



# White Paper Conference: 10 Thorny Questions

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# Bad Faith Warnings & Constructive Dismissals

# Bad Faith and Previous Warnings

- ▶ Significance in “Totting Up” warnings.
- ▶ Not raised in initial disciplinary process.
- ▶ Effect on ongoing disciplinary proceedings

# Bad Faith and Previous Warnings

- ▶ Primary Position Tribunals will not look behind previous warnings if:
  - ▶ Issued in Good Faith
  - ▶ Not for an Oblique reason.
  - ▶ Prima Facie Grounds for issuing it
  - ▶ Not manifestly inappropriate

# Wincanton Group PLC v Stone & Gregory

- ▶ Prior warnings for failing to follow management instruction.
- ▶ Separate later disciplinary action for both, while live warnings.
- ▶ Could live warning be considered for “totting up” to dismissal?
- ▶ Guidance: Warning with an oblique notice or is manifestly inappropriate will not be valid.
- ▶ If is valid need to consider:
  - ▶ **“is it appropriate to take into account then arriving at disciplinary decision?”**

# Way v Spectrum Property Care Limited

- ▶ Final written warning for breaching recruitment policy.
- ▶ Subsequent disciplinary for sending inappropriate emails/images.
- ▶ Without live warning = final written warning
- ▶ With live warning - dismissal
- ▶ Bad Faith only raised at Tribunal stage.
- ▶ Court of Appeal: Fact warning not challenged at time does not make warning valid!

# Action for Employers

- ▶ Good record keeping of investigation and outcome.
- ▶ Ask employee “Have you been given a fair hearing?”
- ▶ Review proceedings – any evidence of bad faith?
- ▶ If bad faith – disregard warning.
- ▶ No bad faith – explain why you find that.
- ▶ Have someone different review the previous process

# Constructive Dismissal 6 months later?

## **Essential requirements:**

Fundamental breach

Causes employee to resign

No delay in resigning

# Timing of resignation

Delay between breach and resignation = affirmation of contract.

OR DOES IT?

# Colmar Mari v Reuters Ltd

- ▶ Off with stress, depression and anxiety
- ▶ Returned to work – work had been reallocated and given inferior work
- ▶ Off again with stress and resigned 18 months later
- ▶ Delay = affirmation of contract so could not rely on fundamental breach of trust and confidence.
- ▶ Had accepted 39 weeks sick pay
- ▶ Made repeated requests for access to work emails
- ▶ Had requested PHI
- ▶ Had discussions about returning to work

# One off incident vs Final Straw

But delay between breach and resignation of 6 months could be treated as a “final straw”.

- ▶ Unjustified performance complaints in 2010
- ▶ Deemed competent following capability process in Jan 2012.
- ▶ Alleged bullying in 2012 – no action taken
- ▶ Altercation 22 April 2013

# One off incident vs Final Straw

- ▶ Investigation into incident – July 2013
- ▶ Disciplinary hearing – 23 October 2013
- ▶ Disciplinary outcome – 16 October **2013**
- ▶ Appeal hearing – 14 July **2014** (following maternity leave)
- ▶ Appeal outcome – 16 July 2013
- ▶ Resignation – 17 April 2013
- ▶ Employment terminated – 28 August 2014

# Final Straw

- ▶ What was the most recent act or omission?
- ▶ Has the employee done anything to suggest they have accepted/affirmed the contract?
- ▶ Was the most recent act/omission in itself sufficient to justify resignation?
- ▶ If not, was it part of a course of conduct comprising several acts or omissions which viewed cumulatively amounted to a fundamental breach?
- ▶ Did the employee resign, partly or wholly, in response to that cumulative breach?

# So can an employee resign 6 months later?

- ▶ Depending on the facts and circumstances
  
- ▶ **YES!!!**