

# Employment E-Bulletin

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### RIGHT TO LEGAL REPRESENTATION AT INTERNAL DISCIPLINARY HEARINGS



#### Introduction

Workers currently have the statutory right to be accompanied at disciplinary and grievance hearings by a trade union representative or a fellow worker. Despite workers often requesting that this right be extended to cover other categories of person such as relatives or legal representatives there is no obligation on an employer to do so.

In April 2009, we reported on a decision by the High Court (*G –v- X School*) which potentially opened the door to workers being granted the right to be accompanied to disciplinary and grievance meetings by qualified lawyers. The school appealed the High Court's decision and last week, the Court of Appeal published its decision.

#### The Facts

G was employed as a music teaching assistant at a primary school. Following an allegation that he kissed and had sexual contact with a 15 year old boy who was a work experience student at the school, he was dismissed.

During the disciplinary process and prior to his dismissal, G made a number of requests that he be allowed legal representation at the internal disciplinary hearing and on each occasion his requests were rejected on the grounds that the local authority's policy did not extend a worker's right to be accompanied to a lawyer.

Following G's dismissal, the school reported the matter to the Independent Safeguarding Authority ("ISA") in order that it could determine whether G's name should be placed on a "barred" list of prohibited persons who were considered unsuitable for teaching or working with children.

#### High Court Decision

G sought a judicial review of the school's refusal to allow him legal representation at the internal disciplinary meeting on the grounds that it amounted to a breach of Article 6 of the European Convention on Human Rights ("ECHR") (The right to a fair hearing). The High Court held that as the school was under the control of a public authority (and therefore required to act in a way which is compatible with the ECHR) it should have granted G's request to be legally represented given the consequences of his name being added to the barred list and the serious effect this would have upon his future career prospects.

#### Court of Appeal Decision

Having considered the school's appeal against the decision of the High Court, the Court of Appeal held that G should have been granted the right to have legal representation at the internal disciplinary hearing. In reaching this decision, it took into account the fact that the disciplinary proceedings had a significant effect upon G's ability to continue to practice in his chosen profession and that the procedure could have irretrievably prejudiced G's position by virtue of his name being added to the ISA barred list.

## Comment

In an earlier decision by the Court of Appeal in 2009 (Kulkarni –v- Milton Keynes Hospital NHS Foundation Trust) the Court held that doctors and dentists who are employed by NHS bodies were entitled to legal representation at internal disciplinary hearings. Taking into account the decision in Kulkarni and G –v- X School it would appear that the right to legal representation at internal disciplinary hearings will be extended to any professional within a public sector organisation who could lose the right to practice in their chosen profession if allegations against them were upheld.

Because both G and Mr Kulkarni were employed in the public sector, they were able to directly rely upon the ECHR unlike employees within the private sector who can only rely upon the Human Rights Act 1998 which requires domestic legislation to be interpreted in a way that it is compatible with ECHR so far as it is possible to do so. The case does not therefore create a precedent entitling all employees to be legally represented at disciplinary hearings. It does however create the possibility that where a person is facing serious allegations which could prevent him or her from continuing with their chosen profession they may be entitled to request legal representation. Unfortunately, the position does remain unclear in this regard and employers are advised to adopt a cautious approach when faced with this type of request.



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