

Employment news: The right to be accompanied and legal representation

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It is a well-established principle that a worker is entitled to be accompanied by either a colleague or a trade union official at a disciplinary or grievance hearing. The companion must also be permitted to put forward the worker's case, respond to any views expressed and confer with the worker during the hearing, if the worker so wishes. There is no requirement, however, to allow the companion to answer questions on the worker's behalf.

Employees often ask if they may bring someone other than a colleague or trade union official. The short answer is usually 'no'. Whilst an employer may, in exceptional circumstances, allow a family member or personal friend to attend (for example, where the subject of the hearing is particularly sensitive or confidential), there is generally no requirement to do so (unless this is a reasonable adjustment for someone with a disability).

The question has recently become more complex, however, when the request is to be accompanied by a legal advisor and where the allegations are very serious. In March 2009, the Administrative Court stated that, where the allegations in question may have a very serious impact on the worker's future and working life, the worker should be entitled to legal representation at the disciplinary hearing. The case concerned (R on the application of 'G' v the Governors of 'X' School) involved a teacher accused of sexual impropriety with a person under 18 and of abuse of a position of trust.

The Court of Appeal has recently reiterated this point in another case (Kulkami v Milton Keynes Hospital NHS Trust), in which an NHS doctor faced charges of misconduct/incapability. Given that the disciplinary charges in that case were 'in effect ...criminal' and of such gravity this (if upheld) the worker in question may have been unable to work in the future, it was decided that the worker should have had the right to legal representation at any internal disciplinary hearing.

In short, where the allegations have potentially serious and far-reaching implications, or are of a quasi-criminal nature, a worker cannot fairly be expected to represent himself and the right to be accompanied by a non-legally qualified trade union official or colleague is not sufficient.

On the face of it, these decisions are significant only for public employers. In each case, the successful argument was brought (against a public employer) under Article 6 of the European Convention of Human Rights (the right to a fair hearing), with which a public body has a direct obligation to comply. No such direct obligation applies to private employers. That said, with the policy in the area perhaps showing signs of change, best practice even for private employers (and especially those that may be considered to be performing some public function) may be to consider very carefully any request for legal representation, especially where the allegations being made are very serious.

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