Lawyers at disciplinary hearings: in or out?

Recent cases have decided that, as a general rule, an employee is not entitled to legal representation at an internal disciplinary hearing.

Overview

The question of whether an employer should allow legal representation at an internal disciplinary hearing has been much debated in recent cases. Assuming there is no contractual right to such representation, legal arguments have focused on Article 6 of the European Convention of Human Rights, which guarantees a number of procedural safeguards at hearings which amount to a “determination” of an individual’s “civil rights and obligations”. All cases come from the public sector, because the Human Rights Act can not be enforced directly against a private sector employer.

Following a number of decisions involving teachers, doctors and most recently a district probate registrar, it has become clear that an internal disciplinary hearing is not normally regarded as determining an employee’s civil rights, even if it results in dismissal. The position is different in the rare cases where a disciplinary hearing not only determines whether the particular employment continues, but whether the worker can continue to practice his or her chosen trade or profession.

Teachers and doctors

After a period of uncertainty, the Supreme Court had a chance to rule on this issue last year in a case involving a teaching assistant (identified as “G” in the litigation) accused of having inappropriate sexual relations with a pupil. The Supreme Court drew a distinction between the internal disciplinary hearing before the governors (which was just about whether he could continue to work at a particular school) and the decision to be made by the Independent Safeguarding Authority (ISA) in the event that G was dismissed. Only ISA was in a position to prevent him from working with children again. It followed that the internal disciplinary hearing would only attract the protection of Article 6 if it had a powerful influence on ISA’s decision. The Supreme Court emphasised the ISA was an independent body with its own decision-making powers, so it could not be said that the decision of the board of governors would have a sufficiently strong influence on ISA’s deliberations in this case. It followed that G was not entitled to legal representation before the school governors.

Earlier this year the Court of Appeal had to consider similar issues in a case involving a doctor who had been dismissed for misconduct, though not of a clinical nature. He also argued that the disciplinary hearing needed to comply with Article 6, but in this case the focus was on the composition of the disciplinary panel rather than legal representation. The Court of Appeal said that while being dismissed by an NHS Trust might make it difficult to find work as a doctor in the NHS, that was not sufficient to engage Article 6. His dismissal would not prevent him working in the private health sector, or significantly influence any decision of the GMC, which was the only body which had power to bar him from practice.
Probate registrars
The latest case to deal with this issue involves the dismissal of a district probate registrar following allegations of bullying. The outcome of the Ministry of Justice’s appeal against the employment tribunal’s decision that she had been unfairly dismissed was released by the Employment Appeal Tribunal last month. One of her complaints was that she had not been allowed legal representation at the internal appeal against her dismissal. She argued that because her dismissal would prevent her from pursuing her chosen profession as registrar, Article 6 had been engaged during the internal disciplinary proceedings and her request should have been granted.

Because it thought that her dismissal would prevent her from working again as a registrar, the employment tribunal had concluded that Article 6 was engaged. However it was not clear how it had reached this conclusion in the absence of any evidence from either side about the impact her dismissal would have on her ability to work as a registrar in the future. The case was therefore remitted to a new tribunal for re-hearing.

Conclusions
When faced with a request to allow legal representation at an internal disciplinary hearing, public sector employers will need to assess in each case what impact a decision to dismiss will have on the employee’s future ability to work in their chosen profession. In cases where that issue is determined by an independent third party, they can be reasonably sure that saying no to legal representation will not amount to a breach of Article 6, even if in practice the employee may find it very difficult to find a new job. However, if there is any doubt on this issue, it is safer to say yes.

It is less likely, but not impossible, that private sector employers will find themselves in a similar position. If so it would be prudent to comply with Article 6 if it would be engaged in analogous circumstances in the public sector. That’s because if a dismissed employee brings unfair dismissal proceedings, the tribunal may, when applying the unfair dismissal legislation, expect a private employer to have granted a request for legal representation in circumstances where Article 6 would have applied, had the same case arisen in the public sector.

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