

HUMAN RESOURCES

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WHEN DOES A WARNING EXPIRE?

If you are unfortunate enough to be subject to disciplinary action it is normal, after a period of improved conduct or performance, that the warning issued to you will have expired.

It has long been the conventional wisdom in employment law that employers cannot rely on expired warnings to justify the termination of employment except in the matter of selection for redundancy.

The ACAS Code of Practice on disciplinary and grievance procedures (DGP) provides guidance on this. Not only does it tell employers that warnings should be recorded but, moreover, advises that after a period of time has elapsed they should be disregarded for disciplinary purposes. It goes on to recommend that that period should be:

- 12 months for a final written warning
- 6 months for a verbal, stage one or first written warning.

Many organisations' disciplinary codes refer to the fact that a warning will expire after a set period of time and will be removed from the employee's personnel records.

However, in the recent case of Airbus v Webb the Court of Appeal has suggested that an employer can rely, in certain circumstances, on expired warnings to justify what would otherwise have been an unfair dismissal.

In this case, Webb was dismissed for gross misconduct, having taken a break when he should have been working. The incident happened three weeks after the expiry of his final written warning for a similar offence.

Four other employees were also caught but, as they had clean disciplinary records, they were given final written warnings whereas Webb was dismissed. Webb claimed at an employment tribunal that he had been unfairly dismissed as the company had wrongly relied on an expired final written warning.

The Court of Appeal has found that the employer, in the limited circumstances where the employee has committed a serious offence so soon after the expiry of a final written warning, was entitled to rely on the expired warning and hence the dismissal was fair.

This decision is highly controversial and has created a great deal of uncertainty for employers and employees alike. In particular, employees cannot now assume that just because a warning has expired, if they commit a similar offence, that warning may be relied on by their employer to justify a dismissal that would, otherwise, be unfair.

Employers too have a degree of uncertainty, in that they may rely on an expired warning without any degree of knowledge of whether or not an employment tribunal would uphold their decision or not.

Employees need to be aware that they may not be able to 'get away' with misconduct after a final warning has expired and their behaviour may need to be exemplary for some time thereafter.

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