Appeal No. UKEATS/0029/13/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 12 November 2013

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR KEVAN SWEENEY (DECEASED) APPELLANT

STRATHCLYDE FIRE BOARD RESPONDENT

JUDGMENT

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APPEARANCES

For the Appellant	MR J BRYCE (Advocate) Instructed by: Thompsons Solicitors and Solicitor Advocate 16-20 Castle Street Edinburgh EH2 3AT
For the Respondent	MR B NAPIER (One of Her Majesty's Counsel) Instructed by: Scottish Fire and Rescue Service West Hub 99 Bothwell Road Hamilton South Lanarkshire ML3 0EA

SUMMARY

UNFAIR DISMISSAL – Reason for dismissal including substantial other reason

Unfair dismissal. The Claimant was dismissed because he had been convicted of criminal offences which were held to be not befitting of office held by him, that of retained fireman, with rank of watch commander. The Respondent would have issued a final written warning rather than dismissing, in light of all the circumstances, had it not been for a final written warning which the Respondent had given the Claimant for other misconduct, after the criminal acts had taken place, but before the conviction and before the disciplinary procedure relating to the criminal conduct. The Claimant argued that the final written warning should be ignored as it did not exist when the criminal acts took place. The Respondent argued that it required considering all that appeared on the record. **Held**: the Respondent was entitled to have regard to the final written warning. Appeal dismissed.

THE HONOURABLE LADY STACEY

1. I regret to note that Mr Sweeney passed away after the case was heard. This is a full hearing about unfair dismissal. I shall refer to the parties as Claimant and Respondent. Mr Bryce appeared for the Claimant both before me and at the Employment Tribunal. Ms Pitt appeared at the ET for the Respondent, and before me Mr Napier QC appeared. The Claimant appeals against the decision of the ET, Judge Sorrell sitting alone, sent to parties on 20 February 2013. By that decision the ET dismissed the Claimant's claim of unfair dismissal.

Background

2. The Claimant was employed by the Respondent as a retained fireman. He attained the rank of watch commander. He was presented with a long service award in 2007, as he had over twenty years of good service. His employment began in 1985 and ended in his dismissal on 15 September 2011. There was an internal appeal in which the decision to dismiss was upheld.

3. The events with which this case is concerned took place in 2010 and 2011. On 30 July 2010 the Claimant was charged by police with an offence of domestic assault, in which he had broken his wife's nose. The assault had taken place earlier that month. The criminal case came before the court in March 2011. The Claimant pled guilty. On 31 March 2011 the Claimant was sentenced in respect of the crime of domestic assault and a connected breach of bail, at Kilmarnock Sheriff Court, to 180 hours community service.

4. After the assault but before the court disposal, on 31 August 2010, the Respondent issued a final warning to the Claimant regarding unauthorised absence from his post. That arose out of his going overseas to work as a fireman without obtaining the appropriate authorisation from

the Respondent, being absent between 12 March 2010 and 10 June 2010. The final written warning was in the following terms:

> **"Dear Mr Sweeney**
>
> **Disciplinary Procedures – Final Written Warning**
>
> **I refer to the disciplinary hearing which was held on Tuesday, 31 August 2010 at North Ayrshire and South Ayrshire Headquarters, Ardrossan. In terms of Strathclyde Fire and Rescue Disciplinary procedures, I am issuing this final written warning to you regarding the following matters of serious misconduct:**
>
> - **Your unauthorised absence from duty from 12 March 2010 until 10 June 2010.**
> - **Your failure to adhere to HR procedure 02/2007 career breaks and**
> - **A serious breach in trust and confidence.**
>
> **The conduct improvement expected of you will be that you comply with Strathclyde Fire and Rescue procedures for the duration of your future employment. The likely consequence of other misconduct or insufficient improvement is:**
>
> - **Dismissal from Strathclyde Fire and Rescue**
>
> **The final written warning will be noted on your personal record and will stand to be admissible against any further misdemeanour for a period of 18 months from the date of this letter, namely, until Wednesday, 29 February 2012.**
>
> **I would remind you that this decision will not be implemented until 7 days after the issuing of this letter. When notification of an appeal is received during this period, the decision will not be implemented until the outcome of the appeal is known.**
>
> **I have to advise you that the disciplinary procedures entitles you to appeal to ACO Goodhew (Operations to Director) within 7 days of receipt of this letter if you believe the issuing of a final written warning to be unfair in the circumstances. If you choose to appeal you must complete form DCP/3/07, providing full details on the grounds of appeal.**
>
> **Yours faithfully**
>
> **D. Proctor, Area Commander East & West Dunbartonshire."**

5. On 15 April 2011 the Claimant was suspended by the Respondent. The letter of suspension stated that the reason for the suspension was to enable the Respondent to carry out an investigation into an allegation that the Claimant's conduct was the subject of criminal proceedings. It was stated that that may be in conflict with the Strathclyde Fire and Rescue Services aims, objectives and policies and be not befitting of a watch commander. The Claimant was warned that if substantiated, the allegations could result in a breach of the employer's trust and confidence in his ability to fulfil his role. An investigation followed, and on 28 April 2011 the Respondent wrote to the Claimant stating that an investigation had been

undertaken into allegations which could amount to gross misconduct and which could result in his being dismissed from the service. He was invited to attend a fact-finding interview on 10 May 2011. On 31 May 2011 an officer of the Respondent reported to the group commander of the Respondent that he had attended Kilmarnock Sheriff Court on 4 March 2011 to witness the case against the Claimant and to provide welfare support as necessary. He reported that the Claimant pled guilty to the charges at the hearing and sentencing was deferred until 31 March 2011. He attended on that date and noted that the Claimant was sentenced on charge 1 (domestic abuse) and charge 2 (a breach of bail conditions by failure to abide by a court order not to visit the family home until the completion of the court proceedings) to 100 hours and 80 hours of community service respectively. Mr Hankinson, the group commander, made a fact-finding report noting the criminal proceedings and stating that the conduct of the Claimant may not be befitting of a watch commander, and that therefore there was a case to answer. The Respondent wrote to the Claimant on 9 August 2011 requiring him to attend a disciplinary hearing. It stated that the reasons for the hearing were to consider an allegation that his conduct had been the subject of criminal proceedings, and that that may conflict with the service's aims, objectives and policies, and not be befitting of a watch commander. There was a warning that it might amount to gross misconduct and could result in his being dismissed from the service. At the hearing, the Claimant produced medical evidence and a letter of support from his wife.

6. The decision reached by the Respondent at the disciplinary hearing on 15 September 2011 was to dismiss the Claimant. The Respondent wrote to the Claimant on 20 September 2011 in the following terms:

> **"Dear Mr Sweeney**
>
> **DISCIPLINARY PROCEDURES**
>
> **I refer to the disciplinary hearing which was held on Thursday, 15 September 2011. In terms of Strathclyde Fire and Rescue Disciplinary Procedures, I write to advise you that you have been dismissed from your post of Watch Commander with effect from Thursday, 15 September 2011 on the grounds of misconduct.**

As outlined to you during the Hearing, the reasons for your dismissal are as follows:

(1) that your conduct, which was the subject matter of criminal proceedings relating to domestic abuse and breach of court bail conditions, was found to conflict with Strathclyde Fire and Rescue Service's Aims objectives and policies and be not befitting of a watch commander. It is the view that this misconduct represents a breach of the code of conduct, a breach in your employer's trust and confidence, in your ability to fulfil your role and a breach of your contractual terms and conditions of employment.

(2) In accordance with the disciplinary procedure No 19/2005

'Before deciding whether disciplinary action is appropriate and at what level, the chairperson should consider the employee's disciplinary and general record… Disciplinary action is cumulative so if an employee has an outstanding warning on their record, any future action taken must be at least at the next level on the disciplinary scale.'

Your conduct has previously given cause for concern and resulted in a final written warning being issued to you on 31 August 2010. This sanction remains live on your file until 29 February 2012. The reason for the sanction is due to unauthorised absence, a failure to adhere to the career break procedure and resulted in a breach of trust and confidence.

Having fully considered all of the evidence available to me (inclusive of points 1 and 2 above), I have no alternative but to dismiss you from the Strathclyde Fire and Rescue.

…

If you consider this action to be unfair in the circumstances you may appeal…"

7. The Claimant lodged an appeal against his dismissal on 23 September 2011. His ground of appeal was stated as follows:

> **"I wish to appeal the level of sanction awarded against me at my discipline hearing on 15 September 2011. It is my belief that the final written warning given to me in conjunction with my outstanding final written warning currently on my record is too severe as both offences are inextricably linked. That is to say that because the stress I was under during my suspension (in June to August 2010) from the service and along with my outside stresses contributed to an incident which led to my arrest and subsequent conviction. I believe that the Chair at my hearing did not give due weight to the medical evidence submitted and the circumstances of my life at that time. I ask the Chair of my appeal to review my case with a view to reducing the discipline award that would allow me to continue my employment with Strathclyde Fire and Rescue."**

8. An appeal hearing was heard on 18 November 2011. The Assistant Chief Officer of the Respondent took the appeal and decided to uphold the dismissal. He wrote to the Claimant giving his decision and stating the following:

> **"In summary, I concluded that the nature of your conduct which led to the criminal proceedings and which you pled guilty had a significant detrimental effect on your suitability to be employed by Strathclyde Fire & Rescue Service."**

9. The Claimant submitted a form ET1 in which he made a claim of unfair dismissal and a claim of disability discrimination. The latter claim was dismissed and that decision was not appealed.

10. The ET summarised the evidence led before it. For the purposes of the appeal before me, the relevant evidence is found at paragraph 54 of the ET reasons. The decision to dismiss the Claimant was made by Mr Milne, who took into account the fact that the final written warning was on the Claimant's file having been issued on 31 August 2010 and being stated to be live for 18 months. The incident which led to dismissal was that of the domestic assault, which had taken place before the final warning was given about absence.

11. In narrating the submissions made on behalf of the Claimant, the ET make plain that the evidence from the witnesses for the Respondent was that they knew that the misconduct pre-dated the warning. The evidence from Mr Milne, the person who took the decision to dismiss, was that in light of all of the circumstances he would have imposed a final warning in respect of the criminal convictions, had it not been for the final warning on the Claimant's record at the time of his decision. He felt that he had no option, given that the Respondent's policy was that disciplinary action is cumulative, and that he therefore had to make a disposal which was on the next level.

12. It was submitted before the ET that a warning pertains to future conduct, and to future conduct alone. While it was accepted that an employer was entitled to take into account a warning which related to behaviour of a different nature from the current disciplinary matter, it was argued that in this case the Respondent was not entitled to take into account the existence of the warning because the misconduct which led to dismissal had taken place before the warning had been given. It was argued that the purpose of a warning is to deter future action.

The ET decision

13. The submissions at the ET were wide in scope, covering the Claimant's rights under article 8 of the **European Convention on Human Rights** as well as his rights under the **Employment Rights Act 1996** (ERA). The ET correctly directed itself on the provisions of section 98 of the **Employment Rights Act 1996**. It made reference to the cases of **Singh v London Country Bus Services Ltd** [1976] IRLR 176 and **Gunn v The British Waterways Board** EAT 138/81. It directed itself that the conduct of an employee outside of his work may be of relevance and that potential damage to an employer's reputation is an important factor, particularly where public service employees are concerned. The ET directed itself in terms of the case of **Polkey v AE Dayton Services Ltd** [1988] ICR 143, noting that a dismissal may be unfair on account of unfair procedure alone. It directed itself that it must be careful not to assume that because it would have acted in a different way to the employer, that the employer had acted unreasonably. It made reference to the cases of **Iceland Frozen Foods Limited v Jones** [1983] ICR 17, **J Sainsbury plc v Hitt** [2003] ICR 111 and **British Home Stores v Burchell** [1980] ICR 303. The ET noted appropriate directions on the question of compensation and finally noted the terms of section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992** (TULRCA) which provides that an ET may increase (in certain circumstances) an award it makes if it finds that an employer has failed to comply with an ACAS code.

14. At paragraph 81 the ET set out the issues to be determined by it as follows:

- Has the Respondent shown the reason for dismissal?
- Was the reason for dismissal a potentially fair one?
- Did the decision to dismiss fall within the band of reasonable responses?
- Did the Respondent follow a fair procedure?

- Were there any failures by either party to follow the ACAS code and if so, were such failures unreasonable?
- If the Claimant was unfairly dismissed, what remedy is appropriate?
- If compensation is to be awarded, how much should be awarded?

15. The ET noted that the primary issue with which it was concerned was whether the sanction of dismissal fell within the band of reasonable responses. There is some discussion about the position which watch commander holds in the local community, and the ET found the evidence given by the Respondent's witnesses to be credible to the effect that a significant element of a watch commander's community role was to engage with vulnerable groups which included women who had suffered domestic abuse. The ET found that Mr Milne had taken into account the Claimant's 26 years of service and his personal mitigating circumstances. The ET found that in light of all the circumstances, Mr Milne would have issued the Claimant with the lesser sanction of a final written warning had it not been that the Claimant had a current final written warning on his record. It is noted at paragraph 89 that Mr Milne's position was "that his hands were tied and he had no alternative but to dismiss him for gross misconduct". It is explained that he took this from the Respondent's Handbook for dealing with discipline in the workforce which states that:

> **"Disciplinary action is cumulative so if an employer (sic) has an outstanding warning on their record any future action must be at least at the next level on the disciplinary scale."**

16. The ET took the view that the actions of the Respondent were entirely reasonable in all the circumstances. The claim for unfair dismissal was dismissed.

Claimant's submissions

17. In the hearing at the EAT, matters proceeded on the basis that it was agreed between parties that the Respondent would not have dismissed the Claimant had it not been for the final written warning. The submissions on behalf of the Claimant were solely on that topic, it being accepted that the ET had dealt properly with all other submissions made to it.

18. It was argued that the warning was irrelevant because it came after the conduct which led to the disciplinary procedure. This is summed up in the final sentence of the grounds of appeal thus:

> **"A final written warning dated 31 08 10 cannot be relevant to conduct that predates it, as a matter of law."**

19. According to the grounds of appeal, the question was formulated in the written submission for the Claimant made to the ET but the question was not addressed. It is asserted in the grounds of appeal that the question can be answered only in the negative. It is argued that it is irrational in the sense of having regard to irrelevant considerations to proceed on the basis that a final written warning can be relevant to conduct which happens before the written warning is issued.

20. Mr Bryce, counsel for the Claimant produced a skeleton argument which he amplified in oral argument. He argued that the relevant ACAS code (paragraph 20) sets out the purpose of a final written warning as follows:

> **"20. A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences for the misconduct, or failure to improve performance, within the set period following a final warning. For instance that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority."**

He argued that it is clear from the text quoted that ACAS envisage that the relevance of a written warning is only to future conduct. Counsel argued that as a matter of ordinary language, a warning refers to the future.

21. Counsel referred to the case of **Airbus UK Ltd v Webb** [2008] EWCA Civ 49. He argued that section 98(4) of **ERA 1996** is not an isolated provision but is part of a statutory scheme, including the provisions of **TULRCA 1992** section 207 which makes reference to the ACAS code of practice. He referred to the case of **Thomson v Diosynth** [2006] SLT 323, in which he argued that the approach taken by the court was holistic in that it construed section 98(4) in the context of the ACAS code. (Counsel assured me, and showed me, that there was no relevant difference between the code in force at the date of these decisions and the code in force at the date of the dismissal.) In that case the Claimant had been dismissed for misconduct in circumstances where the employer had made it clear that but for the existence of a previous written warning, which had expired, he would not have been dismissed. The court found at paragraphs 27 and 28 the following:

> **"27. In this case the relevant warning was not stated to remain in force for an indefinite period but, according to the letter of 20 July 2000, was to stay on the Respondent's record for 12 months, a period which had expired before the act of misconduct took place. Nevertheless, in regarding the warning as tipping the balance in favour of dismissal, the appellants acted as if it remained in force beyond the expiry of the 12-month period. Their position was that the other factors, taken together, would not have justified that course of action. In these circumstances, the majority of the employment tribunal where, in our view, wrong to say that the warning was not used in the 'traditional' sense of forming the basis of more severe disciplinary action than might otherwise have been taken. It clearly was.**
>
> **28. The Respondent was entitled to assume that the warning letter meant what it said, and that it would cease to have effect after one year. In seeking to extend the effect of the warning beyond that period the appellants, in our view, acted unreasonably. We therefore agree with the conclusion of the EAT that the Respondent was unfairly dismissed."**

22. Counsel argued that **Thomson v Diosynth** was binding on me, but in any event was to be preferred to **Airbus** because it had correctly taken a holistic approach. Further, the court had recognised that the warning should be construed *contra proferentem.* Thus the warning had to be construed so as to preclude any application to anything other than future conduct. As the

contra proferentem rule applied, the warning had to be read so as to preclude any wider reference than it should properly bear. He argued that warning was of vital importance, as it was what tipped the case into dismissal; and the ET had erred in law in holding that decision to be in the band of reasonable responses open to the Respondent.

23. According to counsel's argument, **Airbus** could be distinguished from the present case. It did not deal with retrospectivity. He accepted that neither did **Thomson v Diosynth**. In **Airbus** the facts are conveniently set out at paragraph 10 thus:

> **"The employer dismissed the employee for not working when he ought to have been. Others in the same position were not dismissed. The disparity of treatment was because he had been given a final warning for a similar act of misconduct some 13 months earlier whereas the others had clean disciplinary records. However, the final warning given with respect to the earlier misconduct had expired after 12 months. The majority of the employment tribunal considered that although dismissal would have been fair had all been dismissed, it was not permissible to distinguish him in this way because once the warning had expired, he had to be treated someone with a clean record. The warning could not be relied on for any purposes. They considered themselves bound to reach this conclusion in the light of the decision of the Inner House of the Court of Session in *Diosynth Ltd -v- Thomson* [2006] IRLR 284."**

The court decided that the employer was entitled to have regard to the misconduct irrespective of the date warning about it, as set out in paragraph 47 of that case. Counsel drew a distinction between that and the present case, where the warning, in light of the stated policy, was what caused the employer to dismiss. In the present case there would have been no dismissal had the warning not been on the record. Counsel argued that the Respondent had given retroactive effect to the warning and in doing so the Respondent had acted unreasonably. He argued that so deciding did not involve any conflict with the decision in **Airbus**.

24. Counsel did not plead perversity. Rather he argued that the Respondent had taken into account an irrelevant consideration and had thereby acted irrationally in the familiar public law sense, as set out in the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] IKB 223. He referred to **Bryant v Sage Care Homes**

UKEAT/0453/11/LA, in order to emphasise that he appreciated that perversity as a ground of appeal is subject to a high test. He submitted that he did not seek to argue that ground; he argued that a different error of law had been made, that of irrationality.

25. The argument for the Claimant was helpfully summarised by counsel. According to binding authority, an employer may not have regard to an expired warning when dismissing for misconduct. Thus, by parity of reasoning, dismissal on the basis of a warning which did not exist at the date of the misconduct is unreasonable. There was no conflict with the case of **Airbus** when properly understood. If that argument was not accepted, then I should prefer the case of **Thomson v Diosynth** because of the court's proper reference to the statutory scheme as a whole, including the ACAS code. Counsel invited me to allow the appeal and find the dismissal unfair.

Respondent's submissions

26. Mr Napier QC, for the Respondent, also produced a skeleton argument which he supplemented by oral discussion. He argued that the appropriate test for an ET on an unfair dismissal case was set out in the case of **Orr v Milton Keynes Council** [2011] IRLR 317 at paragraph 44 by Aikens LJ as follows:

> **"The approach taken in these cases to the determination of the fairness of the dismissal concentrates on the conduct and state of mind of the employer immediately before and at the time of the dismissal. In substance it requires one to ask whether, when he took the decision to dismiss the employee, the employer had taken all reasonable steps to inform himself of the facts, whether, having done so, he formed the view on reasonable grounds that the employee had behaved in a way that justified his dismissal and, finally, whether his conclusion that the conduct justified dismissal was itself reasonable. In *Iceland Frozen Foods Ltd v Jones*, Browne-Wilkinson J, giving the decision of the EAT which has subsequently been approved by this court, held that in deciding the last question it is necessary to determine whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which the employer might have adopted. All these elements are in my view encompassed in the question posed in section 98(4)(a) of the 1996 Act, namely, whether the employer acted reasonably or unreasonably in treating it [sc. the reason shown by the employer] as a sufficient reason for dismissing the employee."**

27. Mr Napier also referred to the opinion of Elias LJ in **Turner v East Midland Trains** [2013] IRLR 107, for the proposition that the band of reasonable responses test does not apply only to the question of whether the sanction of dismissal was permissible, but bears on all the decisions taken in the dismissal process. He accepted that the provisions of section 98(4) cannot be viewed in isolation although he reminded me that section 207 of **TULRCA 1992** provides that the code is to be taken into account only where it appears to the Tribunal to be relevant. He argued that the code did not envisage the circumstances which arose in this case, and was therefore irrelevant.

28. Turning to the law on written warnings, counsel argued that case law had laid down two rules about final written warnings which existed at the time when the decision to dismiss was taken. He argued that if it could be shown that a final written warning was fundamentally flawed because it had been imposed unlawfully or was wholly disproportionate to the misconduct, then such a final written warning could be regarded as a nullity. If on the other hand it was not flawed then there was no basis for the Tribunal to go behind it. He referred to the cases of **Davies v Sandwell** [2013] IRLR 374, and **Wincanton Group v Stone** [2013] IRLR 178 where he quoted Langstaff P at paragraph 29 as follows:

> **"What is at issue in the case of any dismissal alleged to be unfair for which conduct is an accepted reason is whether the employer acted reasonably or unreasonably in treating that reason as the reason for dismissal. The focus required by statute is thus on the employer's actions and not upon the actions of the employee. Hence if an employer has given a warning in good faith, the view of an employment tribunal as to whether it, the employment tribunal, would itself have given the warning of whether it should and given by the employer is beside the point; the employer is entitled to think at the time of dismissal for later misconduct that the warning should have been given, and the employer's actions in response in that light to any new misconduct must be judged on the basis that the employer is entitled to take that view."**

29. Mr Napier argued that in the present case there was no argument that the final written warning on which the tribunal placed reliance was other than validly imposed. He was correct in that; Mr Bryce's argument did not depend on the final warning being invalid. Rather his

argument depended on the nature of a warning, as being something which looks exclusively to the future.

30. **Thomson v Diosynth**, according to Mr Napier, was not in point in the present case. He argued that the ratio of that case is that a final written warning should be disregarded as a factor in determining reasonableness when it is time limited and the time limit has expired. I did not understand Mr Bryce to have argued anything in conflict with that; rather his argument was that the final written warning was irrelevant when the employer came to decide what to do about the criminal convictions, because the conduct leading to those convictions had taken place before the final written warning was imposed. Mr Napier recognised that, and argued that the submission for the Claimant was that, by analogy with the decision in **Diosynth v Thomson**, the final written warning which existed at the date of dismissal should not have been taken into account when the Tribunal considered the reasonableness or otherwise of the dismissal under section 98(4). He argued that the ACAS code gives no guidance about the current situation. It may be that the current situation is an unusual one and was not foreseen by the draftsman. According to Mr Napier it did not follow that the code should be read as forbidding a warning such as the one in the present case being taken into account by a tribunal. He pointed out that had the criminal conviction misconduct been known at the time of the issuing of the warning a different sanction might have been applied. He also argued that the issuing of a warning is part of the whole history of the case and it is not something that the reasonable employer requires to ignore. He referred back to the case of **Davies** and in particular to paragraph 34 at which Lewison LJ stated:

> **"The second comment I wish to make relates to the written warning and its aftermath. This was one of the factors that the employer took into account in deciding to dismiss Miss Davis (sic). Given that the question is whether the employer acted reasonably, the sub question is whether it was reasonable to take that historic written warning into account. The fact of the written warning was a fact in the real world; and I cannot see that history can be rewritten. It was also a fact in the real world that, as the ET found, Miss Davis (sic) appealed against the written warning but her appeal was not pursued to a conclusion. In its first decision the ET decided that it was reasonable for the employer to take into account both these real facts.**

However the EAT held that the ET had made an error of law in having regard to the fact that the appeal against the written warning was not pursued to a conclusion. Although the point is not formally part of this appeal, I would not wish to be taken as endorsing the view that it is was unreasonable for an employer to take into account the fact that an appeal (not against the dismissal itself, but against a historic disciplinary sanction) has been withdrawn or abandoned."

31. Mr Napier argued that the final written warning in the current case "existed as a fact in the real world" and that the Respondent was entitled to take it into account and the ET therefore was entitled to take it into account in deciding whether the employer acted reasonably. Ignoring it would have amounted to rewriting history. He argued that the Tribunal was not required to assess the importance of the warning by looking at the rules of language, as suggested by counsel for the Claimant. The question was wider than that; the ET had to consider whether it would be open to a reasonable employer to have taken account of the warning in the way that the Respondent did. In amplification of his argument that the Tribunal required to look broadly at all the facts under section 98(4) of ERA, Mr Napier referred to **Airbus** at paragraph 47 where Mummery LJ said:

"Having regard to the reason for dismissal shown by the employer the question to be determined under s.98(4) is whether, in the circumstances, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee and this shall be determined in accordance with equity and the substantial merits of the case. I see nothing in the very wide wording of these provisions as laying down a rule for tribunals that the circumstances of the employee's previous misconduct must be ignored by the employer, if the time-limited final warning had expired at the date of the subsequent misconduct, which was the reason, or principal reason, shown by the employer for the dismissal. The fact of the previous misconduct, the fact that a final warning was given in respect of it and the fact that the final warning had expired at the date of the later misconduct would all be objective circumstances relevant to whether the employer acted reasonably or unreasonably and to the equity of the case and the substantial merits. The legislation does not single out any particular circumstances necessarily determinative of the questions of reasonableness, equity, merits or fairness."

32. Mr Napier did submit in his skeleton argument that there had been another reason why a reasonable employer could have had regard to the final warning, which related to a fabricated report. However he noted that that was not the conduct of which the Appellant was disciplined and I propose to say no more about it. Mr Napier also submitted, under reference to the case, decided by me, of **Kay v University of Aberdeen** UKEATS/0018/13/BI that the ET had

material before it from which it could decide that the Respondents did not act unfairly in dismissing the Claimant because of his conduct, being the criminal convictions. Once again, that was not the reason given by the Respondent for dismissal and it was not raised before me by the Claimant as a question for decision. Mr Bryce on behalf of the Claimant put his case succinctly and argued that the Respondent had dismissed the Claimant because of the written warning and the policy on a moving up the scale in disposal. That was the case that the Respondent required to meet on appeal.

33. Finally, Mr Napier argued that the outcome of the case could not be described as unfair. He argued that if the Respondent had known of the criminal events when imposing the final written warning for the absence matter, the result might well have been dismissal.

34. Mr Bryce in reply said that he did not seek to put aside the final writing warning; he said it had to be looked full in the face and dealt with; if one did that one found it was irrelevant because it was imposed after the conduct in question and the whole contextual point of final written warnings is to look to the future. He reminded me that his case was not based on any invocation of common sense or fairness, as he accepted that the EAT could deal only with errors of law.

Conclusion

35. I have decided that this appeal must fail. I accepted that the ET decision does not deal, at least not clearly, with the argument put up by Mr Bryce before me and which was put up before the ET. I have however had the opportunity of hearing full argument from Mr Bryce and from Mr Napier on the question, and as presented to me there is no argument about the facts. It therefore seems to me that even if the ET did not deal with an argument properly put before it, I can deal with it now. I understood parties to share that view.

36. In my opinion, the Respondent was entitled to take into account all that appeared on the record of the Claimant. Mr Napier's submissions about the ACAS code are to be preferred to those of Mr Bryce. The code does not deal with the situation with which the Respondent was faced. Similarly, the cases of **Airbus** and **Thomson v Diosynth** are not in point. They do not deal with the same situation. I do not accept Mr Bryce's argument that the final written warning requires to be construed as referring only to misconduct taking place after the date of the warning. Rather I accept Mr Napier's position broadly to the effect that a written warning final or otherwise is a fact which a reasonable employer is entitled to have in mind. In this case the Respondent dealt with the disciplinary offence relating to absence before the Claimant pled guilty to the assault. The Respondent was aware from the Claimant's position at the internal appeal that the Claimant regarded the matters as linked, both being due to pressure in his life. The fact is however that the Respondent dealt with the matters separately as they became aware of them. There was no argument from the Claimant at the disciplinary procedure regarding the absence offence that other matters were current and all should be dealt with together. The Respondent's policy on multiple incidents of misconduct happening during the subsistence of a warning is clear. Plainly a reasonable employer will not be hidebound by policy and will require to consider each case on its own facts. Such an employer will however be entitled to abide by its policy unless there is good reason why it should not. In the present case, the Respondent had a policy which would involve a person who committed misconduct while on a final written warning being dismissed, depending always on the nature of the misconduct. In the present case, the Claimant committed two acts of misconduct. One was the behaviour which resulted in the criminal convictions; the other was the unauthorised absence. The Respondent found each of them to be conduct which merited a final written warning and it was not argued before me that the Respondent had acted unreasonably in so doing. It seems to me that the Respondent was entitled to regard the facts, which were that the Claimant had

committed both of these acts of misconduct, as leading to a situation in which he put at risk his continued employment. The Respondent considered all of the mitigating circumstances, including his many years of good service and his explanation for the criminal convictions. Nevertheless, it took the view that the policy which dictated that a person who had committed more than one offence which merited a final written warning would require to be dismissed should not be displaced, despite the mitigating factors. I appreciate that the policy is directed towards a second act of misconduct during the period in which a final warning is live. I do not accept Mr Bryce's analysis of the nature of a warning. While it is correct to argue that a warning is an admonition that tells the employee that future misconduct will have certain consequences, it is in my opinion more than that. It is also a recording of the commission of misconduct in the mind of both employer and employee. Mr Napier submitted that a warning is "Janus like" in that it looks both ways. I accept that submission. I am of the view that the Respondent was entitled to look at the Claimant's record when deciding on the disposal in the disciplinary procedure relating to the criminal convictions. The Respondent was entitled to take notice of a finding of misconduct which was marked by the imposition of a final written warning. In my opinion the Respondent was absolutely entitled to proceed as they did. That being so it cannot be said under section 98(4) that the Respondent acted unreasonably when one considers all the circumstances of the case.

37. The appeal is dismissed.