

White Paper Conference
***“Bad Faith Warnings /
Delayed Resignations”***

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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)?”



Relevance of Previous Warnings

- **ACAS Code**
- **Section 98(4)**
- **Different type of conduct**
- **FWW + misconduct = dismissal**



Scenario...

- **Breach of Recruitment Policy**
- **FWW by line manager**
- **Reminded to be familiar with all policies**
- **No appeal**



Scenario cont...

- **Breach of E-mail Policy**
- **Full disciplinary process**
- **FWW taken into account**
- **Dismissed**



Scenerio concluded...

- **Appeal**
- **Emp-ee – FWW not fair**
- **Challenge considered but dismissed**
- **Appeal rejected**



Fair or Unfair



Scenario – expanded...

- **Breach of Recruitment Policy**
- **FWW by line manager (sanctioned recruitment/ prejudged process/ conflict of interest?)**
- **Reminded to be familiar with all policies**
- **No appeal (under pressure?)**

Scenario – expanded cont...

- **Breach of E-mail Policy**
- **Full disciplinary process**
- **FWW taken into account (only dismissible with FWW)**
- **Dismissed**

Scenario – expanded concluded...

- Appeal
- Emp-ee – FWW not fair (**dishonesty/ covering tracks/ prejudged/ pressure**)
- Challenge considered but dismissed (**no evidence and no appeal**)
- Appeal rejected

Fair or Unfair



Decision

Way v Spectrum Property Care [2015] EWCA Civ 381

ET →	EAT →	CoA
<ul style="list-style-type: none">• “irrelevant satellite litigation”• Reasonable process• FWW + FWW offence = dismissal	<ul style="list-style-type: none">• Assume bad faith• Allow evidence• Even if bad faith – no difference	<ul style="list-style-type: none">• Degree of illogicality• Bad faith warning <u>not</u> to be taken into account• Erroneous belief not bad faith not sufficient
FAIR	FAIR	REMITTED

Supporting authorities

Co-operative Retail Services Ltd –v- Lucas

EAT/145/93

Simmonds –v- Milford Club UKEAT/0323/12

Davies –v- Sandwell Metropolitan Borough Council

[2013] IRLR 374

Wincanton Group plc –v- Stone & another [2013] IRLR

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Answer

- **Consider live warnings**
- **If challenged, consider validity – motive/ appropriate/ faith/ grounds**
- **Appealed?**
- **Investigate thoroughly**
- **Need to rely on warning?**

Question 2

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

Requirements

- **S95(1)(c) ERA**
- **Fundamental breach**
- **Caused resignation**
- **Did not delay too long**

Problem with delay?

- Implies affirmation

***Western Excavating (ECC) Ltd –v- Sharp* 1978 ICR 221, CA**

***WE Cox Toner (International) Ltd –v- Crook* 1981 ICR 823
EAT**

- Under protest?

Cantor Fitzgerald International –v- Bird & ors

2002 IRLR 867, QBD

- Severity of consequences?

***Bournemouth University Higher Education Corporation –v- Buckland* 2010 ICR 908, CA**

Problem with delay (cont)?

- Last straw

Lewis v Motorworld Garages Ltd 1986 ICR 157, CA

Lochuack v London Borough of Sutton EAT
0197/14

Vairea v Reed Business Information EAT 0177/15

Conduct, not delay

Chindove v William Morrison Supermarkets plc EAT
0201/13

Mari v Reuters Ltd EAT 0539/13

Answer

- **No rule that 6 months = too long**
- **Consider the breach(es)**
- **Conduct – affirmation?**
- **Fact sensitive**

Questions?





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