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human resource services

No. 72

HR Broadcast – Right level of warning

A recent case has shown the importance of ensuring that any warning imposed by an employer within disciplinary proceedings is pitched at the right level. This is particularly important in the case of final written warnings.

In a recent case an employee with 19 years' service had 18 years unblemished record but started to receive performance related warnings in the 19th year. He received a final written warning and then after further incidents was dismissed.

He claimed unfair dismissal at the Employment Tribunal. The Tribunal concluded that the final written warning was too high a tariff and substituted an ordinary (first written) warning. It then went on to conclude that when added to the most recent incidents the dismissal was still fair.

However, the employee appealed to the Employment Appeal Tribunal who said that this approach was wrong. Where a warning, particularly a final written warning was 'manifestly inappropriate' then it was wrong to substitute an ordinary warning and the correct approach was to disregard the warning completely - and that made the dismissal unfair.

Further, there is case authority that where a final written warning is manifestly inappropriate that it might be open to the employee to resign and claim constructive unfair dismissal.

Note that the language used is strong; the decision on the level of warning must not just be wrong but it must be manifestly inappropriate, in other words so obviously wrong that it should never have been imposed by the employer, so this is not an easy way out for the employee. However, the lesson for employers is that great care is needed before a final written warning is imposed.

LAPSED WARNINGS

ACAS guidance is that warnings should have an expiry date and should be disregarded after that date. As is not unusual two cases provide different approaches to this guidance, one following the ACAS approach and another saying that there is no hard and fast rule and that it may still be reasonable to take into account the whole of an employee's record.

In a recent rather extreme case, an employee with a large number of warnings was dismissed by reference to his entire record including old, lapsed warnings. The matter went to the Employment Appeal Tribunal who took the latter approach and concluded that it was reasonable for the employer in these unusual circumstances to look at the whole employment record.

The best and safest approach is still to follow the ACAS guidance but this most recent case does mean that in some cases it may be appropriate to look at the entirety of the employment record including lapsed warnings.