



The right to be accompanied

Introduction

Currently, employees have the right to be accompanied to internal disciplinary meetings by either a colleague or trade union representative. A recent decision of the High Court in *R (on app'n of "G") v Governors of "X" School*, however, has held that in certain circumstances an employee has the right to be accompanied to such meetings by a qualified lawyer.

Facts of the case

G was employed as a part-time music assistant on work experience at X School. The school commenced disciplinary proceedings against him as a result of him having kissed a 15 year old boy. Following an internal disciplinary hearing in February 2008 he was dismissed and told that he would be reported to the Secretary of State for Children for possible inclusion on the register of those deemed unsuitable to work with children.

G had sought to be accompanied by his lawyer at the internal disciplinary hearing but the school refused and stated that G could only be accompanied by a work colleague or trade union representative.

G appealed against the school's decision to dismiss him and sought permission to be accompanied by his lawyer to the appeal meeting. His solicitor explained that as he was a part-time casual worker he did not have a colleague to accompany him and he was not a member of a trade union. . Furthermore, he stressed that this was an extraordinary case which could result in a "lifetime disadvantage" for G. The School again refused to grant him permission.

G's solicitor then instigated judicial review proceedings and as a result the internal appeal meeting was stayed pending the

outcome of the judicial review. In the meantime, the school reported G to the Secretary of State for Children.

Judicial review – March 2009

The School pointed out to the High Court that under section 10 Employment Relations Act 1999 an employer must allow a worker to have a fellow worker or trade union official accompany them at a disciplinary hearing and that this right does not extend to lawyers.

The High Court noted this position but held that on the facts of this particular case this rule could not deprive G of his right to a fair trial under Article 6 Human Rights Act 1996 ("HRA"). The Court noted that "the gravity of the particular allegations made against the Claimant (sexual impropriety with a person under 18 and abuse of position of trust), taken together with the very serious impact upon the Claimant's future working life... are such that he was, and is, entitled to legal representation at hearings before the Disciplinary Committee and the Appeal Committee".

The school has been granted leave to appeal the decision to the Court of Appeal.

Kulkami –v– Milton Keynes Hospital NHS Trust [2008]

It is interesting to note that a similar case was heard in the Court of Appeal in August 2008. In this case Dr Kulkami was accused of sexual impropriety with a patient; he had allegedly placed his stethoscope under her knickers without her permission. The Trust refused Dr Kulkami's request to be accompanied by his lawyer to the disciplinary hearing.

The High Court ruled that he was not allowed legal representation at a disciplinary hearing. The Court did not consider that Article 6 was relevant to an internal disciplinary hearing and that, even if it were, Dr Kulkami's right to a fair trial was not infringed by the Trust's decision to refuse his request as he was able to appeal any decision the Trust made to the General Medical Council and/or the Employment Tribunal.

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Conclusion

Clearly if the decision in R (on app'n of "G") v Governors of "X" School is upheld by the Court of Appeal then it will have a significant impact on the way in which employers conduct internal disciplinary meetings. The presence of lawyers in any such meetings would grossly overcomplicate the process and would run contrary to the principles of the new ACAS Code of Practice which encourages employers and employees to try and resolve disciplinary issues informally.

It is hoped that the Court of Appeal will follow the decision in Kulkami and make it clear to employees that they can only be accompanied to disciplinary hearings by either a work colleague or trade union representative.

Forthcoming employment law changes

Changes in employment law are introduced on two fixed dates each year; April and October. In keeping with this a number of legislative changes will be introduced on 6th April 2009.

We have set out below details of the most important changes:

- Abolition of the Statutory Dismissal and Grievance Procedures and the introduction of the new ACAS Code of Practice on Disciplinary and Grievance Procedures. Although not legally binding, if employers or employees fail to follow the Code the Tribunal can increase/decrease an award by up to 25%.
- The right to request flexible working will be extended to carers of children under the age of 17
- Paid annual leave entitlement increases to 5.6 weeks
- Statutory Maternity Pay increases to £123.06 (from £117.18) and Statutory Sick Pay increases to £79.15 (from £75.40).

If you would like to receive more information regarding the contents of this newsletter or information on any other employment law related matters then please contact **Russell Brown** at Glaisyers Solicitors LLP, One St James's Square, Manchester M2 6DN. Tel: 0161 832 4666; Fax: 0161 832 1981; Email: rwb@glaisyers.com

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