Employment

Lapsed disciplinary warnings and dismissal: a new approach

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Everyone knows that it is always impermissible to take a lapsed warning into account when deciding whether to dismiss an employee. According to the Court of Appeal and the Employment Appeal Tribunal, "everyone" is wrong.

The decision in *Stratford v Auto Trail VR Ltd UKEAT/0116/16*, shows that the position is more nuanced than might have been thought. While it is certainly not permissible for an employer to rely on the existence of a lapsed warning to dismiss in all cases, it must always be remembered that the test of fairness set out at s 98(4) of the Employment Rights Act 1996 is whether the employer acted reasonably or unreasonably, having regard to the reason for dismissal, equity and substantial merits of the case. The fact of previous misconduct, the fact that a warning was given in respect of it, and the fact that it has lapsed, are all objective circumstances which the employer is entitled to take into account in treating his reason as sufficient reason for dismissing the employee.

The decision in *Stratford* relied heavily on the reasoning in *Airbus Ltd v Webb [2008] EWCA Civ 49*, in which a lapsed warning had also been taken into account when an employer decided to dismiss. Distinguishing an earlier Scottish authority (*Diosynth Ltd v Thomson [2006] IRLR 284*), it was held that where the facts apart from the lapsed warning were sufficient to justify dismissal, such a lapsed warning could be taken into account when deciding on the penalty to impose. If the other factors taken together would not justify dismissal, however, a lapsed warning cannot "tip the balance".

The facts in *Stratford* and *Airbus* were clearly of importance to these decisions. In *Stratford*, the dismissal incident was the 18th time in 13 years that the employee's behaviour had been the subject of formal action, and the behaviour leading to his dismissal had been clearly prohibited by the employer. In *Airbus*, the employee had been the subject of a final written warning which had expired only three weeks before the dismissing incident (and which had itself been reduced from summary dismissal), and the dismissing incident itself (leaving work without permission) was clearly serious. The employee in that case was expressly said to have committed an act of gross misconduct. In contrast, the employee in *Diosynth* did not commit an offence capable of being gross misconduct, but the lapsed warning was seen as "tipping the balance" towards dismissal. This is still impermissible.

Where, then, do such legal niceties leave HR departments? Craving certainty, no doubt, but there appears little of that to be had from these three decisions. The employer must, as always, act reasonably in all the circumstances. There are a number of actions which HR advisers can take to increase the chances of a favourable outcome in an employment tribunal:

- Ensuring that dismissal and appeal managers are aware of the difference between taking a lapsed warning into account when deciding whether to dismiss for an offence which justifies dismissal, and taking it into account to "elevate" a less serious infraction to the level of dismissal. The latter is almost certain to create trouble.
- Ensuring that staff handbooks and any disciplinary policies set out in clear terms that, while a written warning formally lapses after a certain period of time, it may still be taken into account as part of the background circumstances of any disciplinary proceedings in the future.

- Ensuring that any warning procedures are flexible enough to be tailored to the particular circumstances of the case, as suggested by Elias J at paragraph [61] of the Employment Appeal Tribunal's decision in *Airbus*, approved by the Court of Appeal. For example, warnings do not always need to have a time limit of 12 months. If the nature of the misconduct is such that any warning needs to last longer than that, this should be considered. Similarly, procedures could also be put into place which limit a warning to 12 months, except in circumstances of misconduct which are substantially the same as those for which the warning was given, in which case the time limit would be extended.

- Ensuring that any warnings given are documented properly, and that their status is clear. All too often, multiple "informal" warnings stack up on an employee's file without any further action having been taken, without any time limit being decided on, and without the employee having been clearly told how to improve his or her behaviour. As always, putting before an employment tribunal a clear record of what disciplinary action has been taken is vital, even if the warnings in question have since lapsed.

A previous version of this blog was published on 12 June 2017 by Practical Law Company. This can be viewed here.

Matthew Sellwood is frequently instructed in the Employment Tribunal, and has recently also appeared in the Employment Appeal Tribunal. He has conducted successful defences in a range of multi-day hearings involving elements of unfair dismissal, discrimination and whistleblowing, and also advises across the whole range of employment law. As both a former employer at a public authority and a former trade union representative at a national charity, he brings a pragmatic view to employment litigation and is able to view 'both sides' of any issue.