Final warning for poor performance and the impact on the fairness of dismissal

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In Fallahi v TWI Limited, the EAT held that in performance

dismissal cases, Tribunals may only look behind final written warnings where they are "manifestly inappropriate". However, warnings may carry less weight in performance dismissal decisions, with the result that they do not undermine the fairness of any later dismissal.

What does the law say?

In order to dismiss an employee fairly, an employer needs to identify a fair reason for dismissal. One such reason is capability (which covers both poor performance and ill health). Where a fair reason exists, the Tribunal must decide whether, in the circumstances, the employer acted reasonably in treating that reason as sufficient to dismiss.

This test applies equally to cases where the employee has previously been given a final warning. In the case of Davies v Sandwell MBC the Court of Appeal said that in such cases it is not the function of the Tribunal to: "…reopen the final warning and rule on…whether the final warning should, or should not, have been issued and whether it was a legally valid warning or a 'nullity'." In other words, the Tribunal should not try to unpick whether it was right or wrong for the warning to have been issued.

Instead, the job of the Tribunal is to decide whether the final warning was something which a reasonable employer could reasonably take into account when deciding to dismiss. This requires the Tribunal to consider whether it was "manifestly inappropriate" to have given the warning. This is a high threshold for claimants to overcome and requires them to show that that it plainly ought not to have been imposed (e.g. if a warning was issued for gross misconduct where it was clear that the conduct in question did not amount to this).

Where a final warning is found to be manifestly inappropriate, and the employer had attached significant weight to it when deciding to dismiss, then it is likely that the subsequent

dismissal decision will be found to be unreasonable and unfair.

What happened in this case?

Mr Fallahi began working for TWI Limited as a Senior Project Leader in June 2014. Concerns with his performance were raised at three separate appraisals which took place over the course of a year. In January 2016 an informal performance management process was initiated. Objectives were set, with six targets to be assessed over an eight-month period (one in June 2016, one in October 2016 and the remaining four in January 2017).

Before those deadlines arrived, Mr Fallahi's line manager became concerned with the lack of progress towards the targets which had been set. In May 2016, Mr Fallahi, was invited to a capability hearing and warned that the outcome could be a first or final written warning. The outcome of the hearing was that there had been consistent underperformance over a considerable period of time. A final written warning was issued, and further objectives were set for a three-month review period from June to August 2016. Mr Fallahi did not appeal the decision to issue the final written warning.

By the end of July 2016, however, it was clear that Mr Fallahi would not achieve the further objectives he had been set. His manager gave him the option of continuing with the final month of the review period or leaving immediately with one month's pay. Mr Fallahi agreed to leave, and settlement negotiations began. However, the negotiations broke down and he went off sick. He failed to attend a further capability hearing, despite an occupational health assessment stating that he was well enough to attend. In light of the continued poor performance, Mr Fallahi was dismissed on the grounds of capability.

Mr Fallahi brought a claim for unfair dismissal in the

Employment Tribunal. The Tribunal dismissed the claim, concluding that the warning was within the range of reasonable responses and had not been manifestly inappropriate.

What was decided?

Mr Fallahi appealed to the Employment Appeal Tribunal (**EAT**). He contended that the "manifestly inappropriate" test was not applicable to warnings issued as part of a capability process. In such cases, he argued, Tribunals should be free to consider the impact of any flaws in the warning process without needing to surmount this high threshold. Alternatively, if the manifestly inappropriate test was applicable, then the warning was manifestly inappropriate and unreasonable in light of a number of procedural failings.

The EAT dismissed the appeal, holding that the "manifestly inappropriate" test applies to types of all dismissal cases – including capability dismissals – when a Tribunal is considering whether it can look behind a warning. However, the EAT noted that the question of going behind a warning may be of less importance in capability dismissals, where the true significance of a warning is to notify the employee of the need to take positive steps to improve over a period of time. By contrast, the validity of a final warning will be of the utmost importance in misconduct cases where, for example, a warning leaves an employee "hanging by a thread". In those case, the employer will attach significant weight to the prior warning when deciding to dismiss for a further act of misconduct.

The EAT also held that that Tribunal had been entitled to find that the use of the final warning was appropriate in this case. The Tribunal had found that the final warning was the starting point for the further review period. The position was made clear to Mr Fallahi and he knew what he had to do to demonstrate the necessary improvement. In particular, it was reasonable for the employer to have sought to cut short the

review period by one month given the lack of progress towards the objectives (and, in any event, he was given the option to continue with the review period if he wished). The warning was one factor which had been taken into account when deciding to dismiss, but what really mattered was the poor performance and failure to improve.

What does this decision mean for employers?

This decision confirms that Tribunals will not usually interrogate warnings given in a performance management process prior to a dismissal. An employee who wishes to challenge a performance dismissal on the basis of an earlier warning, will need to surmount the high hurdle of showing that it was "manifestly inappropriate".

Even where a warning in a capability process is manifestly inappropriate, this will not always mean that the ultimate dismissal is unfair. This is because the employer may not have attached significant weight to the warning when deciding to dismiss. Rather, the decision to dismiss will be based on the post-warning failure to improve.

Nevertheless, it would be wise for employers to ensure that warnings are only issued in appropriate cases and that internal capability procedures are followed. In this case the employer lost patience with the employee's failure to improve and ended up cutting short both the informal and formal review processes. A better strategy would have been to have grasped the nettle commencing a formal performance management process much earlier in the employment relationship. This would have allowed the employer more breathing space to follow their internal procedure to the letter and may also have meant that dismissal took place before the employee acquired unfair dismissal protection.

Fallahi v TWI Limited

If you would like to discuss any issues arising out of this

decision please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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