

No right to legal representation at disciplinary hearing for teaching assistant- R (on the application of G) v Governors of X School and Y City Council [2011] UKSC 30
SC

In a significant recent decision for Employment law, the Supreme Court ruled that employees at disciplinary hearings do not have an automatic right to legal representation.

The case concerned the dismissal of a teaching assistant after allegations of sexual misconduct against a boy of 15. Proceedings were not brought by the CPS but the school took the matter to a disciplinary hearing. The employee asked to be represented by a solicitor, but this was refused. The employee was dismissed and the governors were obliged to report this to the Independent Safeguarding Authority [ISA] where he would be considered for inclusion on the list of those unsuitable to work with children under the Safeguarding Vulnerable Groups Act 2006.

The Claimant issued judicial review proceedings, arguing that denial of legal representation at the initial disciplinary proceedings breached his rights under Article 6 of the European Convention on Human Rights. He succeeded before the High Court and Court of Appeal, but in a decision which appears to have bucked the recent trend, these decisions were reversed by a majority decision [4:1].

The Supreme Court found that Article 6 rights were not engaged at the initial disciplinary stage, as the school was not concerned with his civil rights, merely his employment. The majority found that the hearing result would not have had a substantial influence on the later decision to place him on the list of people barred from working with children.

The key question in disciplinary proceedings is what actually constitutes the determination of civil rights, and following the case of *Ringeisen V Austria [No. 1] [1971] 1 EHRR 455* this was held to mean “proceedings the result of which is decisive for private rights and obligation.” The ECtHR also noted proceedings which are “directly decisive” of the right in question, in which case Article 6 would apply, and in direct contrast those which only have a “tenuous” or “remote” consequence, to which Article 6 will not apply.

Lord Dyson in his lead judgment applied the approach of the ECtHR to the facts of the case, finding that the civil right in question was the Claimant’s ability to continue in his profession which involved working with children. Therefore a decision by the ISA to bar him would affect his civil rights and Article 6 would apply to those ISA proceedings.

In determining whether his civil rights had been breached the question was raised as to the level of proximity needed between the initial proceedings, and the proceedings by the ISA in order to breach Article 6.

The Supreme Court followed the 'substantial influence or effect' test proposed by Laws LJ in the Court of Appeal but decided that the Court of Appeal had erred in the application of that test.

In Lord Dyson's opinion, it was not the school's function to determine later proceedings concerning the Claimant's civil rights. The only function of the tribunal was to determine whether the Claimant should continue to be employed and those proceedings did not have substantial influence over the ISA proceedings. In their view, the ISA was deemed to be simply that, independent. In making the decision whether to place an individual on the barred list, the ISA must assess fully the facts using its independent discretion. Lord Hope also recognised the risks surrounding a decision to require legal representation at disciplinary hearings, commenting that anything other than a majority decision would have "very unattractive consequences" and consequences which Parliament wished to avoid. In the past they had achieved this through the limitation under Section 10 of the Employment Relations Act 1999, of who could accompany an employee to a disciplinary hearing.

Lord Kerr notably dissented, finding that the ISA decision would be substantially affected by that of the school.

The effect of this ruling is that employees who are subject to ISA approval are no longer able to argue that they have a right to legal representation at disciplinary hearings due possible subsequent influence on later proceedings.

This decision also has scope to affect employees regulated by other external authorities. The test to be employed will be that of "substantial influence or effect" on subsequent proceedings. Therefore if there is any risk of substantial influence or effect on subsequent proceedings it seems that Article 6 will be engaged, meaning there may well be a right to legal representation at the earlier stage. While this leaves the door ajar, it is not hard to see that these situations will be commonplace.

Practitioners may wish to consider the remedies available following **Mezey v South West London and St George's Mental Health NHS Trust [2010]** EWCA Civ 293 and seek to prevent disciplinary action if at all possible. Further, practitioners will wish to ensure that their clients have the best possible advice before the employee starts the disciplinary process – something akin to a 'Police caution' might be necessary to ensure the client knows the significance of any comments he made.

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