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Employment Newsletter

Introduction

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The right to legal representation at internal disciplinary hearings

Section 10 of the Employment Relations Act 1999 (the "ERA") provides that a worker has the right to be accompanied at a disciplinary or grievance hearing by either a trade union official or a work colleague. However, a recent High Court case, *R (on the application of G) v Governors of X School* [2009] IRLR 434 has extended the right to be accompanied to include, in some cases, the right to legal representation.

In *R*, the claimant was employed as a music assistant in a primary school. Allegations were made against the claimant by a 15 year old boy who was gaining work experience at the school. The boy claimed that the claimant had kissed him and had sent text messages suggesting that they meet up at the claimant's home or that they go for a drive. When this matter was brought to the attention of the school, the claimant was suspended. An investigation took place and a disciplinary hearing was arranged. The claimant was informed that the allegations against him, that he had formed an "inappropriate relationship with a child" could amount to gross misconduct. Prior to the disciplinary hearing, the claimant was told that he could be accompanied at the hearing by either a trade union representative or a work colleague. He was also provided with the investigation report and a report from the local authority's safeguarding officer concerning the referral of the matter to the Secretary of State. Legally, the school was obliged to refer the case to the Secretary of State if the allegation was upheld.

The Secretary of State would then consider whether to make a direction under s.142 of the Education Act 2002 prohibiting the claimant from work which directly or indirectly involved children.

The claimant's solicitor wrote to the school requesting that a solicitor be allowed to accompany the claimant at the disciplinary hearing given the seriousness of the situation.

The request was refused and the claimant represented himself at the hearing. The disciplinary committee upheld the allegation, finding the claimant guilty of a breach of trust which amounted to gross misconduct and the claimant was dismissed.

The claimant brought proceedings for a judicial review. He claimed that the refusal to allow him to have legal representation at the disciplinary hearing had infringed his human rights under Article 6 of the European Convention on Human Rights. Article 6 provides that an individual has the right to a fair trial. The claimant argued that the seriousness of the allegations and the consequences of a referral to the Secretary of State meant that he should have been allowed to have legal representation. The High Court agreed. The "gravity" of the allegations together with the serious consequences for the claimant's future career, meant he could not be expected to represent himself and that having a trade union official or a work colleague accompany him, was insufficient.

The High Court disagreed with the arguments put forward on behalf of the defendant school. Amongst other things, the school had argued that the disciplinary procedure leading to dismissal and the referral to the

Secretary of State, were two distinct stages. The disciplinary procedure was clearly subject to s.10 of the ERA and that had been complied with. The second stage, the referral to the Secretary of State and any right of appeal the claimant had in that respect, had its own procedures which had not yet been implemented. The claimant would have the protection afforded by Article 6 during the second stage. However, the Court did not accept this argument and held that there was no distinction between the procedures. The referral to the Secretary of State was a "natural and likely outcome of the disciplinary procedure" and therefore they were "one and the same proceedings for the purposes of Article 6". Accordingly, the claimant was entitled to the same degree of protection throughout the proceedings.

The Court also disagreed with the argument that the claimant would have been sufficiently protected by Article 6 during subsequent proceedings, including any employment tribunal claim he brought for unfair dismissal. Any protection afforded to the claimant during subsequent proceedings could not negate the claimant's right to a fair procedure during the disciplinary hearing and any appeal. Also, it was unclear as to the extent to which the matter could be dealt with fully in future proceedings, whether the relief available would be sufficient and anyway, by then, the direction under s.142 would already have been made causing damage to the claimant's career.

In giving his judgment, Mr Stephen Morris QC acknowledged that s.10 of the ERA deals expressly with representation at disciplinary hearings. He explained that his decision in this case was "confined to the circumstances of the particular allegations of misconduct made in the present case and the prospect, which was clear from very early on, of referral to the Secretary of State under s.142". Procedural fairness, he explained, will vary depending on the facts of each case and this ruling is not meant to cover other cases, for example cases involving different conduct or where there is no possibility of a referral or similarly draconian action. Nevertheless, the principle of this case appears to be that where some finding in an internal disciplinary proceeding may lead to a report to a body which has power to decide on an individual's registration for a profession, then legal representation would be appropriate. There are many such cases apart from teachers, for example: NHS Trusts employing doctors, dentists and nurses would report certain disciplinary or capability findings to the General Medical Council, General Dental Council or Nursing and Midwifery Council. These bodies have the power to strike off individuals from the professional register.

Further developments regarding employee/self- employed status

As numerous cases have shown, it is not always easy to determine whether an individual is an employee or an independent contractor. Yet this status is fundamental to ascertaining what rights and responsibilities an individual has within the employment context. Various tests have been developed by the courts to assist in deciding the employee/self-employed question and one important aspect is the written terms of any contract entered into by the parties. However, the courts have differed in their approach to written contracts. Some courts have taken a strict "black letter" approach and have been reluctant to look behind the express terms contained in the contract to see if they accurately reflect the parties' positions. This was illustrated in *Consistent Group Ltd v Kalwak* [2008] IRLR 505, a Court of Appeal case summarised in our summer 2008 Employment Newsletter. In this case, the Court of Appeal had to decide whether a group of Polish workers were employees or independent contractors. In *Kalwak*, the focus was very much on the terms of the contracts and other documents signed by the claimants on their arrival in England. Lord Justice Rimer held that it was not for the courts to substitute express written terms with implied terms to reflect what the court believed to be the true agreement between the parties. The court was not prepared to imply terms into the contract unless it could be proven that the express terms were meant to mislead; that the contract was a "sham" and in order to be a sham, both parties had to have intended it to be so.

In *Protectacoat Firthglow Ltd v Szilagyi* [2009] IRLR 365, however, the Court of Appeal has adopted a different approach. Mr Szilagyi worked for Protectacoat applying protective coatings to house walls. Before he was taken on, he was told to find an assistant to work with him and to sign two documents – a partnership agreement and a contract for services. The partnership agreement, which purported to create a partnership between Mr Szilagyi and his assistant, contained clauses consistent with the requirements of the Partnership Act 1890. The services agreement stated that the partnership was to provide services to Protectacoat applying the protective coating. Amongst other things, the services agreement provided that Protectacoat was under no obligation to provide the partnership with work, fees would be paid gross and into the partnership bank account, the partners would provide their own equipment, there were no set hours

but the partnership would work such hours as was convenient to their client, the partnership could provide services to others and the partnership would deal with its own tax and NI but that Protectacoat could deduct income tax under the "subcontractors tax deduction scheme". Mr Szilagyi also signed a hire agreement which provided that he would hire a van and other equipment from the company for £210 a week. After a few months, Protectacoat ended the arrangement due to a dispute with Mr Szilagyi over equipment. Mr Szilagyi brought proceedings and the court had to decide whether he was an independent contractor, or whether the documents he had signed were a "sham" and he was in fact an employee.

Lady Justice Smith in the Court of Appeal held that Mr Szilagyi was an employee. She stated that contractual documents, entered into by the parties, will ordinarily provide the answer as to whether a person is an employee or not and is the place to start. However, they are not conclusive. The proper question to ask is: what is the true legal relationship between the parties? Where there is a written contract, the court will have to consider whether the parties really intended to act in accordance with the terms as set down. In a commercial setting, the parties to an agreement will usually have equal bargaining power and will be able to agree on the terms to be incorporated. So the courts may well be less inclined to look behind the written terms to see if they are genuine. However, in the employment context, the person providing the work may be able to dictate the terms and the other party will just have to accept them.

In the *Protectacoat* case, the agreements were a sham. There was no real partnership between Mr Szilagyi and his assistant. There was no joint business, no joint assets and no partnership bank account. The "fees" were paid to them directly and individually. With regard to the services agreement, the court accepted the evidence of Mr Szilagyi that, whilst the agreement stated that the partnership could provide services to others, another worker employed under the same arrangements as Mr Szilagyi had been "dismissed" for doing so. The company expected Mr Szilagyi to work only for them. The Court of Appeal found "mutuality of obligations" between Mr Szilagyi and Protectacoat, one of the essential components of an employee/employer relationship. Mr Szilagyi had to devote the whole of his time to the Protectacoat work and in return if work was available, it would be given to Mr Szilagyi. In addition, Mr Szilagyi had to report to the company every morning and on completing a job; he could never go directly to another job. He was told to tell customers of Protectacoat that he was an employee if they asked and Protectacoat supplied the van and equipment to Mr Szilagyi without charge. The written documents did not reflect the true relationship between the parties. Basically, Smith LJ found that "Protectacoat wanted the ha'penny of treating their installers as employees when it came to attendance and control and also wanted the bun of not having to give them the rights they would enjoy as employees, such as their rights under the Employment Rights Act 1996."

This case has redressed the balance following the *Kalwak* case. Courts and tribunals must consider the reality of the situation rather than simply accepting the written terms describing the relationship. As Smith LJ put it: "The court must look at the substance not the label."

Disability Discrimination and the exemption from the duty to make reasonable adjustments

Under the Disability Discrimination Act 1995 (the "DDA"), an employer has a duty to make reasonable adjustments if a disabled person is put at a "substantial disadvantage" in comparison to non disabled persons, because of a "provision, criterion or practice applied by or on behalf of" the employer or because of a "physical feature" of the employer's premises. However, the employer is exempt from this duty if the employer does not know and could not reasonably be expected to know that the person has a disability and is likely to be placed at such disadvantage. In *Eastern And Coastal Kent Primary Care Trust v Grey* [2009] IRLR 429, the Employment Appeal Tribunal has separated out the different strands to this exemption in order to clarify what has to be established.

Mr Justice Silber explained that, the employer will be exempt from the duty to make reasonable adjustments if the employer:

i "does not know that the disabled person has a disability;

ii does not know that the disabled person is likely to be at a substantial disadvantage compared with persons who are not disabled;

iii could not reasonably be expected to know that the disabled person had a disability; and

iv could not reasonably be expected to know that the disabled person is likely to be placed at a

substantial disadvantage in comparison with persons who are not disabled."

These four strands must all be satisfied; they are cumulative not alternatives. In the *Grey* case, the EAT found that the employment tribunal had failed to ask the correct questions based on the above criteria. Mrs Grey was a senior nurse employed by the PCT. When the PCT advertised 5 community cardiac nursing posts, Mrs Grey applied. She suffered from dyslexia and on the application form she chose "learning difficulty/disability" to describe her condition and applied for a guaranteed interview. However, the interviewing panel were not told of Mrs Grey's disability and when the candidates were asked if they required any special arrangements at the interview, Mrs Grey said nothing about her dyslexia.

The oral interview went badly and Mrs Grey was not offered a post. She then brought a DDA claim on the grounds that, amongst other things, there had been no reasonable adjustments made to the interview process with regard to her dyslexia. The employment tribunal found in Mrs Grey's favour. The employer "knew or could reasonably be expected to know" of her disability and although the interviewing panel did not know of her dyslexia, if they had, they would have known that she "would or might be at a substantial disadvantage" in the interview and arrangements could have been made to help her.

The employer appealed and the EAT upheld the appeal. The employment tribunal, having found that the employer knew of Mrs Grey's disability, went on to hold that the employer therefore also knew she was likely to be placed at a substantial disadvantage. The employment tribunal should have considered whether the employer knew or "could not reasonably be expected to know" that Mrs Grey's disability would have put her at a disadvantage. For the employment tribunal, knowledge of Mrs Grey's disability was equated with knowledge that she would have been at a disadvantage in the interview, and this was the wrong approach. All the elements of the exemption to make reasonable adjustments should have been considered by the tribunal and it had failed to do this.

"Discretionary" bonus scheme may have contractual element

Employers must take care when drafting discretionary bonus schemes to ensure that they clearly specify what is discretionary within the scheme. If they wish to ensure that the whole of the scheme is under their discretion, such as whether it is paid, how it is calculated, how much is paid and so on, then this must be clearly stated. If it is not, there may be an argument that whilst some parts of the scheme are discretionary, other parts are contractual. This issue arose in *Small v Boots co plc* [2009] IRLR 328 when a number of warehousemen brought proceedings against Boots for unlawful deduction of wages when Boots failed to pay performance-related bonuses following a TUPE transfer to Unipart.

The employment tribunal judge focused on the word "discretionary" which was used to describe the bonus scheme in the scheme documentation. He held that the scheme was therefore discretionary and not contractual. However, the case went to the Employment Appeal Tribunal which held that the word "discretionary" was ambiguous. Mrs Justice Slade held that the employment tribunal judge had failed to ascertain to which part of the scheme the word "discretionary" applied. He had not considered whether any part of the scheme was contractual; he had treated the whole scheme as being discretionary. Slade J explained that the word discretionary in the Boots documentation could apply to "the provision of an overarching bonus scheme, to a decision each year to operate the bonus scheme, to the method of calculation of bonus or to the threshold which triggers a bonus or to whether and if so what percentage of salary will be paid." The case was remitted to a different employment tribunal to be reheard.

This case underlines the importance of clear drafting.

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