



Employment Law Breakfast Seminar

Friday, 7 May 2010

8.00am – 9.30am The Village Hotel, Cardiff

Full details and booking information inside

Spotlight

Employment

Spring 2010 Issue

In this issue we focus upon:-

- [Legal representation at disciplinary hearings](#)
The recent decision of the Court of Appeal suggesting that public sector employees should be entitled to legal representation in cases of serious misconduct
- [Eweida v British Airways](#)
A look at the recent Court of Appeal decision on indirect discrimination on the grounds of religion.
- [News Round-Up](#)



“Speak to my lawyer, I’m not interested...”

Neil Dite considers the recent Court of Appeal decision in *The Governors of X School v R (on the application of G) & others* which suggests that public sector employees may, in some cases, be entitled to legal representation at disciplinary hearings, and what the decision may signal for some private sector employees.

The Court of Appeal has recently given its decision in the case of *The Governors of X School v R (on the application of G) & others*. The case concerned the question of whether a public sector employee was entitled to legal representation at a disciplinary and/or appeal hearing in respect of serious allegations of misconduct. If the allegations were proven, it was likely that this would have a profound impact upon the employee’s ability to work again (or for a significant period of time) in the same profession. Serious stuff.

The starting point is the minimum requirements of the ACAS Code of Practice on disciplinary and grievance procedures (now approaching its 1st anniversary of coming into force on 6 April 2009). Under the Code an employee is entitled to be accompanied at a disciplinary hearing or appeal by a certified trade union representative or fellow employee. In practice many employers go further than that and permit the attendance of an employee’s friend or family member for emotional support. However, the intended presence of a *legally qualified* companion (not falling into the permitted categories) has always sat uncomfortably for employers. In most cases such attendance is strongly resisted.

A shift from the norm...

The issue first came into the spotlight (no pun intended) in the case of *Kulkarni v Milton Keynes Hospital NHS Trust*, a decision of the Court of Appeal handed down on 23 July 2009.

In that case, Dr Kulkarni, shortly after starting work for the Trust was accused of improperly touching a female patient. He was suspended on full pay pending an investigation.

Dr Kulkarni was denied legal representation at the subsequent disciplinary hearing. He appealed to the High Court on the basis that this infringed his human rights and his right to a fair trial under Article 6 of the European Convention on Human Rights. The High Court rejected that argument, finding that his human rights were adequately protected by his right to take the matter to the General Medical Council and/or an Employment Tribunal.



Dr Kulkarni appealed to the Court of Appeal and won. The decision was largely based on the precise wording of the NHS disciplinary procedure (applicable to all NHS doctors and dentists) however, the Court of Appeal went further than that. It also took the view, in passing commentary, that the right to legal representation at disciplinary hearings could be triggered if an employee faced disciplinary proceedings that could lead to him or her losing the right to *practice in their profession*.

In the most recent case, *The Governors of X School v R (on the application of G) & others*, a decision of the Court of Appeal handed down on 20 January 2010, the Claimant was a teaching assistant at the school.

In October 2007 he was suspended pending an investigation into allegations that he had formed an inappropriate relationship with a 15 year old boy on work experience at the school and had engaged in sexual conduct with him (the teacher was aged 22 at the relevant time). No criminal proceedings were brought but the school, unsurprisingly, instigated disciplinary proceedings.

The Claimant was refused legal representation at the disciplinary hearing, despite his specific request. He was permitted, in line with the ACAS Code, to be accompanied by a certified trade union representative or a fellow employee. The disciplinary panel found that there had been inappropriate conduct and decided that the Claimant should be summarily dismissed. The panel also concluded that a report should be submitted to the Independent Safeguarding Authority (ISA) on the Claimant’s conduct. This would have likely resulted in the Secretary of State placing the Claimant on a ‘barred list’ and prohibiting him from working with children, potentially for an indefinite period.

The Claimant brought judicial review proceedings in the High Court claiming that his right to a fair trial under Article 6 had been infringed by the refusal of the school governors to permit him to have legal representation at the disciplinary hearing. He argued that the subsequent report to the ISA would likely have very serious consequences for his future teaching career.

The Claimant won. It was accepted that his right to a fair trial under

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Article 6 had been infringed and that the report to the ISA formed a part of the disciplinary process. The school appealed to the Court of Appeal.

The Court of Appeal upheld the decision of the High Court, although on slightly different reasoning. It held that, although the disciplinary process and the subsequent report to the ISA could not be regarded as forming two parts of one procedure, the connection between the two processes was so close as to justify the Claimant's right to legal representation at the dismissal stage. The Court found that the Claimant's ability to practice his profession may be 'irretrievably prejudiced' by the disciplinary proceedings. The disciplinary proceedings were, determinative of his civil right to practise his chosen profession and so attracted the right to legal representation.



In practice (public sector employers)

So what do these two decisions mean for employers? Well, it would seem that employers in the public sector should allow employees to be legally represented at disciplinary hearings (and one would suggest, appeals) when the allegations are such that, if proven, they could result in the employee being barred from, or restricted from, working in the same profession. It may be appropriate to amend any Codes of Practice and/or workplace policies to reflect that position. However, one would stress that the decisions do not create a 'hard and fast' rule applicable to all public sector employer disciplinary hearings.

Whether the Claimant is entitled to arrange for legal representation at the disciplinary hearing will depend on the seriousness of the allegations made against him or her and the gravity of the likely consequences for him or her in terms of their future career.

That said, it is important not to entirely forget the ACAS Code. Paragraph 16 deals with what a companion to a disciplinary hearing is allowed *and not allowed* to do.

*"The companion should be allowed to address the hearing to put and sum up the worker's case, respond on behalf of the worker to any views expressed at the meeting and confer with the worker during the hearing. The companion does **not**, however, have the right to answer questions on the worker's behalf, address the hearing if the worker does not wish it or prevent the employer from explaining their case."*

Clearly, there will be many cases where a skilled advocate may be able to make a great difference to the outcome of a disciplinary hearing, however, that it is not to detract from the fact that direct and appropriate questions should be put to, *and answered by*, the employee alone.

In practice (private sector employers)

"What about the rest of us?" I hear you cry. Well, as a starting point, private sector employers are not directly bound by the European Convention on Human Rights. However, one would suggest that, unfortunately, the position is not that clear-cut. In both *Kulkarni* and *The Governors of X School*, the cases involved situations where the employers were subject to external regulation – the General Medical Council and the ISA respectively. But, it is not difficult to easily think of other professions or occupations which are

subject to some form of external regulation to which that line of thinking could be applied – examples are the financial services sector and the Financial Services Authority; the legal profession and the Solicitors Regulation Authority and the Bar Council, even nightclub bouncers now need to be registered to a Security Industry Authority!

The worrying point for such private sector employers is that, as in *The Governors of X School v R*, the misconduct of an employee, if founded, is likely to be closely connected with any obligations to the regulatory body. Take for example, the case of a banker accused of fraudulently dealing with client monies for his personal gain. The connection between the disciplinary process itself and the resulting FSA investigation would almost inevitably be so close as to trigger the right to legal representation at the disciplinary stage.

Further case law in this area will help to define the scope of the courts' decisions in these cases, which at present remains somewhat unclear. With the potential application being as wide as discussed above in terms not only of the public sector but also private sector 'regulated' employers, employing many hundreds of thousands of employees throughout the country, one would expect (and hope) the next key decision will be handed down in the not too distant future!

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British Airways – it seems they're never out of the headlines

With the ongoing saga between British Airways and Unite Union on pay and terms and conditions continuing to dominate the headlines, [Jennifer Dolan](#) considers the 'other' BA matter which sparked a furore of media attention – the case of Miss Eweida and her silver cross necklace.

The Court of Appeal gave its judgment on 12 February 2010 in the case of *Eweida v British Airways* – a case which will be familiar to most as being the 'silver cross' case. The case, throughout its journey from the Employment Tribunal to the Employment Appeal Tribunal and ultimately the Court of Appeal, has attracted a significant amount of media interest. Ironically however, given the more sensational dispute ongoing between BA and Unite Union over cabin crew pay and terms and conditions, the Court of Appeal's judgment has attracted comparatively little media coverage.



Miss Eweida is a Pentecostal Christian working in customer services at Heathrow. She brought proceedings against British Airways for religious discrimination after being barred from wearing a silver cross necklace over her uniform whilst at work. She argued that Muslims and Sikhs were allowed to wear Muslim veils (hijabs) and religious Kara bangles, but that she, as a Christian, was being told to remove religious jewellery.

BA suspended Miss Eweida during which time she lost several month's pay. After receiving significant adverse publicity, BA decided to change its uniform policy to permit its employees to wear (visibly) all religious jewellery, including Christian crosses. Miss Eweida was reinstated to her position.

Miss Eweida's claim for religious discrimination under the Employment Equality (Religion or Belief) Regulations 2003 was rejected at both the Employment Tribunal and the Employment Appeal Tribunal. Miss Eweida appealed to the Court of Appeal and has lost again.

The court found that any discrimination against Miss Eweida was indirect and not direct. She could only therefore succeed if she could show that there was an actual *group* of persons which had been disadvantaged. Here there was no evidence that a sufficient number of employees other than Miss Eweida were put at a disadvantage by reason of not being allowed to wear a visible Christian cross necklace. BA employed some 30,000 staff, of whom Miss Eweida alone had requested to wear a visible cross contrary to the company's uniform policy.

The decision would seem a sensible and reasonable one. This is perhaps best summed up in the judgment of Sedley L.J. when he pointed out that if a solitary employee could be indirectly discriminated against on the grounds of his or her religion then this could place "*an impossible burden on employers to anticipate and provide for what may be parochial or even factitious beliefs in society at large*".

The decision does however suggest that if an *identifiable section of the workforce* (and quite possibly a small group) could be seen to be put at a particular disadvantage by such policies, then this may be enough to establish a prima facie case of indirect discrimination on religious grounds. It will remain to be seen whether further case law in this area is developed.

It is interesting to contrast this position with a claim for indirect disability discrimination. Here, there is specific provision in the Disability Discrimination Act 1995 for an *individual* to bring proceedings. There is no like requirement to show an identifiable section of the workforce as being disadvantaged.

Reassuring reading then for employers. However, the issue may not have been put to bed just yet – the Claimant (supported by Liberty) is seeking permission to appeal to the Supreme Court.

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Sick notes to "Fit" notes

The new 'Statement of Fitness for Work' certificates come into force on 6 April 2010 to replace the current Med3 medical certificates or 'sick notes' as they are more commonly known.

The rationale behind the new scheme is to focus on what an employee *can do* rather than what they *can't do* during a period of ill health. Doctors will still be able to advise that an employee is unfit for work but will also be able to advise that an employee *may* be fit for work if they can get appropriate support from their employer. The fit notes themselves provide examples of the types of measures an employer will be expected to consider upon a recommendation from an employee's GP: a change to working hours, a phased return to work, workplace adaptations and amended duties/responsibilities.

The new statements will continue to not be required until after the 7th calendar day of sickness absence and the requirements of the Statutory Sick Pay scheme remain unchanged.

The Department for Work and Pensions has produced a helpful guide for employers <http://www.dwp.gov.uk/docs/fitnote-employer-guide.pdf>.

Harsh uplift in compensation

Although the cases remaining to be decided under the 'old' statutory dispute resolution procedures are dwindling, cases concerning the Tribunal's power to apply an uplift or decrease to a compensatory award for a party's failure to follow the correct procedures remain useful guidance and continue to be relevant under the current ACAS Code where an uplift or decrease of up to 25% can still be applied.

The potentially serious consequences for an employer in not complying with the correct procedure were recently illustrated in the case of *Drewett v Penfold*. In that case, the Tribunal took into account the particularly tragic personal circumstances of the employer (the untimely death of his wife) in looking at the breaches of procedure. It applied the minimum 10% uplift.

The Claimant appealed to the Employment Appeal Tribunal on the issue of the uplift and was successful in obtaining the maximum uplift

Of 50%. The Employment Appeal Tribunal's view was that the employer's personal circumstances, however tragic, were outside of the employer/employee relationship and therefore not linked to the breaches of procedure.

A decision that might in law be a right one, but one cannot but have some sympathy when reading the full facts of the case. The message is clear – breach the minimum procedures and expect an additional sanction.

Reduction to maximum unfair dismissal compensatory award

The maximum compensatory award in unfair dismissal cases has been reduced from £66,200 to £65,300 in cases where the dismissal occurred on or after 1 February 2010. This represents the first time the maximum figure has been reduced since it has been in place and is a reaction to the unprecedented current economic climate. The limit on weekly pay for the purposes of calculating the basic award remains unchanged at £380 (gross), with the maximum basic award capped at £11,400.

Short back and sides please

In an interesting case, the Employment Appeal Tribunal recently decided that a male police officer who was told to cut his shoulder length hair or face disciplinary action was not unlawfully discriminated against on the grounds of his sex even though his female colleagues would not have been given the same ultimatum.

The Employment Appeal Tribunal found that requiring employees of both sexes to conform with a 'conventional' standard of appearance was not discriminatory provided that that policy was not applied more favourably to one sex over the other. *Danise v The Commissioner of Police for the Metropolis*.

Additional Paternity Leave

The new Additional Paternity Leave Regulations came into force on 6 April 2010 but will apply only to babies whose expected week of childbirth (or matching in cases of adoption) begins on or after 3 April 2011.

The new regulations provide that Additional Paternity Leave ("APL") (on top of the current 2 week statutory maximum) up to a maximum of 26 weeks and a minimum of 2 weeks will be available. The APL must not start until at least 20 weeks after the date of childbirth (or placement in cases of adoption). In addition, it must not end later than 12 months after those dates. In line with 'ordinary' paternity leave, the APL period must be made up on complete weeks – it will not be permissible for odd days to be taken here and there.

APL will only be available to fathers (or those with caring responsibilities of an adopted child) where the mother has returned to work. In effect, the mother's entitlement to Additional Maternity Leave is substituted. If the period of APL is taken within the normal 39 week maternity pay period, it will be paid in the same way and at the same rate as Statutory Maternity Pay – which increased to £124.88 from April 2010.

Employees who take up the option of APL will also be entitled to many similar rights to those enjoyed by women on maternity leave – the right to benefit from all terms and conditions (save for pay) that would have applied if there was no period of absence, the right to not suffer any detriment by taking APL and the right to be given up to 10 'keeping in touch' days.

Employers will need to revise existing maternity and paternity leave policies to ensure compliance ready for the incoming changes next April. Dolmans Employment Team will be able to help you ensure that this review process is handled as smoothly as possible.

Hot off the press
Election on 6 May 2010
and the Equality Act 2010
is finally here

Britain will go to the polls on 6 May 2010 in what is likely to be one of the most closely fought campaigns of recent times. The election 'run-in' will be the most interactive ever featuring no less than 5 live TV debates, with the main party leaders taking questions from audiences members as well as TV viewers. The last date for voter registration is 20 April 2010.

The Equality Bill was finally approved by the House of Commons on 6 April 2010 and is awaiting Royal Consent. It represents the harmonisation of discrimination law into one single Act (albeit a single Act of some 210 clauses and 28 Schedules).

The majority of the provisions will come into force in October 2010. From April 2011 the Act will create a new 'positive duty' on public sector organisations to consider discrimination issues when designing or delivery public services.

The timing of the approval of the Act by the House of Commons, so close to a general election is also very interesting. As currently drafted the Act proposes to extend the rights of employers to take 'positive action' – i.e. considering under representation of disadvantaged groups when selecting between two equally qualified candidates. However, if the next government is a Conservative one, it seems likely that they will not implement the 'positive action' provisions.

Dolmans Employment team will take a more detailed look at the Equality Act 2010 and what it means for employers on a practical level in the next edition of Spotlight.

Employment law is changing...

...all the time. The Dolmans Employment Team is able to offer cost effective, bespoke training packages to ensure that you are able to keep up with the latest developments in the law and to manage your employees effectively. Our courses are interactive and practical, aimed at getting the key points across without getting "too bogged down" in unnecessary detail.

The Dolmans Employment Team is able to offer training courses in the following areas:

- Dispute Resolution and Grievances in the workplace
- Absence Management
- Equality and Diversity (including all aspects of discrimination)
- Redundancy planning and procedure
- Restructuring programmes
- 'Family Friendly Rights' (including dealing with flexible working requests)
- Stress and Bullying in the workplace
- TUPE Transfers

Our courses can be tailored to suit your individual business needs. We are able to provide training at your premises or elsewhere over a single morning/afternoon/evening or over a number of days. We are mindful that disruption to your business needs must be kept to a minimum.

For further information on training courses available, please do not hesitate to contact Jennifer Dolan jenniferd@dolmans.co.uk.



Breakfast Seminar

Friday, 7 May 2010

8.00 am – 9.30am

The Village Hotel, Cardiff

The Dolmans Employment Team is pleased to confirm that its previously well received breakfast seminars will continue to expand. The seminars will aim to focus on the issues covered in **Spotlight** and identify in more detail the key points in training presentations and discussion.

The next breakfast seminar will be held on Friday, 7 May 2010 (8.00am – 9.30am) at the Village Hotel, Cardiff. Registration at 8.00am for an 8.15am start. Please click [here](#) for map/directions to the venue.

In this seminar we shall be focusing on:-

- [The ACAS Code one year on](#)

A look at the ACAS Code of Practice on disciplinary and grievance procedures, its application in practice and key recent decisions.

- [A round-up of this April's key employment law changes](#)

An up-to-the-minute presentation looking at what you need to know in terms of the key employment law changes coming into effect this April.

Attendance at the seminar is free of charge, with places being allocated on a first come-first served basis (maximum 40 attendees).

Tea/coffee/refreshments and a light breakfast will be provided. Please advise us when booking of any particular dietary requirements.

To book your place at the seminar, simply email Rahel Chinnock rahelc@dolmans.co.uk confirming your name, business and position held. Please feel free to suggest further topics for discussion which may be of interest to you in future seminars.

What we do - Employment Law Services

Dolmans is a dynamic law firm achieving outstanding results for its clients. We have gained a reputation for our expertise and professionalism. Our integrity is an essential element of the way in which we work and we are highly skilled in the delivery of our services.

The Employment Team is the chosen representative of many companies, public authorities and senior executives in employment litigation, dispute resolution and the provision of non-contentious advice.

However, we can offer more than that. The Dolmans Employment Team advises its clients proactively – reducing the risks of problems arising in the first place and dealing with any that have arisen promptly before they get any worse.

We are able to provide the following services to our clients:-

- **Employment Litigation.** Dealing with claims in the regional Employment tribunals throughout the UK and the Employment Appeal Tribunal.
- **Contracts and Policy Documentation.** We are able to review your existing contracts of employment and policy documents to ensure full compliance with the legislation in place today. Alternatively, we are able to provide fresh documents individually tailored to meet your business objectives.
- **Business Restructuring and Termination.** We can advise you on a step-by-step basis through a restructuring or redundancy programme or the exit strategy of a senior employee.
- **Helpline Consultancy.** Urgent problems demand urgent answers. Dependant upon your specific requirements, we are able to provide a one-stop point of contact for urgent employment law and HR advice for an agreed fixed monthly retainer.
- **Employment Training Services.** We are able to offer interactive training seminars to you and your staff covering all employment law issues. The focus of our training is to provide clear and concise practical advice, telling you what you need to know.

Dolmans is able to provide fully-integrated commercial legal services to our clients, including Commercial Dispute Resolution and Litigation, Mergers and Acquisitions, Debt Recovery and Commercial Property services.

For full details of the commercial services Dolmans is able to offer, please contact Alison Henders-Green, Partner alisonhg@dolmans.co.uk.



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Dolmans is a fully integrated commercial law firm. To find out more about us go to www.dolmans.co.uk.

If you would like this document in a different format please contact Rahel Chinnock rahelc@dolmans.co.uk.

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