



briefing

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Legal representation at disciplinary hearings: Court of Appeal gives its decision

Usually employers would be reluctant to allow an employee to be legally represented at a disciplinary hearing. Such hearings are often viewed as internal proceedings at which outside legal representation would be inappropriate and would run the risk of turning the hearing into a contested court type hearing.

In [G v The Governors of X School](#) the High Court held that, in certain circumstances, an employee has the right to legal representation at a disciplinary hearing and that representation by a workplace colleague or trade union official is insufficient. The Court of Appeal has now upheld that decision.

Whilst the courts have stressed the decision is based on the particular facts of the case employers should be aware of the potential wider impact.

Background

G worked as a music assistant at the school and a complaint was made that he had behaved inappropriately towards a pupil. Once the CPS had decided it would not be pursuing criminal proceedings against G the school carried out an internal investigation. On 6 February 2008, the school wrote to G confirming that the investigation was complete. The disciplinary hearing was arranged for 21 February and the school informed G beforehand that he was entitled to be represented by his trade union representative or a work colleague but that nobody else would be permitted to attend. G's solicitors wrote to the school asking for permission to represent him at the disciplinary hearing stating that the school should take account of the potential repercussions of an adverse finding against G and that a refusal of their request would constitute a breach of G's human rights.

The school refused to allow G legal representation at the disciplinary hearing and G was subsequently summarily dismissed for abuse of trust.

This decision was confirmed in writing by the school and G was notified of his right of appeal. The letter also stated that the school would be reporting G's dismissal "to the appropriate agencies" on the basis that G's behaviour indicated that he might be unsuitable to work with children. G informed the school of his intention to appeal against the dismissal and asked the school to allow him legal representation at the appeal. This request was also refused. G then made an application for a judicial review of the decisions not to allow him legal representation at the disciplinary and appeal hearings. He argued this was in breach of his rights to a fair trial under Article 6 of the European Human Rights Convention. The appeal process was put on hold pending the outcome of the judicial review proceedings.

High Court decision

The High Court held that because of the seriousness of the conduct alleged and the severity of the consequences of dismissal - a prohibition on working with children - G was entitled to an enhanced measure of procedural protection. G could not be expected to represent himself and being accompanied by a trade union official or work colleague was not sufficient. The High Court stressed however that its decision was confined to the circumstances of the particular allegations of misconduct made in this case and because of the prospect of G being placed on a 'barred list'. The High Court stated that its decision was not intended to have wider implications.

Article 6 of the European Human Rights Convention provides for the right to a fair trial and that everyone is entitled to a 'fair and public hearing' in relation to the determination of civil rights or obligations or criminal charges. Further, anyone charged with a criminal offence has the right to make a representation to cross-examine witnesses. The High Court held that the disciplinary proceedings and a subsequent referral to the Secretary of State were civil rather than criminal proceedings.

Both the school and G appealed to the Court of Appeal: the school against the finding that G was entitled to legal representation and G against the finding that the proceedings were not criminal proceedings.

Court of Appeal decision

The key issues for the Court of Appeal were as follows:

- Were the disciplinary proceedings a determinant of G's right to practise his profession for the purposes of Article 6?
- Does Article 6 require that G be allowed the opportunity of legal representation in the disciplinary proceedings?

In relation to the first question, the Court of Appeal held that there was a very close nexus between the disciplinary process and the barred list procedures. The outcome of the disciplinary proceedings (if still unfavourable to G after the appeal) would have a "profound influence on the decision-making procedures relating to the barred list". This would mean that G's right to practice his profession, a civil right, would be directly at stake. On that basis, the disciplinary proceedings were a determinant of G's right to practise his profession and Article 6 applied. However, Article 6 does not necessarily entail a right of representation but could do so depending on what was at stake regardless of whether or not the case was classified as civil or criminal.

Comment

A similar decision was reached in [Kulkarni v Milton Keynes Hospital NHS Foundation Trust](#) in July 2009. It was held that doctors and dentists employed by the National Health Service are entitled to legal representation at internal disciplinary hearings by a legal representative instructed or retained by their medical defence organisation. The NHS is effectively a single, national employer and if an individual faces career threatening disciplinary charges, dismissal could make the individual unemployable and so, legal representation should be permitted at any disciplinary hearing.

On the face of it, both these decisions would only seem to impact on the teaching or medical professions but the same principles could arguably apply to any profession which operates something like a barred list, for example care workers who work with vulnerable adults or certain roles in the private sector such as in financial services. Employers in those sectors will need to revisit their disciplinary procedures to make sure that provision is made for legal representation in cases where the disciplinary proceedings could impact on the employee's right to practice his/her profession.

Remember though that human rights claims can only be brought directly against public authorities and people working in the private sector would need to bring such a claim within another existing right such as a claim for unfair dismissal.

More information

If you would like further information, or would like to discuss the potential impact of these decisions on your organisation, please call Debra Gers, or your regular Morgan Cole contact.



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