Expired warnings don't disappear

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Here's a typical scenario: an employee with a poor disciplinary record again transgresses, but the previous warnings for similar incidents have expired. May the employer consider the employee's disciplinary history as a whole when deciding on a fresh sanction, although some or all of the warnings have lapsed?

We know that previous warnings (whether lapsed or not) cannot be used to determine if an employee is guilty of a later incident of alleged misconduct: the previous conduct only becomes relevant to determine an appropriate sanction if the employee concerned has been found guilty of a new transgression.

It is interesting to note, first of all, that the LRA does not refer to 'misconduct' as a ground for dismissal, but to 'a fair reason related to the employee's conduct or capacity'. This terminology suggests that an employer is not necessarily limited to a particular instance of misconduct or current warnings when making its decision whether or not to dismiss, but may have regard to the employee's conduct in general.

Second, the CCMA Guidelines on Misconduct Arbitrations which provide a compulsory set of guidelines for arbitrators to use in misconduct cases, do not in any way limit an assessment of the employee's conduct to the latest transgression and previous, current warnings. It states, in para 93 of the Guidelines, that the test is 'whether the employer could fairly have imposed the sanction of dismissal in the circumstances, either because the misconduct on its own rendered the continued employment relationship intolerable, or because of the cumulative effect of the misconduct when taken together with other instances of misconduct.' It goes on to state further that 'an employee's disciplinary record may be a relevant aspect of the enquiry into the gravity of the contravention if the employer relies upon the cumulative effect of repeated misconduct by the employee or if the misconduct complained of is made up of previous incidents in respect of which warnings have been given,' Again, there is no limitation as far as the currency of the warnings are concerned.

The recent decision of the Labour Appeal Court in *NUM obo Selemela v Northam Platinum Ltd* has now settled the matter by deciding that employers are entitled 'in appropriate circumstances' to take into account the *cumulative effect* of past transgressions in determining whether further progressive discipline would make any sense at all.

In this case the employee, a Mr Selemela, was dismissed after being found guilty of refusing to obey an instruction, leaving his workplace without permission and allegedly threatening to kill a colleague. A CCMA commissioner found him not guilty of the allegations and reinstated him with a year's salary in back pay. The employer had the award reviewed and set aside by the Labour Court, after which the employee appealed to the LAC.

Regarding the merits of the employer's decision to dismiss, the LAC agreed with the Labour Court's decision that Selemela's version of events was highly implausible and that he was indeed guilty of insubordination. It was common cause that the employee had two previous warnings for insubordination and for leaving his workplace without permission. He had also received a final written warning for insubordination and that warning was still valid at the time he had committed the transgressions that had led to his dismissal. The commissioner, however, had miscalculated the relevant dates and found that the final warning had lapsed.

But, said the court, even if the final warning had lapsed, there was no reason why the earlier (lapsed) warnings should not have been taken into account when evaluating the fairness of his dismissal: in appropriate circumstances employers are entitled to take into account the *cumulative effect* of past transgressions in determining whether further progressive discipline would make any sense at all. One such circumstance, according to the court, is where the employee concerned is found to have a 'propensity to commit acts of misconduct at convenient intervals falling outside the period of applicability of the written warnings'.

The court also referred to a 2006 decision of the LAC, *Gcwensha v CCMA and Others*, where it was held that 'an employer is always entitled to take into account the cumulative effect of these acts of negligence, inefficiency and/or misconduct. To hold otherwise would be to open an employer to the duty to continue employing a worker who regularly commits a series of transgressions at suitable intervals, falling outside the periods of applicability of final written warnings. An employee's duties include the careful execution of his work. An employee who continuously and repeatedly breaches such a duty is not carrying out his obligations in terms of his employment contract and can be dismissed in appropriate circumstances.'

We would recommend that employers not remove lapsed warnings from employee's files and adapt their disciplinary procedures to make it clear that lapsed warnings may be taken into account where appropriate. What will constitute an appropriate case in which to consider lapsed warnings will depend on the facts of each case, but a rough guide would be to ask whether or not, given the employee's track record, past remedial / corrective action had the desired effect.