

LEGAL REPRESENTATION AT DISCIPLINARY HEARINGS

1. Since 4th September 2000, and the coming into force of Section 10 of the Employment Relations Act 1999, a worker (note, not only an employee) has had a statutory right to be accompanied at disciplinary and grievance hearings.
2. The right to be accompanied applies to disciplinary hearings and hearings of the worker's grievance only; so, for example, it does NOT apply to hearings concerning a dismissal for redundancy¹, or an investigatory interview of the worker in relation to a grievance brought by another worker².
3. The statutory right is limited to a right to be accompanied by either a fellow worker or a reasonably certified trade union representative. There may, however, be a contractual right to be accompanied by other classes of persons, including legal representatives. Always check the contract before convening a hearing.
4. In the absence of any contractual right to be accompanied by a legal representative, the accepted position has been that there is no entitlement to be accompanied by a lawyer. In 2009, however, two important cases have called that accepted position into question. They are:

¹ *Heathmill Multimedia Limited v Jones* [2003] IRLR 856

² *Skiggs v South West Trains Limited* [2005] IRLR 459

Reg (on the application of G) v Governors of X School and Another³; and

Kulkarni v Milton Keynes Hospital NHS Trust and Another⁴

Reg (on the application of G) v Governors of X School and Another

Facts

5. The claimant, a music assistant, was employed by the respondent governors. Allegations were made of sexual conduct by the claimant against a 15-year old pupil. Following an investigation, the claimant was required to attend a disciplinary hearing. He asked for, and was denied, the right to be accompanied at the hearing by a legal representative. (He was allowed the right to be accompanied by either a fellow worker or a trade union representative.) The allegations were found proven and he was dismissed.

6. By application of the Education (Prohibition from Teaching or Working with Children) Regulations 2003, upon finding the allegation proven, the school was obliged to refer the case to the Secretary of State for consideration of whether to make a direction under Section 142 of the Education Act 2002, preventing the claimant from working with children

³ [2009] IRLR 434

⁴ [2009] IRLR 829

indefinitely. It was common ground that the Secretary of State would be entitled to rely upon the findings of the school's disciplinary panel.

7. The claimant sought judicial review of the decision to dismiss. The High Court allowed the application and quashed the decision.

8. The principal points of the High Court judgment are:

(i) The disciplinary process and the referral to the Secretary of State were inextricably linked, because the referral was the natural and likely outcome of the disciplinary hearing. As such, the two stages were, in fact, parts of one and the same proceedings for the purposes of Article 6 of the ECHR;

(ii) The proceedings were not criminal, and so the claimant did not have the automatic right to legal assistance of his own choosing guaranteed by Article 6(3);

(iii) The consequences of these civil proceedings (dismissal and the possibility of a Section 142 direction) were nonetheless sufficiently grave to require a high degree of procedural protection for the claimant under Article 6;

(iv) Given the gravity of the allegations and the potential consequences to the claimant, he could not fairly be expected to represent himself, and

representation by a fellow worker or trade union representative would not be adequate;

(v) Neither the claimant's right to make representations to the Secretary of State nor his right of appeal to the First-Tier Tribunal provided sufficient procedural protection because:

(a) The Secretary of State would be allowed to rely on the findings of the disciplinary panel;

(b) It was unclear whether the Secretary of State had the power to conduct a fact-finding exercise such as to allow the findings of the disciplinary hearing to be overturned;

(c) Even if the Secretary of State had such a power, as the disciplinary hearing was part of one and the same process as the referral, it was not possible only to allow legal representation for part of the same process;

(d) The appeal to the First Tier Tribunal was confined to the evidence before the Secretary of State; and

(e) Even if, which was unclear, the First Tier Tribunal had the power to set aside the findings of the disciplinary hearing, the Section 142

direction would probably have been made by that stage causing the claimant irreversible prejudice;

(vi) The claimant's right to present a claim to the employment tribunal did not provide him with sufficient procedural protection because:

(a) The tribunal would not conduct a review of the primary facts; and

(b) The tribunal would have no power to halt the Section 142 process pending its determination of the claimant's claim.

9. The last points are of particular note: the High Court was held to be a more appropriate venue to challenge the procedural aspects of this decision to dismiss than the employment tribunal. This raises the spectre of judicial review in such cases, with the associated element of considerable cost to potential proceedings.

Kulkarni v Milton Keynes Hospital NHS Trust and Another

Facts

10. The claimant doctor was accused of sexual misconduct towards a patient. A disciplinary hearing was convened. The claimant asked for, and was denied, the right to be represented by a legal representative. He applied for judicial review. At first instance, the High Court dismissed his

application, holding that it was doubtful that the Human Rights Act applied to disciplinary hearings but that even if it did, there were sufficient procedural safeguards, through the claimant's right to be represented at any GMC and employment tribunal hearing, for there to be no violation of Article 6. The claimant appealed to the Court of Appeal.

11. The Court of Appeal allowed the appeal. Whilst the appeal was allowed on a specific factual aspect of the case that did not concern Article 6, the Court nonetheless took the opportunity to offer guidance on the application of Article 6 to such cases. The principal points of the judgment are:

- (i) Article 6 is NOT engaged merely where what is in issue is the loss of a specific job;
- (ii) Where, however, the consequences of a disciplinary hearing are serious and far-reaching, such as the loss of the right to practice one's chosen profession, Article 6 is engaged. Here, the claimant in effect faced criminal charges, albeit in a disciplinary context;
- (iii) There was no sufficient procedural safeguard through proceedings before the GMC or the employment tribunal because neither body would be able to decide the crucial questions of fact that were before the disciplinary hearing;

(iv) An express contractual term that covers representation rights will mean that there is no room to import an implied term entitling a worker to require the employer to extend representation rights in his/her case, BUT:

(a) It is always open to a worker to ask the employer to extend representation rights;

(b) It is always open to an employer to waive strict entitlements;

(c) It is open to an employer in such cases to say that it will not consider such a request;

(d) If the employer considers the request, it must do so fairly and rationally;

(e) Since the line between cases where Article 6 may be engaged and where it may not be engaged is likely to be unclear, if a worker asks for extended representation rights, an employer might want to give the request fair consideration, keeping in mind that the denial of appropriate representation rights might be a violation of Article 6.

12. Practical Points

- (i) What is the nature of the proceedings (i.e. grievance or disciplinary)? It appears that it is only in certain disciplinary hearings that the right may be engaged.
- (ii) Has the worker requested the right to be accompanied by a legal representative? Remember the need for a request.
- (iii) Check the contract – does the worker have a contractual right to be accompanied by legal representative? If not, consider whether to accede to the request and record your reasons.
- (iv) What is at stake for the worker? Is it the loss of a job, or is it the loss of a professional career? Loss of a specific job is not enough.
- (v) Is Article 6 likely to be engaged? Is the employer a public body? If not, is the request, nonetheless, reasonable?
- (vi) If the worker is allowed a legal representative, consider arranging for a legal representative to advise the disciplinary panel.

ENHANCED DISCLOSURE AND “ADDITIONAL INFORMATION”

(Or, “I’d tell you but I’d have to kill you”)

1. It is estimated that 20% of the working population of England and Wales have criminal convictions recorded against them. Unemployment is a principal risk factor in re-offending. The underlying rationale of the Rehabilitation of Offenders Act 1974 was that persons with convictions would not necessarily be prejudiced by their convictions for the rest of their lives. There has, however, been a steady retreat from that liberal ideal.
2. Part V of the Police Act 1997 permits registered bodies to obtain information about the criminal records of potential employees. In England and Wales, the information is provided by the Criminal Records Bureau. The information is called disclosure. There are two types relevant here: standard (containing details of spent and unspent convictions, cautions, reprimands and warnings) and enhanced (containing all classes of information contained in standard disclosure, and non-conviction information thought relevant to the post applied for).
3. In turn, the non-conviction information provided in enhanced disclosure falls into two classes:

- (i) Approved Information (non-conviction information that will appear both on the job applicant's copy of the disclosure certificate and the registered body's copy of the disclosure certificate); and
 - (ii) Additional Information (appears on neither copy of the disclosure certificate, but on the registered body's certificate only will reference be made to information that will be provided under separate cover, and the additional information is sent in a separate letter only to the registered body).
4. The decision to disclose additional information, and what is contained in it, is entirely a matter for the chief officer of police. The criteria to be applied by the chief officer are, in summary: (i) that the information might be relevant for a prescribed purpose; (ii) that it ought not to be included in the certificate in the interests of the prevention or the detection of crime; and (iii) that it can be disclosed to the registered body without harming those interests.
5. Additional information must be handled, stored, used and disposed of in the same way as any other disclosure information, subject to one fundamentally important qualification. Neither the additional information itself, nor even the fact that it exists, must be disclosed to the job applicant, or to anyone not involved in the recruitment decision. It is a criminal offence to disclose additional information without the prior

written authority of the chief officer of police for the force providing the information.

6. The principles are simple to understand. In practice, they are difficult to apply. What is to be done in the case of an applicant who has been made a provisional offer of a job, but in respect of whom there is additional information which makes the recruiter withdraw the offer? How do you tell the applicant why the offer has been withdrawn, without telling the applicant about the additional information? How do you defend the employment tribunal proceedings?

Receipt of additional information

7. Assume that a provisional offer has been made, and enhanced disclosure has been applied for and received. It contains additional information.

Action

8. Consider carefully the additional information:
 - (i) Is it relevant to the job? (Remember the criteria for disclosure by the chief officer)

- (ii) What is it? Is it likely to be reliable? (Remember, there is no guarantee of accuracy)
- (iii) Does other information disclosed, that is not additional information, call into question the applicant's suitability for the job?
- (iv) Remember:
 - (a) Whilst it is the chief officer of police's decision as to whether to provide additional information, what to make of the additional information is the recruiter's decision.
 - (b) The mere fact that additional information has been provided does not automatically mean that the applicant is unsuitable for the job.
 - (c) Unlike information disclosed as standard disclosure, or approved information disclosed as enhanced disclosure, you cannot discuss the information with the applicant or even tell the applicant that there is additional information.

How to tell the applicant

9. Assume the additional information is relevant, other information does not call into question the suitability of the applicant, but the additional

information does. The offer of the job is withdrawn. How is the applicant told?

- (i) There is no right answer, but plenty of wrong ones.
- (ii) The CIPD suggests telling the applicant that after making relevant checks and relevant enquiries, the offer has been withdrawn.
- (iii) Take care not to disclose the information indirectly – for example, by responding to the applicant asking “is it about...?”

The Applicant challenges the withdrawal of the offer

10. Unsurprisingly, an applicant may feel aggrieved at the withdrawal of an offer without any meaningful explanation of why.

Action

- (i) Will the police give authority for disclosure?
- (ii) Will the police talk to the applicant directly? (Do not direct the applicant to the police without checking with the police first that this is a possibility.)
- (iii) Prepare for a challenge, for example, in the tribunal.

Preparing for the tribunal

11. The fact that the applicant is challenging the decision to withdraw the offer does not entitle the recruiter to disclose the additional information, either to the applicant or to the tribunal. The prohibition on disclosure applies to any person.

Action

- (i) Notify the CRB of the problem. They cannot authorise disclosure but keeping them informed is an important self-protective measure.
- (ii) Notify the police:
 - (a) Will the police authorise disclosure to the applicant?
 - (b) Will the police authorise disclosure to the tribunal?
- (iii) If the police will not authorise disclosure by the recruiter, notify them in good time of the proceedings and any hearing date. Request that the police attend and seek the tribunal's permission to hear the information in private.

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