

Public / Employment

Lessons learned

How will the judgment in *G* affect employees outside the schoolroom?
Henrietta Hill reports



IN BRIEF

- Whether Art 6(1), ECHR required that the claimant be entitled to legal representation at his internal disciplinary hearing.

In *R (on the application of G) v (1) Governors of X School (2) Y City Council (Secretary of State for Children, Schools and Families and the Equality and Human Rights intervening)* [2010] EWCA Civ 1, [2010] All ER (D) 118 (Jan) the claimant was a part-time teaching assistant. It was alleged that he had kissed a 15-year-old boy who was undertaking work experience at the defendant's school and had sought to groom him with a view to conducting a sexual relationship with him. During the internal proceedings before the disciplinary committee of the school's governors, the claimant asked to be permitted legal representation at the hearing. The request was refused and he was told that he was only entitled to be accompanied by a work colleague or union representative. The disciplinary committee found the allegations established and dismissed the claimant. The claimant appealed to the appeal committee of the school's governors, again requesting permission to be legally represented and again he was refused.

The particularly serious features of the claimant's case were twofold.

- First, the allegations against him were akin to allegations of a criminal nature.
- Second, he had been told that if the allegations against him were established the school was obliged under child protection legislation to make a reference to the secretary of state for him to consider making

a direction that would result in the claimant being added to the old "List 99" (the "children's barred list"), and the school did indeed later do so. This would have seriously hampered his ability to work with children.

Violation of rights

The claimant brought proceedings in the Administrative Court, seeking judicial review of the decision to dismiss him, alleging *inter alia* that:

- (i) the denial of legal representation violated his rights under the civil limb of Art 6, European Convention on Human Rights (the Convention); and
- (ii) that the allegations of indecent assault and sexual grooming were akin to criminal offences and so should be regarded as the imposition of a "criminal charge" for the purposes of the criminal limb of Art 6.

The Administrative Court allowed the claimant's application under the Art 6 civil limb but rejected his argument in respect of the Art 6 criminal limb. Both parties were granted permission to appeal.

Held

The Court of Appeal concluded that Art 6 was engaged at the internal disciplinary

hearing stage. The court held that test for the engagement of Art 6 laid down in *Ringeisen v Austria (Application 2614/65)* (1971) 1 EHRR 455—that the "the French expression '*contestations sur (des) droits et obligations de caractere civil*' [in Art 6] covers all proceedings, the result of which is decisive for private

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rights and obligations”—is likely to be met where the first or preliminary decision in the relevant proceedings “has a substantial influence or effect on the later vindication or denial of the claimant's Convention right”. That test was met in the claimant's case because the Independent Safeguarding Authority, to whom the secretary of state had delegated the decision as to whether or not referred employees should be added to List 99, would not hold any oral hearing on the claimant's case, but would merely review the reasons for his dismissal, and the evidence for the same, on the papers. That authority would

therefore not correct any unfairness which had occurred during the internal disciplinary proceedings. Moreover, his right of appeal against any barring to the Upper Tribunal was limited in scope. On that basis, the outcome of the internal disciplinary proceedings, if unfavourable to the claimant, would indeed “have a substantial effect on the outcome of the barred list procedures which will then be applied to him”.

The court then concluded that, by reason of the nature of the charges against the claimant, and the potential consequences of them being upheld against him, he was entitled to be legally represented because “a professional

not to make any order in respect of the claimant’s cross-appeal on the Art 6 criminal charge point. However, the court appeared to accept that even the civil limb of Art 6 generated the right to cross-examine witnesses against him, saying that it was “...difficult to see how a rational disciplinary tribunal could refuse to allow a professional advocate, instructed for the accused party, to ask any questions at all of the complainant if the latter gave evidence before them”.

Comment

The judgment in *G* means that any employee who faces the prospect of being added to the secretary of state’s barred

relied upon against them and may well include other procedural protections such as the right to disclosure. However, it is plainly arguable that the decision is not confined to the education context, but extends to any employment situation where the nature of the allegations against an individual are of a criminal nature, and/or where the potential consequences are effectively to preclude an individual from working within a certain profession. As a result, the judgment in *G* significantly strengthens the rights of employees in certain situations. The Court of Appeal has dismissed the school’s application for permission to appeal its decision, but the case may yet be heard by the Supreme Court, and so the story may not end here.


NLJ

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advocate might properly make a great deal of difference to the flavour and emphasis; and if there were any contest as to the primary facts, to that also”.

In light of its judgment on the Art 6 civil limb, the Court of Appeal decided

lists is entitled to enhanced procedural protection, equivalent to that afforded under the criminal limb of Art 6(1), which will normally include, *inter alia*, the right to legal representation, the right to cross-examine any witnesses

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