Employment Legal Update

To what extent does an employee have a right, on human rights grounds, to be legally represented at an internal disciplinary or appeal hearing? The Court of Appeal had to deal with this thorny issue recently. As a result, we expect that some employee lawyers will use this case to justify requests to allow them to accompany their employee clients at internal proceedings. In the vast majority of cases, it will still be appropriate to decline these requests but employers should consider this carefully, particularly in serious cases involving potential criminal proceedings or significant regulatory issues.

The facts

This case involved a teaching assistant (G) working at a school. After an allegation was raised that he had sexual contact with a 15 year old boy, he was subsequently dismissed following a disciplinary hearing.

At that hearing, the school governors refused to allow him legal representation. They then reported his conduct and their decision to dismiss him to the Independent Safeguarding Authority (ISA), which had the power to determine whether G should be placed on a "barred list". Being placed on this list would effectively prevent G working with children and therefore from carrying out his profession.

G brought proceedings challenging the governors' decision not to allow him legal representation at the disciplinary hearing on the basis that this violated his rights under Article 6 of the European Convention on Human Rights (ECHR), which is effectively concerned with the right to a fair trial and hearing.

In the High Court, the judge agreed with G that he should have been allowed to be legally represented at the disciplinary hearing. The governors appealed to the Court of Appeal.

G was entitled to be legally represented

The Court had to consider whether the right to a fair trial was a relevant issue and, if it was, whether the governors had breached that right in not allowing G to have a lawyer present at the hearing.

The important factors here were the impact that the disciplinary decision had on G. In particular, the likelihood that he would be barred by the ISA and, as a result, be unable to practice his profession. The subsequent ISA proceedings did not allow for further oral evidence or cross examination. This meant that the findings made by the governors in the disciplinary hearing would have a "profound influence" over the ISA when deciding whether to bar G.

The Appeal Court effectively decided that, broadly speaking, the more serious the allegation or charge, the more careful the Court should be to ensure that the trial process was a fair one. In this case, bearing in mind the seriousness of the issues, the Court of Appeal agreed that G should be entitled to legal representation.

Impact

This is a fairly exceptional case, with an unusual set of facts. For private sector employers, this case may have some relevance when dealing with criminal or serious regulatory issues but it does not establish a right to legal representation at all disciplinary hearings.

We anticipate arguments being deployed where an employee attends a hearing to face a charge which, if found to be true, would require the employer to notify a regulator such as the FSA, which could then apply its own sanctions. If the regulator's decision is heavily influenced by the findings or decision of the employer's disciplinary process, the employee could argue it is necessary for his lawyer to be present at the disciplinary hearing.

On a wider interpretation, lawyers could point to similarities between this case and, for example, a case involving gross misconduct such as fraud or dishonesty, which could potentially impact the employee's future employability. That, in our view, is taking the Court's decision too far.

Recommendations

It is well worth being aware that new arguments might be deployed by employee representatives in the future to try and force employers to allow legal representation at such hearings.

If your policy is not to allow lawyers to accompany employees to internal proceedings, you do not need to change that policy as a result of this case. You should consider any such request carefully, to establish if you should waive that policy for the particular employee, if their case is one of the more exceptional ones. If you reject the request, you should set out your reasons for doing so. If you accept it, you should make clear that this is an exception to your general rule, to try to avoid setting a precedent for the future.

0266 emp
February 2010