

### WARNINGS - A TOUCH OF CAUTION IS URGED

**Specialising in Employment Law, Maxine Orr, a Partner with Worthingtons Solicitors, discusses the proper procedures for dismissing and disciplining an employee.**

Disciplining and dismissing an employee has never been more fraught with pitfalls - if you don't follow a correct procedure or fail to demonstrate a full investigation there is most certainly going to be a finding of unfair dismissal against you by a tribunal. A recent decision in the Court of Session in Scotland looked at the effect of past warnings and the extent to which an employer can rely on them.

Mr Thomson was employed as an operator by Diosynth Ltd at its factory which produced chemicals for companies in the pharmaceutical industry. Part of the manufacturing process involved a technique known as "inerting" whereby air was pumped out of a vessel containing chemical and replaced with nitrogen (an inert gas) with a view to preventing accidental combustion and spillages. In November 1998, following a spillage in the factory, all employees were given briefings on the importance of carrying out the inerting process properly. Mr Thomson along with all other employees undertook to comply with these procedures.

However, in July 2000 he failed to inert a container which led to the leakage of methanol. Following a disciplinary hearing Mr Thomson received a written warning and a three-day suspension without pay. He was reminded of the importance of adhering to the correct inerting procedure. The warning was to remain on his disciplinary record for one year running from July 2000.

In November 2001 a further accident arising from a failure to inert occurred at the factory resulting in the death of an operator. Following a full investigation, 18 employees were identified as failing to inert when required to do so. Mr Thomson was one of them. At his disciplinary hearing Mr Thomson admitted that he had failed to inert on three separate occasions and that he had falsified records in relation to those failures. He was dismissed by the

employer "due to the seriousness for this matter and due to receiving a previous warning for the same issue". Mr Thomson appealed internally but was unsuccessful and issued Employment Tribunal proceedings for unfair dismissal against the company.

The Tribunal found that the dismissal was fair deciding that "owing to the safety risks associated with the business and Mr Thomson's previous assurance that he would follow the procedures, it had been reasonable for the Company to take into account the expired warning". He appealed to the Employment Appeal Tribunal. It overturned the decision, stating that the Company was not entitled to take into account the expired warning especially since the warning had not been expressed as a final written warning, meaning that the employer had failed to communicate to the employee the seriousness with which it viewed his failure to inert.

The Company appealed to the Court of Session. Mr Thomson argued that an employer is not entitled to rely on a time-expired warning as a determining factor in reaching a decision to dismiss. In this case the employer admitted that Mr Thomson would not have been dismissed had it not been for the previous written warning. The Court stated that Mr Thomson had been entitled to assume that the warning letter meant what it said and that it would cease to have effect after 12 months. In seeking to extend the warning's effect beyond that period, the Company had acted unreasonably.

It is important that Employers take professional legal advice before taking action against employees to avoid lengthy and expensive court proceedings and compensation payments. **41**



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