August 2011

Review

Employment

JUSTICE DONE OR JUST SEEN TO BE DONE?

This month, a faintly unsettling case about the importance of justice being seen to be done, seemingly regardless of whether it actually is. A manager who is the subject of a grievance should not generally be involved in the investigation and hearing of that grievance, obviously. But what if the manager is not the subject of the complaint but has merely had past dealings with the person who is? Would this be sufficient to exclude him from hearing the grievance on the basis he "might" be biased? Possibly so, according to a recent decision of the EAT in ***Watson v University of Strathcylde***.

Ms Watson worked at Strathclyde University. In 2004 Mr Taylor was appointed as Director of Marketing and Communications and became her line manager. They did not get on. She found his behaviour to be intimidating and threatening and these concerns were heightened after he was convicted of a breach of the peace in 2005 for discharging an air gun in a public place. Mr Taylor offered to resign over the incident, but Dr West, the University Secretary together with the University Principal decided that this was not necessary because it was a private matter that did not impact on his professional life.

Relations between Ms Watson and Mr Taylor remained poor and in May 2006 she raised a grievance about him, which included reference to his behaviour around the time of the air gun incident. Her grievance was considered by the University's HR Manager but was not upheld. Ms Watson appealed and was informed that the appeal panel would, as usual, comprise Dr West and two other senior members of the University. Ms Watson objected to Dr West's inclusion on the appeal panel, as she believed that a number of his decisions and his relationship with Mr Taylor were core issues in her grievance. In her view he had a conflict of interest because he had both been a member of the committee that had appointed Mr Taylor back in 2004 and had publicly supported him at the time of his conviction for the firearms offence. In other words he was too close to Mr Taylor to give her appeal a fair hearing.

The other two senior members of the appeal panel considered Ms Watson's concerns, but reached the view that there was not actually any conflict of interest and Dr West was therefore allowed to join the panel. When Ms Watson found out, she resigned and claimed constructive dismissal on the grounds that the University's including Dr West on the appeal panel constituted a fundamental breach of the implied term of trust and confidence. The Tribunal rejected Ms Watson's claim, accepting the University's conclusion that because Dr West did not have an actual conflict of interest and it was usual for him to sit on such appeals he was entitled to hear hers.

The EAT has, however, overturned this. It said the University's decision to include Dr West on the panel rendered the grievance appeal procedure unfair – the appeal panel was tainted with "apparent bias" and this was enough to justify Ms Watson's resignation. It said that it was not sufficient for the University to have asked itself whether Dr West was actually biased – it should then have gone a step further and considered whether the outside world would see a risk that he might be. In its view, any reasonable employer would have removed Dr West from the appeal panel, bearing in mind the nature of Ms Watson's concerns.

This case does raise some interesting and practically difficult issues for employers. Does this mean that if an employee cries "bias" his employer must run around looking for somebody else to hear an appeal? Not necessarily. An employee is not entitled to pick and choose who deals with his grievance, though that might be seen as not the message arising from this particular decision. We have all seen cases where the employee alleges a plot against him at the highest levels within the organisation, linking one manager to the next up by a combination of fear, greed and shared self-interest, and especially in "institutional discrimination" and whistleblowing cases. Does that not blot out all those managers as possibles for grievance or disciplinary hearings?

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The EAT referred to the test sometimes applied in a court and tribunal context, i.e. whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that a prospective decision-maker was biased, but realistically it must be a question to be determined by the specific facts of each case. So long as the conclusion reached by the employer on the bias allegation is not unreasonable, a Tribunal will be hard put to overturn it. Relevant factors to be seen to consider would include:

- the cogency of the bias evidence – Dr West having merely been part of the recruitment process two years earlier would not by itself take Ms Watson very far.
- the impact of possible bias – here Dr West would have been a minority on the appeal panel so whether his views would have made any difference is questionable.
- the reasonableness of his support for the subject of the grievance. One might think it surprising that a public order conviction would be said to be a purely private matter for a senior university member, but against that, the Principal had taken the same view.
- the lapse of time since the last incident relied upon in support of the bias allegation, and the overall number of such incidents.
- how many other people are accused of the same thing.
- whether the employee's concerns are founded in fact or not – what if Dr West had not in fact supported Mr Taylor in 2005 but the employee could not be persuaded of this?
- what is the evidence relied upon? If it arises from the manager having previously and entirely properly disciplined the complainant on objective grounds then that is just a function of the manager-subordinate relationship and not bias in action.
- how easy it would be to find someone else to hear it - faced with Ms Watson's not totally unreasonable concerns, the University should perhaps just have swallowed its pride/irritation and appointed another person to the appeal panel, especially as there was no suggestion that this would have been difficult to do.

No employer likes to feel itself being dictated to by an employee in connection with who can and cannot hear his grievance or disciplinary matter, and the managers themselves may well feel that its decision to side-line them is an acceptance that they are in fact biased. The temptation to push on with the hearing and ride roughshod over the employee's seemingly baseless objections can be enormous but this case does strongly suggest that employers should not treat allegations of bias lightly, however misguided they might seem. If in doubt, they should just pick somebody else. Clearly this may not always be possible, especially for small employers where prior interaction is more likely and alternative managers less easy to come by, but provided an employer is seen to have addressed its mind to this issue it should not be criticised.

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