Supreme Court clarifies employees’ right to legal representation at disciplinary hearings

There have been a number of judgments in recent years over whether employees have the right to legal representation at disciplinary hearings. These have revolved around Human Rights legislation, with employees seeking to argue that not being allowed a lawyer in the hearing was an infringement of Article 6 of the European Convention on Human Rights (ECHR), the right to a fair trial. (This issue is distinct from the right that all employees already have to accompaniment by a trade union representative or colleague.)

In considering the case of *R (on the application of G) v Governors of X School*, the Supreme Court has accepted that there may be circumstances where the potential consequences of the hearing may be so serious that not allowing representation would be a potential breach of the ECHR. But, at the same time, it has defined more precisely what those circumstances are, in a way which makes it clear that there is no general right to representation at disciplinaries, and that circumstances in which the right exists will be very limited.

In the case in question, the Supreme Court has overturned the Court of Appeal's decision that a teaching assistant accused of sexual misconduct with a minor could use the fair trial right in Article 6 to insist on legal representation at the school's disciplinary hearing. The Court of Appeal had based its decision on the fact that outcome of the disciplinary procedure would not have such a 'substantial influence or effect' on the teaching assistant’s future employment prospects, through the subsequent statutory barring procedure, that the requirements of Article 6 should have been applied to the hearing.

The background to this case is that G, a teaching assistant at X school, was suspended after allegations that he had formed an inappropriate relationship with a 15-year-old boy. At a subsequent disciplinary hearing, G was not permitted representation by a solicitor. The disciplinary panel then found that G had intended to cultivate a sexual relationship with the boy, an abuse of trust amounting to gross misconduct, for which he was summarily dismissed.

As G's behaviour had demonstrated his unsuitability to work with children, his dismissal was notified to the Independent Safeguarding Authority (ISA) so that it could determine whether to place G on a 'barred list' preventing him from working with children.

G then mounted an appeal against the school’s decision and sought to have legal representation at the appeal hearing. When this was refused, he went to the High Court seeking judicial review of the decision to prohibit legal representation, on the basis that it breached his right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR).

The High Court found in G's favour and ordered the allegations of misconduct to be heard by a differently constituted disciplinary committee at which G should be given the right to legal representation.

The school then appealed against the High Court’s decision to the Court of Appeal, but its appeal was dismissed, on the grounds that Article 6 applied to the determination of 'civil rights' such as G's right to practise his profession. The Court of Appeal said that, while such a determination was actually made by
the ISA, the outcome of disciplinary hearing would have such a 'substantial influence or effect' on the ISA's decision on whether to add G to the barred list, that it was right that Article 6 should also be applied to the disciplinary hearing.

The school appealed then appealed to the Supreme Court.

Overturning the Court of Appeal's decision, the Supreme Court said that it did not consider that there was a sufficient connection between the disciplinary proceedings and the ISA proceedings for Article 6 to apply to the disciplinary hearing per se. The test applied by the Court of Appeal, which required the disciplinary proceedings to have a 'substantial influence or effect' on the outcome of the ISA proceedings in order for Article 6 to apply, was the correct one, but it had not been correctly applied in the case under consideration.

The Supreme Court said that it was clear that the ISA was able to make its own findings of fact, taking account of all the available evidence, and make its own judgment on the seriousness of the conduct, before placing someone on the barred list. There was no reason to believe that the ISA would be unable to form its own view of the facts independent from that of the school governors.

Therefore, the governors' determination could not be said to have a substantial influence on the ISA's decision, and there was not a sufficient connection between the disciplinary proceedings and the ISA proceedings for Article 6 to apply to the former (although presumably it must apply to the latter).

The ruling means that the cases in which employees are entitled to bring a lawyer to a disciplinary hearing will be limited to those in which the employer's decision will have a 'substantial influence' on a higher authority where an individual's civil rights are at stake. And that the definition of a 'substantial influence' is a very tight one, covering only circumstances where the outcome of the disciplinary has a direct causal effect on action by another body to deprive the employee of the right to carry on their profession.

In summary, where an employee seeks to bring a legal representative to an internal disciplinary, the key question will be whether the disciplinary proceedings are likely to have a 'substantial influence or effect' on subsequent action taken by any regulatory body controlling the employee's profession. If the regulatory body is able to carry out its own investigation into the facts, independently of any decision reached by the employer, it is unlikely an employee will be entitled to bring a legal representative to the employer’s disciplinary proceedings. If, on the other hand, the regulator relies on the employer’s conclusions as to what happened in a particular case, the employee will have a strong case for insisting on legal representation.

This ruling appears to impose very firm limits on circumstances where legal representation will be appropriate, which will no doubt come as a relief to employers.