SQUIRE SANDERS

# HOW SHOULD EMPLOYERS

**– treat previous warnings when deciding whether to dismiss?**

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How would you deal with an employee who has a written warning on his file and then commits a further (but possibly different) act of misconduct? Would you take that previous warning into account when deciding what sanction to impose? In this month's Review we consider the recent case of ***Wincanton Group Plc v Stone (1) & Gregory (2)*** in which the EAT gave some useful practical guidance on how to treat previous warnings when deciding whether to dismiss. The good news for employers is that provided disciplinary warnings were issued in good faith they can generally be relied upon in any subsequent disciplinary proceedings, and a Tribunal has no right to re-examine them.

S and G were lorry drivers at Wincanton, the logistics company. In 2009 they were both issued with first written warnings for refusing to comply with a management instruction to work from a different depot. Whilst the warnings were still live, both drivers committed further (but different) acts of misconduct - S drove through a red light whilst pulling out of a loading bay at work and G became unable to fulfil his duties as a driver after being disqualified for drink-driving. Both drivers were dismissed and in each case Wincanton took into account their prior warnings in making that decision.

S and G brought unfair dismissal claims and were initially successful. In S's case, the Tribunal said it was unreasonable for Wincanton to have "totted up" his first written warning with what (in its view) should only have been a final written warning for driving through the red light. It also said that Wincanton should have taken into account the circumstances of the first written warning, namely that it arose out of a disagreement as to what Wincanton could lawfully require S to do under the terms of his contract and was therefore not "misconduct" as such (i.e. in the sense of a deliberate breach of duty). Finally, it criticised Wincanton's decision to treat this as "repeated misconduct" because there was no similarity between the conduct that led to the first warning and the human error that led to S's dismissal. In G's case, the Tribunal said that Wincanton's failure to look for alternative non-driving vacancies prior to dismissal (in circumstances where it had told G it would do so) meant that the decision to dismiss fell outside the band of reasonable responses.

The EAT allowed Wincanton's appeal in relation to S, but held that G's dismissal was indeed unfair as Wincanton had told G that it would help him secure alternative non-driving work and had not done so. The EAT was, however, quick to point out that it was not setting down any general principles of law and that it was not convinced that Wincanton was under any duty to look for alternative vacancies before dismissing him in circumstances where G was legally unable to fulfil his duties as a driver. We would take the view that such a duty does exist, even in a misconduct case, if the misconduct affects only the duties the employee can do and not the overall employment relationship.

More importantly the EAT took the opportunity to set out some guidance for Tribunals on the correct approach to be followed in relation to previous warnings when considering the fairness of a dismissal. The key practical points for employers can be summarised as follows:

- as a general rule a Tribunal will not re-examine previous disciplinary warnings when considering the fairness of a dismissal. If an employee has a live warning on his file then unless it was issued for an "oblique motive" or was clearly inappropriate (for example, there was no obvious misconduct) then a Tribunal should treat it as a valid warning.
- if a warning is valid then a Tribunal is not entitled to substitute its own view for that of the employer, i.e. it cannot say it would have imposed a lesser sanction. In S's case, for example, the Tribunal was not entitled to say that it would not have dismissed for the red-light incident in circumstances where it accepted that the prior warning was valid.

- if a disciplinary warning has been validly issued and is still current then an employer is entitled to take it into account when considering whether to dismiss for a subsequent act of misconduct, even if the two acts of misconduct are for different things but it should have regard to the degree of difference or similarity between the different matters when deciding what sanction to impose.
- when deciding what sanction to impose, an employer should take into account the factual circumstances giving rise to any previous warnings.
- an employer should always take into account how it has treated other employees who have committed similar offences, i.e. it should act consistently. This will be relevant when determining the fairness of any dismissal.
- if an employee has been issued with a final written warning then this normally means that ***any*** further misconduct within the span of that warning may result in dismissal. In this respect, it is always good practice when issuing disciplinary warnings to make it clear that ***any*** further acts of misconduct (of whatever nature) may result in further disciplinary action being taken.
- an employer should be cautious if an employee has challenged the validity of an earlier warning, for example if it is still under appeal at the time of the second incident. This does not mean that an employer cannot take into account the previous warning when deciding what sanction to impose, but that it should be seen to consider whether it is appropriate to do so in the circumstances. Existing case law makes it clear that an employer can take account of a final warning, even if it is under appeal, when deciding whether to dismiss, as long as it is satisfied that the warning was issued in good faith and on reasonable grounds (***Stein v Associated Dairies***).
- ultimately it all boils down to what is reasonable – this is what the statutory test is concerned with and this is what employers should bear in mind when deciding whether to dismiss an employee who already has a written warning on his file. Provided your response falls within the band of reasonable responses, a Tribunal will not be able to interfere with it.

In light of this decision, employers should ensure that any warnings, particularly final written warnings, are issued with care and are tailored to the particular circumstances. Provided this is the case then employers will be perfectly entitled to rely on them when considering whether to dismiss an employee and in such circumstances Tribunals will not be entitled to go back and look behind them.

## Further Information

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