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CAN A TRIBUNAL QUESTION WHETHER A WARNING WAS FAIRLY GIVEN?

In this, as in the previous Insight In-depth, we look at disciplinary warnings in the light of two recent decisions. In the previous edition, we considered whether an employer was ever entitled to take into account an expired warning. Here, we review the situation where an employer has dismissed an employee for an offence because they were already in receipt of a final written warning, and ask whether a tribunal can look into whether that warning was fairly given.

Simmonds v Milford Club was one of the first cases to consider when a tribunal can go behind the giving of a final written warning. S had been given a final written warning when, contrary to an agreed procedure, he had asked his wife to deposit the club's takings in the bank while he waited in the car, having been unable to park near the bank. Six months later, the club, relying on the final written warning, dismissed S after he had given employees their staff bonuses in cash rather than giving them a bottle of wine each to the same value, as he had been instructed.

A tribunal held that the dismissal was fair but commented that, without the previous written warning, the dismissal would have been unfair. The tribunal did not consider the appropriateness of S's existing warning. The Employment Appeal Tribunal ("EAT") allowed the appeal and stated that, if there are grounds to believe that a previous disciplinary sanction, which is material to the dismissal, may have been "manifestly inappropriate" the tribunal should hear evidence to determine whether

that sanction was in fact manifestly inappropriate. The EAT commented that the test of whether a previous warning was "manifestly inappropriate" was a higher threshold to reach than the test of whether a dismissal was reasonable.

In a subsequent case, *Davies v Sandwell Metropolitan Borough Council,* the Court of Appeal ("CA"), while agreeing that past warnings should be reconsidered only in the exceptional case of bad faith or a manifestly inappropriate warning, reached a different conclusion as to whether the previous warning should be re-examined. D was dismissed for misconduct and, in reaching its decision, the Council took into account a previous written warning. D said that the warning was wrong; she had not committed the alleged misconduct. She argued that the validity of the warning should be considered as part of her unfair dismissal claim. The CA disagreed and said that the role of the tribunal was to consider the fairness of the dismissal. This included deciding whether it was reasonable to rely on a previous warning, but that did not mean deciding whether the warning should have been issued. The CA made the following points:

"TRIBUNALS SHOULD NOT BE DRAWN INTO LENGTHY EXAMINATIONS OF IRRELEVANT MATERIAL SURROUNDING AN EMPLOYEE'S PREVIOUS DISCIPLINARY RECORD."

- Tribunals should not be drawn into lengthy examinations of irrelevant material surrounding an employee's previous disciplinary record.
- It is not the role of tribunals to decide whether a warning should have been given or not.
- Tribunals should examine only whether a warning was given in bad faith, or was manifestly inappropriate.
- Unless a warning was given in bad faith or manifestly inappropriate, it will have been validly issued.
- If the warning was valid, tribunals should then assess whether it was reasonable for the employer to take it into account when deciding to dismiss.

Although both decisions used almost identical language in setting out the test of whether a tribunal should look behind a final written warning, in *Sandwell*, the CA placed more emphasis on the fact that the starting point is that a tribunal should not look behind a final written warning unless there is good reason to do so. This is probably because, in that case, the CA was very critical of the inordinate amount of time the tribunal had spent in considering whether the employer had been right to issue the final written warning.

In the most recent case, *Bandara v BBC*, B was employed as a producer in the BBC's Sinhalese Service and had an unblemished record for 18 years. B was involved in an argument in which he shouted at his manager. B apologised to her by email the following day. The incident was reported to HR but no action was taken. Four months later, the day after Prince George was born, B decided to prioritise the anniversary of an event in Sri Lankan politics. Another manager, who arrived shortly after the story was run, disagreed with this decision.

Two months later, disciplinary proceedings were brought against B based on these two incidents. In relation to the earlier incident he was charged with abusive behaviour and refusing to follow a reasonable request by a manager and the latter incident was classified as a potential breach of editorial guidelines. The charges were upheld and a final written warning was issued in which it was stated that B's conduct "potentially constitutes gross misconduct", but it was acknowledged that his "behaviour has never been formally addressed before". The warning was to remain live for 12 months.

Further disciplinary proceedings were instigated in relation to B's conduct. A disciplinary hearing was held six months later and a decision was issued after a further delay of five months in which it was confirmed that B's employment would be terminated. The letter of dismissal referred to the final written warning and stated "although not connected to my investigation I have taken into consideration that you currently have a final written warning which is still active…"

A tribunal found that the issuing of the final written warning was manifestly inappropriate. In reaching this conclusion, it referred to the failure to take into account B's long, unblemished service and the delay between the first incident and the subsequent disciplinary proceedings. In its view, B was entitled to think that the matter had been laid to rest by that time. Further, it said that the decision maker had improperly considered unproven, uncharged issues that had been uncovered during the disciplinary process. However, it concluded that, even though the issuing of a final written warning was manifestly inappropriate, in this case, it could still say that dismissal in all of the circumstances was within the band of reasonable responses available to an employer. The EAT disagreed with this analysis, noting that the tribunal's task is not to put forward a hypothesis of its own but to examine the reasoning of the employer and decide whether the employer's decision to dismiss was reasonable in the circumstances. This involved considering whether the employer had attached significant weight to the "manifestly inappropriate" final warning. The case was remitted to an employment tribunal.

What does this mean for employers?

Tribunals are alive to the fact that employers can circumvent the unfair dismissal provisions if they issue unwarranted final written warnings and then are able to dismiss for a further less serious offence. However, this line of cases does not mean that employers must analyse existing warnings in order to decide whether they can be taken into account. Nevertheless, when an employer makes a decision to dismiss on the basis of an existing warning, if the warning could be viewed as "manifestly inappropriate", then the subsequent dismissal might be unfair.

CASES ROUND-UP

Right to be accompanied

There are few cases on the right to be accompanied, so we report the first-instance decision of a tribunal in *Gnahoua v Abellio London Ltd.*

In a previous EAT decision it was held that the right to be accompanied under the Employment Rights Act 1996, provided that the companion comes within one of the permitted categories (a TU official, or a colleague), is an unfettered right for the employee to be accompanied by their chosen companion. In *Gnahoua*, disciplinary proceedings had been brought against G, a bus driver who was caught looking at an iPad while his bus was in motion. He was represented at his disciplinary hearing by a Unite official. The decision was taken to dismiss him. G appealed and informed ALL that he wished to be accompanied by two brothers who had formed the PTSC union, of which he had become a member. ALL indicated that, while it was happy with someone else from the PTSC union attending, it had banned both brothers from representing its staff at hearings. This was because, a tribunal, in separate proceedings by one of the brothers against ALL, had awarded £10,000 in costs

against both brothers for vexatious conduct. This conduct had involved falsifying the date of a witness statement. They were also accused of using threatening behaviour towards members of staff. G attended his appeal hearing without representation. The decision to dismiss was upheld.

His tribunal claims included that he had been denied the right to be accompanied at his disciplinary appeal hearing. The employment tribunal accepted that, technically, ALL had breached G's right to be accompanied. However, the employment tribunal went on to award the nominal sum of £2 because the employer had "strong grounds" for being unhappy with the choice of companion.

Comment

Employers will welcome the decision as, if an employer has a good reason to reject an employee's chosen companion, this case suggests they will not suffer a severe financial penalty for so doing.

"IF AN EMPLOYER HAS A GOOD REASON TO REJECT AN EMPLOYEE'S CHOSEN COMPANION, THIS CASE SUGGESTS THEY WILL NOT SUFFER A SEVERE FINANCIAL PENALTY FOR SO DOING."

Dismissal for gross misconduct for poor attitude

In *Adeshina v St George's University Hospitals NHS Foundation Trust*, the CA had to consider whether a tribunal was entitled to find that an employee's poor attitude to organisational change had, on the facts, amounted to gross misconduct and a repudiatory breach of contract. A had been in a management position and was dismissed having failed to co-operate with, support or lead a change in her service. This included at least one instance of unprofessional behaviour, at a meeting. The CA dismissed her appeal.

Comment

Although the CA decision was primarily concerned with the procedural aspects of the case it still is an interesting example of how poor attitude might, fairly, result in dismissal.

Indirect discrimination

The Supreme Court ("SC") has recently given its decision in two important cases on indirect discrimination. In *Essop v Home Office*, a group of civil servants brought a claim of indirect discrimination on the basis of the application of the "Core Skills Assessment" test. Civil service candidates were required to pass this test to be eligible for a promotion. A report by a firm of occupational psychologists found that Black and Minority Ethnic ("BME") candidates and those aged 35 and over had a lower pass rate than white and younger candidates. A number of employees who had failed the assessment brought claims for indirect discrimination on the grounds of race and/or age. The CA ruled that the individual claimants would have to show the reason why they had failed the test in order for the tribunal to determine whether they had been put at the same disadvantage as the group.

The SC overruled the CA decision, holding that the employees did not have to establish the reason for the particular disadvantage – it was enough to show that they had suffered that disadvantage. It did not matter that some BME and older candidates were able to pass the Core Skills Assessment. The case was remitted to an employment tribunal.

In *Naeem v Secretary of State for Justice*, N, an Imam, had worked for the Prison Service as a full-time chaplain since 2004. In 2011, the average basic pay for Muslim chaplains was £31,847, whereas Christian ones were paid an average of

£33,811. The difference was due to the fact that pay had progression was based upon length of service and because the Prison Service started employing permanent Muslim chaplains only from 2002, so these chaplains had on average a shorter length of service. N argued that this was indirectly discriminatory on the grounds of religion and race. The CA ruled that it could not be said that the provision, criterion or practice ("PCP") of linking basic pay with length of service put the Muslim chaplains at a disadvantage, as the real reason for the pay disparity was for the neutral reason that Muslim chaplains had not been required before 2002. The SC held that the disadvantage was that the pay scale was based on length of service. The reason for the disadvantage was the shorter average length of service for Muslim chaplains, which was enough to establish that the PCP put them at a particular disadvantage. However, the PCP was objectively justified, on the basis that the Prison Service was transitioning to a new scheme, under which length of service was determinative of pay over a shorter period.

Comment

The SC made it clear that once a group disadvantage has been established – often via statistical evidence – an explanation as to the "reason why" there is group disadvantage is not necessary. The PCP that is applied need not put every member of the group sharing the protected characteristic at a disadvantage, provided the group as a whole suffers a disadvantage and an employer may be able to objectively justify its PCP, by proving it is a proportionate way of achieving a legitimate aim, as was the case in *Naeem*.

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