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human resource services

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HR Broadcast – A live final written warning

A question that crops up quite frequently is the situation when an employee is facing an allegation of misconduct when they are already subject to a live final written warning which is for something entirely different. Can the live final written warning be taken into account?

Let's have a look at the Employment Appeal Tribunal (EAT) case of Trye v UKME

Ms Trye was a housekeeper. The company who employed Ms Trye ran 200 premises with over 400 permanent staff (and many more seasonal employees) for a prominent family who liked to visit their various properties in the UK during the summer months.

She was given a final written warning for failing to follow reasonable instructions/procedures and acting in a way which brought the company into disrepute, after attending at the property contrary to instructions when residents were present. Almost a year later, and after an initial period of certificated sickness absence, Ms Trye was absent for four days without a medical certificate and without following the correct procedure for reporting absence. She was dismissed for this even though it was not very serious in itself, but because she had a live final written warning. The Employment Tribunal held this dismissal was not unfair, and the EAT have confirmed they were able to do so.

The EAT Judgment states that gross misconduct is not necessary for a dismissal to be fair, and emphasises that a final warning is clearly relevant to whether an employer's decision to dismiss falls within the range of reasonable responses. Notably it goes as far as to say "if there is a final warning that is current under the terms of the employee's contract of employment, it is only in exceptional circumstances that further misconduct will not be met with dismissal". The employer was able to take into account a final warning which, whilst not about absence, arose in part from a failure to follow procedures. The EAT also had no concerns about the employer taking the final warning into account when it had expired by the date of the hearing (when the further misconduct occurred whilst the final warning was in place).

Therefore there are 2 issues here where the EAT has provided reassurance to Employers;

1. Dismissing an employee for further misconduct will usually be fair, where there is a current final warning. It is only in exceptional circumstances that any further misconduct will not be met with dismissal.

2. An employer can take into account any live final written warning that the employee is already subject to - it makes no difference whatsoever if this final written warning was issued for entirely different misconduct.

This makes the issuing of warnings a serious matter particularly with regard to the length of time that a warning must stay on an employee's record. A written warning must not be given for an indefinite period. ACAS suggests a timeframe of six months for a written warning and twelve months for a final written warning. Unless there are exceptional circumstances, we would advise that you always stick to these guidelines.