

## Unacceptable behaviour

Until 2010, the law governing misconduct dismissals had remained relatively stable. The employer had to ensure that they have a genuine belief in the employee's guilt which is based on reasonable grounds. In addition, the employer must undertake a reasonable investigation and consider all relevant evidence. However, the disciplinary process can still hold traps for the unwary.

### Testing the Evidence

It is generally accepted that where an employer is faced with two conflicting accounts, they are entitled to prefer the evidence of one witness over another. However, the case of *Salford Royal NHS Foundation Trust v Roldan* [\[1\]](#) provides a warning to employers in this situation. In this case, the employer did investigate the allegations of mistreatment of a patient but failed to investigate an inconsistency between the evidence of a witness and one of the findings of the investigating officer. The witness alleged that Ms Roldan had looked around to see if she was being observed before the incident, which was accepted as evidence of malice or intent. However the investigating officer noted that it was not in fact possible for other people to see into the room where the alleged incidents took place. The dismissal was held to be unfair.

Employers should also note the court's observation that where the employer tends to believe that the complaining witness is giving accurate evidence but the allegations are out of character for an employee who has many years of good service it may be perfectly proper for the employer to give the alleged wrongdoer the benefit of the doubt. *This is a particularly significant point* and increases the risk of unfair dismissal challenges based on the claim that the employer should have given the employee the benefit of the doubt. Employers considering allegations of misconduct should ensure that the evidence is tested thoroughly and that all facts, including length of service and the employee's previous record are given due consideration. In this case, the employee also faced criminal prosecution (she was acquitted) and deportation as a result of the dismissal and these factors were also noted by the tribunal. The severity of the consequences of a dismissal can also be relevant in deciding whether an employee should be given the benefit of the doubt.

### Legal representation in disciplinary hearings

Following the cases of *R (on the application of G) v X School & Others* [\[2\]](#) and *Kulkarni v Milton Keynes Hospital NHS Trust* [\[3\]](#), a new principle has emerged that where an individual will be barred from their chosen profession, they are entitled to legal representation in the disciplinary hearing if they request it. This will apply even if the employer is unable to have a legal representative present, for reasons of cost or due to other factors. In the first case, G was a music assistant facing dismissal for inappropriate conduct with a pupil. As a result, the school was legally required to report the matter which was likely to result in the employee

being barred from working with children and vulnerable adults. The consequences of dismissal were serious enough to engage the employee's right to a fair trial and he was therefore entitled to legal representation. In the *Kulkarni* case, Dr Kulkarni was a trainee doctor facing charges of serious professional misconduct. If dismissed, he would effectively be barred from completing his medical training. As a result, the court upheld his right to legal representation in disciplinary proceedings.

The right to legal representation has been limited in *Hameed v Central Manchester University Hospitals NHS Foundation Trust*. [4] Dr Hameed was an ophthalmologist accused of misconduct relating to the use of non-sterile surgical equipment. She was dismissed and sought a declaration that her dismissal was void and in breach both of her contract and her right to a fair trial. However, the judge took the view that there was a chance that Dr Hameed could be employed by another NHS Trust in the future and she was not therefore barred from her chosen profession.

It remains the case that where a dismissal would lead to a report to the Independent Safeguarding Authority [5] or to a professional regulator, requests for legal representation in disciplinary proceedings should be considered carefully. Despite the fact that the ISA will assess cases before someone is barred from working with children and vulnerable adults, the risk of the bar means employees in these circumstances are likely to have the right to legal representation. Legal representatives will have the right to make submissions on behalf of employees and cross examines witnesses.

### **Secret recordings**

Employers could be forgiven for assuming that covert recordings of disciplinary proceedings would not be accepted by Employment Tribunals. In many cases, the making of the recording may amount to a disciplinary offence in itself as well as an infringement of the privacy of others. However, in the case of *Chairman and Governors of Amwell View School v Dogherty* [6], the tribunal held that an employee's covert recording of part of the disciplinary meeting was admissible in the subsequent Employment Tribunal claim.

Ms Dogherty was employed as a teaching assistant. Following a disciplinary process, she was dismissed for misconduct. She commenced an Employment Tribunal claim, alleging unfair dismissal and sought to use covert recordings she had made as evidence. She had recorded the disciplinary meeting, when she and her companion were present and had also recorded the private deliberations of the decision making panel.

The recording of the disciplinary meeting was admissible but the recording of the private deliberations was excluded on grounds of public policy and consideration had to be given to the rights of privacy of the relevant individuals. However, in discrimination cases, it may well be the case that a recording of a private discussion could be admissible in a tribunal where an employee alleges that discriminatory comments have been made in private and seeks to use covert recordings to prove this.

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[1] [www.bailii.org/ew/cases/EWCA/Civ/2010/522.html](http://www.bailii.org/ew/cases/EWCA/Civ/2010/522.html)

[2] [www.bailii.org/ew/cases/EWCA/Civ/2010/1.html](http://www.bailii.org/ew/cases/EWCA/Civ/2010/1.html)

[3] [www.bailii.org/ew/cases/EWHC/QB/2008/1861.html](http://www.bailii.org/ew/cases/EWHC/QB/2008/1861.html)

[4] [www.bailii.org/ew/cases/EWHC/QB/2010/2009.html](http://www.bailii.org/ew/cases/EWHC/QB/2010/2009.html)

[5] [www.isa-gov.org.uk](http://www.isa-gov.org.uk)

[6] [www.employmentappeals.gov.uk/Public/Upload/06\\_0243ResfhMLNDA.doc](http://www.employmentappeals.gov.uk/Public/Upload/06_0243ResfhMLNDA.doc)

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