Human Capital

Review

Employment

March 2009

DO EMPLOYEES HAVE THE RIGHT TO BE LEGALLY REPRESENTED AT DISCIPLINARY HEARINGS?

Possibly, but only if you are a public sector employer and the charges against the employee are sufficiently serious.

In a recent decision involving a teaching assistant accused of inappropriate behaviour with a 15-year-old boy, the High Court held that the employee had the right to be legally represented at the internal disciplinary and appeal hearing *(R (on the application of G) v The Governors of X School)*. The Court took into account the serious nature of the allegations against the employee and the potential consequences for his career. The nature of the allegations meant that the School had a duty to inform the Secretary of State of the outcome of the disciplinary hearing. This could have resulted in the employee being prohibited from working with children indefinitely, effectively bringing his teaching career to an end.

The School argued that the employee had a statutory right to be accompanied at the disciplinary hearing by a work colleague or trade union official and that he had no legal right to bring his lawyer along, but the Court accepted the employee's arguments that this did not afford him sufficient protection in the circumstances.

Private sector employers have nothing to fear from this particular decision because the employee's claim was based on the European Convention of Human Rights, in particular the right to a fair trial under Article 6. The Convention has no direct effect in disputes involving private sector employers unless they are providing services for a public authority in which case it may be relevant.

The Judge was keen to stress that his decision was confined to the particular facts of this case but it is not difficult to imagine public sector employees seeking to rely on this in situations involving serious allegations of misconduct, whether equally serious in fact or not. In that sense it has challenged the view that disciplinary and grievance proceedings are not generally susceptible to scrutiny under Article 6.

EXERCISE CASE WHEN DRAFTING DISCRETIONARY BONUS SCHEMES

If employers wish to retain a wide discretion when it comes to paying bonus payments they need to be very clear about which elements of the scheme are discretionary – merely using the word "discretionary" will not be sufficient to avoid the risk of a claim. *(Small & ors v The Boots Co PLC and Boots UK Ltd).*

The payment (or rather the non-payment!) of discretionary bonuses is a hot potato at the moment. This recent decision of the Employment Appeal Tribunal acts as a reminder to employers that they need to be very careful when drafting discretionary bonus schemes if they wish to avoid claims in the event of non-payment of such bonuses, as Tribunals will scrutinise them closely to determine which elements are discretionary. Employers need to be clear about which components of the scheme are discretionary – the decision to pay a bonus at all, its calculation, its amount, timing or all of the above? Provided they do this they should retain a wide discretion when it comes to the relevant decisions.

In the Boots case a group of warehousemen had received performance-related bonuses until the warehouse operation in which they worked was transferred from Boots to Unipart by virtue of the TUPE Regulations. They did not receive a bonus whilst employed by Unipart. They subsequently TUPE-transferred back to Boots and brought unlawful deductions claims arguing that they were contractually entitled to bonus payments in respect of their employment by Unipart and re-transfer to Boots.

In this month's newsletter we highlight a number of recent decisions that have caught our attention.

The EAT made it clear that the fact that Boots had described the bonus scheme as "discretionary" in its documentation was not determinative of the question of whether the claimants had a contractual entitlement to a bonus. It was unclear from the documentation to what aspect of the scheme the purported discretion was attached – was it to the decision whether to pay a bonus at all, to its calculation or to its amount? The EAT also said the fact that Boots had paid the bonus every year since 1967 (except twice when performance targets were not met) was a relevant factor when determining whether the scheme was genuinely discretionary.

Employers should also remember that even if a scheme is genuinely discretionary they are still under an obligation to exercise their discretion properly. They must exercise their discretion in a way that is not discriminatory, irrational, arbitrary or perverse.

MEDIATION AT WORK

A recent study by the CIPD has identified that "conflict and bullying tend to increase during financial downturns and managers need to be ready to address incidents early so as not to let them damage wellbeing or performance". With conflict and bullying inevitably come complaints and grievances, and the new grievance regime introduced by the revised Acas Code of Practice from next month is therefore very much to be welcomed.

However, in many people's eyes the future of managing conflict of this sort lies not in the body of the Code but in the Foreword, and in particular the reference there to resolving grievances and disputes by mediation. Used early and well, mediation and facilitation have the potential to resolve many such disputes at source, cheaply and discreetly. At the same time, they can both minimise the scope for the taking up of entrenched positions and the risk of substantial drains on time and cost and also give the best chance of restoring necessary working relationships. Statistics show that some 80% of employment mediations settle the same day.

At Hammonds we firmly believe this to be the most efficient way forward for managing in particular the sort of low-level inter-personal conflicts which can bring productive departments to a halt and tie up HR and line management for periods quite disproportionate to the actual issues involved. With this in mind, we have developed a specialist Employment Mediation team to supplement Hammonds' existing award-winning ADR practice. A number of our Employment partners are accredited mediators. If you would like to talk to us about the attractions of this process and about how we may be able to assist you to save substantial time and cost by acting as independent mediator or pre-grievance facilitator when those circumstances arise, please contact David Whincup on 0207 655 1132 or david.whincup@hammonds.com.

SEMINARS AND WORKSHOPS

In April we will be running breakfast workshops on handling grievance hearings.

We will also be running a Business Immigration workshop on the practical issues faced by employers wishing to employ migrant workers.

If you would like to find out more about these seminars and workshops, please go to www.hammonds.com/employmenttraining

FURTHER INFORMATION

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