances**, this may justify a delay in resigning (e.g. 6 week delay while union rep investigated true position with employer)

*Post Office v Roberts (1980) EAT*

## Watch out for...

### ▶ Continuing breaches

Employees can exercise their right to rely upon the breach at any time while it is continuing.

*Reid v Camphill Engravers (1990) EAT*

### ▶ ‘Last straw’ cases

A course of conduct can **cumulatively** amount to a fundamental BoC entitling an employee to resign and claim constructive dismissal following a ‘last straw’ incident - even if the last straw by itself does not amount to a BoC.

*Lewis v Motorworld Garages Ltd (1986) CA*

# What's the solution?

**What is the business' preferred outcome?**

Do you want to pull them back or let them go?



**Assess the risks and discuss with stakeholders**

**Legal / Commercial / Financial**



**Execute**

(a) Charm offensive!

(b) Front footed into litigation or wait and see?