



Representation at a Disciplinary hearing - when can a legal representative attend ?

The Supreme Court, in **R (on the application of G) v Governors of X School** [2011] UKSC 30, rejected the contention that a teaching assistant was entitled to legal representation at a disciplinary hearing, pursuant to Article 6 of the ECHR.

G faced an allegation of gross misconduct, in relation to a 15 year old boy, who it was alleged he had developed an inappropriate relationship with. The school allowed him to be represented by either a TU representative or a colleague at the disciplinary hearing. G asked if his solicitor could represent him, but this was refused. He was dismissed for gross misconduct – the panel finding that it had been his intention to cultivate a sexual relationship with the boy. The Panel also determined that G's behaviour was such that he was not suitable to work with children. This triggered the involvement of the Independent Safeguarding Authority (ISA) who had to decide whether to prevent G from working again with children, by placing him on a barred list. G then sought judicial review of this decision to refuse him legal representation on appeal, based on his Article 6 rights.

The High Court found that Article 6 was engaged on the basis of G's civil rights, given the seriousness of the allegations and the likely impact on his employment. Being accompanied by a colleague, or a TU official, in these circumstances was insufficient and the fact that G could bring subsequent unfair dismissal proceedings did not provide an adequate remedy.

The Court of Appeal agreed that Article 6 applied. Where an individual is subject to one or more sets of proceedings and a civil right might be determined in one – such as the right to practise one's chosen profession - that individual has the protection of appropriate procedural rights (depending on the seriousness of the case), if the other set of proceedings will have a "substantial influence or effect"

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on the civil right in question. Laws LJ found that there was a sufficiently close relationship between the school disciplinary proceedings and the ISA barring procedure to constitute the risk that G would not be able to practise his profession. As the ISA procedure did not provide for an oral hearing, the flavour and the emphasis of the conclusions of the disciplinary proceedings would remain important and influential, and might be irretrievably prejudiced by the disciplinary proceedings.

The school appealed to the Supreme Court. Lord Dyson gave the leading judgement. After reviewing the ECHR jurisprudence, such as **Albert and Le Compte Belgium** ECtHR [1983] 5 EHRR 533 and **Ringeisen v Austria** (No.1) ECtHR [1979-80] 1 EHRR 455, he concluded that there was no clear guidance on when Article 6 should apply – only that the proceedings had to be *directly decisive* of the private rights and obligations.

He thought that Article 6 would not automatically be engaged and it would depend upon a “*pragmatic context sensitive approach*”. Although there was approval for Laws LJ’s test in the CA of “*substantial influence or effect*” the majority found that the disciplinary proceedings did not meet this test, with regard to the ISA barring procedure, and that hence there was no right to legal representation at the disciplinary hearing. The ISA had to bring its own independent judgment to bear, as to the case’s seriousness and significance, before deciding whether it was appropriate to place the person on the barred list.

Lord Hope thought that to allow Article 6 to be engaged, in these circumstances, would turn disciplinary hearings in the public sector, into litigation. This ran contrary to intentions of Parliament (s 10 of the Employment Relations Act 1999 – provision only for colleague or TU official to accompany at a disciplinary hearing). Lord Brown, saw an anomaly between the public and private sector. A private school’s disciplinary hearing, in these circumstances, would not engage Article 6, but it would in the public sector, where both had cases which would require the involvement of the ISA.

In **Kulkarni v Milton Keynes Hospital NHS Foundation Trust** CA [2010] ICR 101, a junior doctor, sought to have legal representation at a disciplinary hearing, following an accusation of sexual assault by a patient. The obiter view was expressed, that in ordinary disciplinary proceedings, where all that could be at stake was the loss of a specific job, Article 6 would not be engaged. However, where the effect of the proceedings could deprive the employee of the right to practise his or her profession, the Article would be engaged, for example where an NHS doctor faces charges which are of such gravity that, in the event that they are found proven, he will be effectively barred from employment in the NHS. Article 6 should imply a right to legal representation where the doctor is facing what is in effect a criminal charge. The issues are virtually the same and, although the consequences of a finding of guilt cannot be the deprivation of liberty, they can be very serious.

The present case can be distinguished on the grounds that the ISA process would not be determinative of G’s civil right to practise his profession, given the ISA’s independent role, separate to the disciplinary process. The practical effect will be to limit the cases where a public sector employee can seek the protection of Article 6, in relation to disciplinary hearings.

James Hurd



THE NEW REFORMS

With effect from the 6th April 2012 the qualifying period for unfair dismissal will increase from 1 to 2 years.

The fees for commencing a claim in the Employment Tribunal will be brought in from April 2013. At present, there is no indication as to how much the fees will be. There is a consultation period which is scheduled for December 2011.

The public have been able to voice their opinions on making employment law more accessible and understandable through the “Red Tape Challenge” the Coalition government will report it’s findings in 2012.

NEW NMW RATES

From the 1st October 2011 the new minimum wage rates come into force:

- £6.08 - workers aged 21 or over
- £4.98 - aged 18-20
- £3.68 - for workers above school leaving age but under 18
- £2.60 - the apprentice rate, for apprentices under 19 or 19 or over and in the first year of their apprenticeship

NEW HEAD OF EAT

Mr Justice Langstaff has been appointed as President of the Employment Appeal Tribunal and will succeed Mr Justice Underhill in 2012.



Working Time Regulations 1998 - What constitutes a compensatory rest break ?

The Court of Appeal in **Hughes v The Corps of Commissionaires Management Limited [2011] EWCA Civ 1061** discussed how compensatory rest under the Working Time Regulations reg.24 could be provided to employees during their working hours.

The Appellant was a security guard who was assigned to a single-manned site throughout the course of his employment with the Respondent. The site was single-manned in the sense that there were three security officers assigned to the site; one would work the day shift, another the night shift, and the other would take his rest day. This was a typical arrangement for single-manned sites.

The Appellant contended that he was not given appropriate rest breaks during his shift as required by the Working Time Regulations ('the Regulations'), as due to the nature of his role he was unable to take a guaranteed, uninterrupted rest break. In **Gallagher v Alpha Catering Services Ltd [2005] ICR 673** it was held by the Court of Appeal that an employee '*must know at the start of the break that it is such. To my mind a rest break is an uninterrupted period of at least 20 minutes which the worker can use as he pleases*'. Reg.12(1) states that, '*Where a worker's daily working time is more than six hours, he is entitled to a rest break*'. However the regulations recognise that in some circumstances

i.e. 'where the worker is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons' (Reg.21(b)), an employer may be unable to provide rest breaks in accordance with Reg.12(1).

In those circumstances Reg. 24 states that where an employee is required by his employer to work during a period which would otherwise be a rest period or rest break —

'(a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and

(b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety.'

In this case, the Appellant was permitted to take a break during his shift but he was required to remain at the site, and if necessary to deal with any security issues that arose during that break. It was conceded that the Appellant's rest breaks could not be guaranteed under reg.12 as he did not know at the start of the break that it would be an uninterrupted period of at least 20 minutes in which he could do as he pleased. However, the Respondent submitted that although the Appellant on occasion, would have his break interrupted, it had fulfilled its obligation under reg.24 as the

arrangement between the parties was that in circumstances where the appellant's rest break was in fact interrupted he was permitted to take his break again at a time convenient to him.

The Court of Appeal upheld the decision of the EAT. Elias LJ held that the Appellant had been permitted to have an equivalent period of compensatory rest pursuant to reg.24(a), as he was compensated for the fact that he could not know in advance whether his break would be interrupted by being allowed to choose when to have his break and, if interruption occurred, to start his break again.

In addition, the Court of Appeal held that had the matter been decided on the basis of reg.24(b) it would also have been satisfied that the Respondent had afforded the Appellant such protection as was appropriate to safeguard his health and safety. This was because the arrangement that the parties had may have resulted '*with a break which is in fact significantly longer than the twenty minutes typically allowed under regulation 12*'.

The Appellant's appeal was dismissed.

Louise Green



Upcoming Events

EMPLOYMENT LAW CONFERENCE NORTH - 15th MARCH 2012

Following on from our very successful seminar in September 2011, we have organized a spring conference for March 2012 dealing with the following topics:

Be Lazy! Search, Seizure and Freezing Orders in Employment cases

Speaker: Michael Mulholland

Redundancy Claims - Practice and Procedure

Speaker: Alisan Bilisland

Speaker: Louise Green

Topic to be confirmed

The seminar will take place at the Radisson Edwardian Hotel, Peter Street, Manchester.

This seminar will be accredited by the SRA for 3 cpd points. For further information and to book a place, please visit the 'seminars' page of our website.

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Employment Advice Helpline

Chambers is pleased to launch a 'pilot' scheme where professional clients with a query relating to employment law matters can telephone chambers between the hours of 2.00pm and 3.00pm on the first and third Fridays of each month. A member of the employment team in chambers will be available to speak to.

The scheme will commence on Friday 9th December 2011.



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