



Employee disciplinary hearings and whistleblowing: recent developments

Summary and implications

In future employers will need to be careful when deciding whether or not to allow an employee to be legally represented at an internal disciplinary hearing. Two recent Court of Appeal decisions have affirmed the principle that, in some circumstances, employees will have a right to legal representation if they so request. The basic test that employers should apply in future is “what will be the likely impact on the employee’s right to practise his profession if the allegations against the employee are upheld?” Will he or she:

- lose his/her current job but be able to find similar work elsewhere; or
- be prevented from practising his/her chosen profession?

If the latter, Article 6 of the European Convention on Human Rights (ECHR) is likely to be engaged and to require the employer to allow him/her to have a lawyer present at the disciplinary hearing. Any public sector employee facing a threat to their continued professional career as a result of disciplinary action can automatically rely on this principle and enforce the right through judicial review proceedings.

Private sector employees in a similar situation may be able to claim that their dismissal is unfair if denied legal representation.

Although the Court of Appeal cases concerned the education and health sectors, they are expected to have a wider impact in other regulated sectors and professions such as financial services, accountancy and legal.

What does Article 6 of the ECHR say?

Article 6(1) – Everyone is entitled to a “fair and public hearing” in relation to the determination of civil rights or obligations or criminal charges.

Case law has already established that the right to practise one’s profession is a civil right within the meaning of Article 6.

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Disciplinary hearings and the right to a fair hearing under Article 6

The case of *Kulkarni v Milton Keynes Hospital NHS Foundation Trust* (July 2009) concerned a first year NHS doctor against whom a female patient had made a serious complaint. The Court of Appeal decided the case on the basis that Dr Kulkarni was entitled to legal representation under contractual disciplinary procedures.

However, the Court of Appeal also examined Article 6 and expressed the view that where the outcome of the disciplinary hearing could lead to the employee being deprived of his right to practice his profession, as opposed to just the loss of a specific job, Article 6 would be engaged and require him/her to be allowed legal representation.

In Dr Kulkarni's case, if the complaints against him were upheld, he was likely to be dismissed from his post, be unable to complete his training and so to become virtually unemployable. This was because the NHS is in effect a single national employer of doctors and has in place a system to alert all of its Trusts when a doctor is dismissed.

In the most recent Court of Appeal case, *G v Governors of X School* (January 2010), the appellant was a teaching assistant facing allegations of sexual contact with a 15 year old boy. If those allegations were upheld by the disciplinary investigation, the school would be obliged to report the allegations to the Secretary of State which could lead to him being barred from working with children in any educational capacity.

The Court of Appeal held that the claimant had a right to legal representation as part of a fair hearing under Article 6 in these circumstances, thereby affirming the comments in *Kulkarni*.

This development is likely to have a wide impact on employers

Public sector employers need to take heed of these recent decisions because they are bound by Article 6. They will, in particular, be relevant to employers in the education and health sectors, these being the sectors to which the cases related.

However this development will also have implications for private sector employers and particularly those operating in the financial services sector and other regulated professions. For example, where an employee regulated by the Financial Services Authority faces serious professional conduct charges and potential dismissal, this could have far-reaching consequences for his future career, not least because of the obligation imposed by the FSA on financial services employers to provide an accurate reference.

If the employee is dismissed and brings an unfair dismissal claim, the Employment Tribunal, as a public body, must act in a way which is compatible with Article 6. It is therefore likely that the Tribunal will take into account whether any request for legal representation was allowed.

Where Article 6 does apply, an employee may be able to assert his/her right not only to legal representation, but also to further elements of a fair trial such as an independent and impartial disciplinary panel and the opportunity to cross-examine witnesses.

Points for employers to note

- The statutory right to be accompanied at disciplinary hearings is restricted to having a work colleague or union representative present. But your disciplinary policy may allow for wider rights of accompaniment.
- If a request for legal representation is made, ensure that it is given fair consideration.
- The right to legal representation will not apply in every case but do not dismiss an employee's request for legal representation out of hand.
- Consider the seriousness of the allegations being investigated and the impact on the employee's profession.
- If the disciplinary hearing could lead to the employee being deprived of his ability to practice his profession, as opposed to just the loss of his job, the right to legal representation could be engaged.
- If in doubt, seek legal advice before any request is refused.

The new whistleblowing referral system

In a separate development, from 6 April 2010 claimants who bring a whistleblowing claim against their employer will be able to tick a box on their Claim Form requesting the Employment Tribunal to forward details of their whistleblowing allegations to the appropriate regulator for investigation.

It is not yet known whether this will lead to an increase in the number of referrals to regulators such as the Health & Safety Executive, HM Revenue & Customs or FSA. However it seems likely that it will and employers need to be aware that:

- any whistleblowing claim brought against them in the Employment Tribunal after 6 April 2010 could result in details of the employee's allegations being automatically passed to the relevant regulator;
- there will be no requirement for the Tribunal to ascertain the truth of the allegations before passing them to the regulator; and
- some claimants bringing whistleblowing claims may tick the box as a way of applying pressure to their employers to enter into settlement negotiations.

Employers need to take care to ensure that if the claimant does tick this box they do not victimise the claimant for having done so, especially if the claimant is still an employee.

In the event that a claimant does tick the relevant box on the claim form and the Employment Tribunal does pass the allegations to the regulator, the Employment Tribunal will inform both the employer and the claimant that it has done so.

Whistleblowing Claims

An employee can bring a claim if they have been subjected to a detriment by their employer for making a "protected disclosure".

The disclosure by the employee must show that, in their reasonable belief, one of the following has occurred, is occurring or is likely to occur:

- a criminal offence;
- a miscarriage of justice;
- danger to the health and safety of any individual;
- a breach of any legal obligation;
- damage to the environment; or
- the deliberate concealing of information about any of the above.

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