

NeTWork: 4th February 2010

The right to bring a legal representative to disciplinary hearings

(G v X School)

The Court of Appeal (CA) has ruled that an assistant in a school was entitled to be legally represented at a disciplinary hearing when a dismissal would prevent him from working within the profession in the future. This judgement follows the earlier ruling of *Kulkarni v Milton Keynes Hospital NHS Foundation Trust* in which it was held that doctors and dentists employed in England by the NHS were entitled to legal representation at disciplinary hearings.

The case involved a music assistant at a primary school who was dismissed following an allegation that he had had sexual contact with a 15 year old boy. The Claimant sought permission to bring a legal representative to his internal disciplinary procedure several times before he was subsequently dismissed, but the local authority's policy did not allow this and his requests were declined.

The CA held that Article 6 of the European Convention on Human Rights applied as the disciplinary hearing was determinative of his right to practise a profession, and therefore the Claimant should have been entitled to legal representation if he so wished.

Although this does not mean that every employee is now entitled to bring a lawyer to a disciplinary hearing, where the consequences of dismissal go beyond simply losing a job and may prevent an individual from working within their profession in the future, (in the instant case the Claimant may have been placed on the 'barred' list of those unsuitable to work with children) employers must be aware and should exercise caution when the employee in question requests legal representation.

Guidance on territorial jurisdiction

(BA v Mak)

The Employment Appeals Tribunal (EAT) relooked at the question as to whether an employee works "wholly or partly in Great Britain" for the purposes of the Race Relations Act and the Employment Equality (Age) Regulations.

It is now necessary to look at the nature of the work undertaken when determining whether an employee works 'wholly or partly in Great Britain' in respect of the legislation outlined above. The proportion of time spent working in Great Britain will not be determinative.

In this case the cabin crew claimants were of Chinese nationality, ordinarily resident in Hong Kong, and took part in 28 'flight cycles' between London and Hong Kong each year. They had duties upon arrival in Great Britain and before departure, were involved in a debriefing session on arrival and also underwent training in Great Britain. The EAT held these activities to be an integral part of each flight cycle and the training the claimants received was essential to the industry.

The claimants were considered to work partly at an establishment in Great Britain and as a result were afforded protection from unlawful age and race discrimination.

Age-related notice periods may be discriminatory

(Kucukdeveci v Swedex GmbH & Co)

The European Court of Justice (ECJ) has ruled that German legislation providing for any employment before the age of 25 to be disregarded in the calculation of service related notice periods contravenes the EU Equal Treatment Directive.

The Claimant in this case had been employed by the Company in 1996 at the age of 18 and then dismissed in 2006. As a result of the German legislation in force, the Company calculated the Claimant's notice period as if she had been employed for only three years. The Claimant argued that this provision was age discriminatory and a reference was made to the ECJ.

The ECJ held that those who start employment under the age of 25 were treated less favourably on the grounds of their age contrary to the Directive. The Court then considered whether this could be objectively justified. It held that whilst affording employers greater flexibility in managing personnel by alleviating the burden of the dismissal of young workers, who are expected to have a greater degree of personal or occupational mobility was a legitimate aim, the current legislation was not an appropriate means of achieving that aim because it applied to all employees who joined the Company before the age of 25, whatever their age on the date of dismissal.

In light of this decision, it may be that the basis for the calculation of basic awards for redundancy and unfair dismissal under UK law, which relate to age for each year of service, might be unlawful discrimination on the grounds of age. The Government is able to state that accommodating the flexibility of younger workers and affording greater protection to older workers is a legitimate aim, but the question of proportionality remains.

More information:

Dermot Carey

Managing Partner

Tel. 01582 731161

Email. dermot.carey@taylorwalton.co.uk

Ian Riches

Business Development Manager

Tel. 01582 731161

Email. ian.riches@taylorwalton.co.uk