

R (on the application of Kirk) v Middlesbrough Borough Council [2010] IRLR 699

High on the list of 'hot' topics in the last year has been whether Article 6 of the European Convention on Human Rights, Right to a Fair Trial, requires employees to be given the right to legal representation in disciplinary proceedings against them.

In *R (G) v Governors of X School*, the Court of Appeal held that Article 6 required that a teaching assistant be given a right to legal representation for the purposes of internal disciplinary proceedings by the school governors because the disciplinary proceedings would have a "substantial influence or effect" on the employee's right to practice his profession in the future.

Here, a complaint was made to the Council concerning Mrs Kirk, a social worker employed by Action for Children (AFC) on an agency placement. It was alleged that she was allowing her former husband, a man whom she had previously accused of sexual abuse, back into her house and that this potentially placed her daughter at risk. After an investigation, the local authority terminated the agency placement. AFC then instituted disciplinary proceedings based on Mrs Kirk's alleged failure to inform them of the investigation. Mrs Kirk sought an injunction requiring AFC to permit her legal representation at her disciplinary hearing. She argued that AFC were carrying out a public function and if the disciplinary hearing went ahead and she lost her job, this would render her unemployable as a social worker.

The High Court refused to grant the injunction on the basis that the circumstances in this case were different from those in the *R (G)* case. In the *R (G)* case, the need for legal representation was driven by the fact that the potential result of disciplinary proceedings could influence a subsequent statutory decision as to whether a person could continue in his or her profession, i.e. prevented by being placed on the children's 'barred list' under the Safeguarding Vulnerable Groups Act 2006.

This case was essentially a private law employment matter with a stand-alone disciplinary issue as to whether Mrs Kirk had breached the terms of her employment in failing to inform her employer of the investigation. The question of the disciplinary hearing being some kind of preliminary to the placing of Mrs Kirk's name on a barring list did not arise. In addition, AFC in applying its disciplinary powers was not carrying out a public law function; therefore human rights principles were not engaged.

In its commentary on this case, IRLR highlight that the ruling suggests that any right to legal representation for the purposes of internal disciplinary hearings does not extend to a case where the employee faces dismissal, even though that may have the effect of curtailing the employee's career prospects. The legal right is likely to be restricted to where future employment is subject to a decision reached under a statutory procedure.

Keeping You One Step Ahead

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Gibb v Maidstone and Tunbridge Wells NHS Trust IDS 906

Rose Gibb, the former chief executive of Maidstone and Tunbridge Wells NHS Trust, lost her High Court battle to secure the large severance package she had been promised as part of a Compromise Agreement. She resigned from her job just days before a report on an outbreak of clostridium difficile which caused the deaths of 90 people. She subsequently accused the Trust of "unjustly enriching itself" at her expense when it withheld £175,000 of her £250,000 severance agreement. In the High Court, the Judge ruled that the agreement was so "Wednesbury" unreasonable as to be void and that the Trust had not unlawfully enriched itself or benefited.

The Wednesbury principle arises from the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* Court of Appeal, 1948 1 KB 223, i.e. public bodies are under a public law duty to make reasonable decisions; a public body will breach this duty if it makes a decision so unreasonable that no reasonable decision-maker could have arrived at it.

The Court of Appeal upheld Ms Gibb's appeal. The unusual factor about this case was that the Trust was alleging its own irrationality as a means to escape the requirement to pay over the remaining money.

The Trust had a range of financial considerations in mind when it agreed the compromise agreement, and there was no basis for assuming that, had the matter instead gone to employment tribunal, the Trust would have offered only the statutory maximum to settle. Equally it was very relevant that the Trust had, quite rightly, taken account of Ms Gibb's many years of good service and the time it would take her to find new employment when agreeing the sum in question.

It had not been shown that the compromise agreement amounted to "irrational generosity" and on this point the appeal would be allowed. Indeed, it appeared that the High Court judge had let himself be drawn into acting more as an auditor rather than as judge. On the scale of severance payments not only in the private sector but in parts of the public sector, £240,000 was not, on its face, 'irrationally generous' or outlandish compensation for the arbitrary termination of a career which it was unlikely Ms Gibb would be able to resume or resurrect, such that no reasonable decision-maker could have arrived at it. Furthermore, the compensation was not outlandish, given that the compromise would have spared the Trust public controversy, the 'near-certainty' of an adverse tribunal finding, a drain on management resources, and damage to staff morale.

Dunn v AAH Ltd [2010] IRLR 709

The finance director and managing director of the UK subsidiary of a German company were subject to a contractual obligation in the form of risk management guidelines, which required them to report to the parent company any significant negative information arising in their operation. For over five months, however, they failed to report a major issue of possible fraud by one of their suppliers, which exposed the company to nearly £11 million in losses. This led to their summary dismissal for gross misconduct. It was argued on appeal that the directors were only guilty of an error of judgement in trying, in good faith, to sort the problem out themselves without involving the parent company. The Court of Appeal upheld the finding that not telling the German parent about the problem for so long was a deliberate and persistent failure to follow contractual instructions that amounted to gross misconduct.

In making its ruling the Court of Appeal defined gross misconduct, providing an update to the meaning given in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 CA, i.e. it is an act "so undermining the trust and confidence which is at the heart of a contract of employment that the employer should no longer be required to retain the employee in his employment, but should be entitled to accept that the contract for employment had been repudiated in its essence, permitting him to terminate it." While this is an extremely useful redefining of the term "gross misconduct", the real relevance is that it describes the circumstances which determine that employment cannot continue. The reason for dismissal cannot be 'undermining trust and confidence'. The reason is gross misconduct and the rule breached should be described, e.g. dishonesty, violence, disobedience, etc..