YOU HAVE BEEN WARNED...

Two recent cases have highlighted the dangers inherent in failing to ensure that disciplinary procedures are fairly and reasonably applied at all stages of the disciplinary process, not just at the dismissal stage. In circumstances where an employer gets it wrong along the way, it will not be saved in any subsequent unfair dismissal proceedings by an employee’s failure to appeal any sanction imposed.

THE FACTS

In the first case, a teacher, Miss Davies, was given a final written warning following an incident of inappropriate behaviour in the classroom. At the disciplinary hearing she produced evidence which undermined the allegations against her. This evidence was ignored on the basis that it had been produced late. Miss Davies appealed the final written warning but subsequently withdrew her appeal on the advice of her trade union, who informed her that her warning could be increased to a dismissal on appeal. So the final written warning remained on her file. Subsequently, further allegations were made against Miss Davies and she was dismissed, partly on the basis that she was already under a final warning. She brought a claim for unfair dismissal. The tribunal held that her dismissal had been fair. Miss Davies’s employer had been entitled to rely on the previous warning. As the warning had not been appealed, its validity could not be questioned. Miss Davies appealed the decision of the tribunal to the EAT.

In the second case, an employee, Mr Sakharkar, was dismissed under his employer’s absence policy. It transpired after dismissal that Mr Sakharkar’s absences had been insufficient to justify a third stage review under the policy and the warning he had received as a result. Mr Sakharkar brought a claim of unfair dismissal. The tribunal held that despite the error, his dismissal had been fair. The third stage warning had been a genuine mistake and Mr Sakharkar had not appealed against it. Mr Sakharkar appealed against the Tribunal’s rejection of his claim.

THE DECISION

The EAT upheld both appeals.

In the Davies case, the EAT held that the tribunal had been wrong about the effect of Miss Davies’s failure to appeal against the final warning. If a warning had been issued by an employer for an oblique motive or had been issued manifestly inappropriately, then an employer could not rely on the warning to justify a subsequent dismissal for a fresh offence. Here, any reasonable employer would have adjourned to consider the late evidence submitted late by Miss Davies. It was not relevant that Miss Davis had failed to appeal the final written warning. This was especially in circumstances where the reason for the employee not pursuing the appeal did not involve any admission that the allegations against them were true.

In the Sakharkar case, the EAT held that the tribunal had erred by taking account of Mr Sakharkar’s failure to appeal the third stage warning. If there was anything to suggest that a warning had been issued manifestly inappropriately, as there was here, then the tribunal should have taken this into account when deciding whether the employer’s decision to dismiss was reasonable. Although both the employer and the employee had honestly misunderstood the policy, the employer’s mistake was not excusable. Tribunals can take into account the employer’s size and administrative resources. Here the employer could have taken the appropriate advice internally and this would have prevented the injustice. The dismissal was unreasonable and therefore unfair.

IMPACT

These cases highlight the importance of applying disciplinary procedures fairly and consistently at all stages of the process. If an employer has acted unreasonably or inappropriately in issuing a warning it will not be able to rely on that warning in justifying any subsequent decision to dismiss, if subsequent
misconduct or underperformance occurs. The fact that the employee does not appeal the warning will be immaterial.

RECOMMENDATIONS
Many warnings issued by employers under a disciplinary do not lead on to dismissals. However, although issuing a warning poses no immediate threat to dismiss, an employer must always be careful to ensure the fair and consistent application of any relevant policy. The greater the resources of an employer, the greater the expectation will be that the employer will apply policies correctly. Care should be taken to ensure that the level of sanction is appropriate with regard to the facts of each case.

Whilst it will not be sensible to double check every warning given that the legal risk is lower than for dismissals, these cases are important. Where an employer is going to dismiss relying on a prior disciplinary record, it is now important to investigate whether those earlier warnings are properly given and in line with any policies or procedures. If the employer is dismissing regardless of any prior warnings (for example for gross misconduct) then the dismissal stands or falls on its own merits, so the existence of earlier warnings would be irrelevant. However, where the employer relies on the earlier disciplinary warnings, the prudent employer will now double check these before dismissing in reliance on them to ascertain whether the warning was appropriate and reasonable.