

ARTICLE: Doctor allowed solicitor in his disciplinary procedure

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The Court of Appeal has recently held in favour of a doctor who claimed he should have been allowed to be accompanied by a solicitor when he attended a disciplinary hearing. While this case turned on its facts, and in particular the existence of an ambiguous contractual right, nevertheless it is the second such decision this year. It raises some interesting issues which employers and employees should take into account when embarking on disciplinary proceedings.

The facts

In July 2007 Dr Kulkarni was employed by Milton Keynes Hospital NHS Trust as a Year One Doctor. Less than a month after he had started, a patient complained that he had placed a stethoscope beneath her underwear without her consent. Dr Kulkarni was suspended while an investigation was undertaken, which included looking into a previous acquittal for sexual assault on a patient when he worked in Swindon.

Dr Kulkarni sought the advice of the Medical Protection Society (MPS) who assigned him Dr Davies, an adviser with a qualification in medical ethics. Dr Davies asked the Trust whether Dr Kulkarni would be entitled to legal representation at the disciplinary and the answer was no. Following further representations to the Trust, a disciplinary hearing which was arranged for 11 December was postponed while the Trust considered certain matters, including the right to legal representation.

The Trust's disciplinary procedures were based on the Department of Health Policy Document "Maintaining High Professional Standards in the Modern NHS" (MHPS). Dr Davies suggested to the Trust that it had discretion to allow Dr Kulkarni legal representation, pointing out that he was not actually asking the Trust to pay for such representation. The Trust responded by saying that there were no exceptional circumstances which justified allowing Dr Kulkarni legal representation.

Solicitors for the MPS sought to prevent the disciplinary hearing by producing a Department of Health circular which had been withdrawn in 2005 but stated that doctors facing disciplinary hearings were entitled to legal representation. The order was granted before the matter went to appeal.

The Court of Appeal decision

Disposing of the clearest issue first, the Court of Appeal agreed with the High Court that the dispute relating to the Swindon acquittal was not something for the Court to decide. Otherwise it risked being drawn into the "micro-management of disciplinary hearings".

Dr Kulkarni maintained his argument that either the contractual terms allowed the Trust a discretion to allow him legal representation, or alternatively the principle of mutual trust and confidence should imply such a discretion into the contract. The Trust argued that the contractual terms were clear and no discretion was available. The Secretary of State, who had been invited to join the proceedings, agreed with the Trust.

Having looked at the previously withdrawn circular and the MHPS which had replaced it, the Court noted that legal representation had been allowed, but then this decision had been

revoked by the Department of Health. The Court reasoned that this could have been due to concern about delay and over-complication by involving lawyers in such proceedings. Nevertheless the removal of the right and its replacement with ambiguous wording required the Court to consider in detail what rights the existing wording did or did not give.

Much of the Court's consideration centred round paragraph 22 of the MHPS which made the seemingly contradictory statement that a practitioner's representative "may be legally qualified but they will not, however, be representing the practitioner formally in any legal capacity". The Court pressed the legal representatives for both the Trust and the Secretary of State to establish exactly what they thought this phrase meant, but neither could advance an argument that satisfied the Court.

There were suggestions that this wording was designed to cover those practitioners who wished to be accompanied by a spouse or partner, who just happened to be a lawyer. An argument was also put forward that it was to distinguish between a solicitor or a barrister who was employed or "retained" by a medical defence organisation such as the MPS, and one who was directly instructed by the practitioner. The Court rejected such interpretations.

Eventually, the Court held that the phrase was "devoid of meaning" and rejected any attempt by the parties to interpret the phrase in any way which would limit the scope of the lawyer's skills in such a situation. It ruled that a lawyer could be allowed into Dr Kulkarni's disciplinary hearing and he or she should be permitted to use all their professional skills in representing him.

Although the Court's decision rested on the contractual wording in this case, it nevertheless went on to make some further *obiter* comments.

Article 6

The Court examined whether Article 6 of the European Convention on Human Rights was engaged, which states that everyone is entitled to a fair and public hearing in the determination of a civil right or of any criminal charge. Further, anyone charged with a criminal offence has the right to legal representation. The Court noted that a previous European case showed that Article 6 was not normally engaged in disciplinary proceedings, but it could be. The Court commented that it could be difficult to know where to draw the line in such situations.

The Trust and the Secretary of State argued that the effect of the disciplinary proceedings against Dr Kulkarni would only result in him losing his job, not his right to practice medicine. However, Dr Kulkarni's representative pointed out that to all intents and purposes the NHS was a single national employer so if Dr Kulkarni was found guilty, he would be unable to complete his training and would be unemployable. The Court agreed and held that Article 6 could be engaged in circumstances where the effect of proceedings could be so serious as to deprive an employee of the right to practice his or her profession. Further, although holding that this was a civil matter, the Court considered that Dr Kulkarni was facing what was in effect a criminal charge, even though it was being dealt with by disciplinary proceedings. As such, he would be entitled to legal representation.

The Court commented that, outside of a situation like this which involved contractual terms, the employer was under no obligation to exercise discretion as to whether to allow legal representation. However, if an employer did consider a request by an employee to allow legal representation, then the employer must do so fairly and rationally, and consider carefully whether a refusal would be a breach of Article 6 rights.

R (and the application of G) v The Governors of X School

The issue of Article 6 rights within the context of a disciplinary hearing had come up previously in this High Court case. G was a music assistant at a school and faced disciplinary action after allegations of an inappropriate relationship with a child. He asked for legal representation but was denied. When the school dismissed G for gross misconduct, they informed the Secretary of State who put him on List 99, preventing him from working with children in the future.

The Court considered that these proceedings which involved a disciplinary hearing and a referral to the Secretary of State were civil rather than criminal matters. However, the Court held that due to the severity of the consequences of a referral, G was entitled to an "enhanced measure of procedural protection", which would involve allowing legal representation.

Conclusion

Dr Kulkarni won on this occasion because of the existence of a contractual right which, although ambiguous, was construed in his favour. For doctors and dentists, this case will lend weight to any argument they may put forward for legal representation in a disciplinary hearing when facing charges which may have a serious impact on their career. For those outside of medical and dental practice, legal representation ought to be allowed when facing charges of a similar gravity as was previously shown in the case of *R (an the application of G) v The Governors of X School*.

However, a key factor in Dr Kulkarni's case was that the NHS was considered to be a single national employer and that, once dismissed for such charges by one Trust, Dr Kulkarni would be unable to obtain employment or training with any of the other trusts. The same was true for G, who was entitled to representation on the basis that a referral would follow dismissal for gross misconduct, barring him from working with children in any capacity in the future. An employee from any other profession would have the initial hurdle of showing that being dismissed would make him or her effectively unemployable anywhere else.

Nevertheless, it is likely that these two cases will encourage an increase in requests from employees who wish to be accompanied by a solicitor at what is undoubtedly a very stressful time for them. In addition, in those instances where an employer grants such a request, it brings up the question of whether the employer will want to have a solicitor in attendance as well, as a means of levelling the playing field.

If you would like further information on this case or how it might impact on your workplace, please contact David Hill at dhill@davidsonlarge.com or Lucy Bond at lbond@davidsonlarge.com.