Neutral Citation No. [2010] NIQB 19 | *Ref:* **TRE7757**

Judgment: approved by the Court for handing down | *Delivered:* **16/02/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AB's Application [2010] NIQB 19

AN APPLICATION FOR JUDICIAL REVIEW BY AB

TREACY J

Introduction

[1] By this judicial review the applicant challenges the decision of Down District Council declining him permission to bring a legal representative to a disciplinary hearing into allegations of misconduct.

[2] The single ground of challenge is that the [disciplinary] proceedings involve a determination of the applicant's civil rights and obligations under Article 6(1) so that legal representation is required as a commensurate measure of procedural protection.

Background

[3] The applicant has been employed by Down District Council as a Recreation Assistant since 1 November 2007.

[4] By letter dated 18 May 2009 he was requested to attend a disciplinary investigation meeting on 26 May 2009 to enable the Council to take a detailed statement about a number of allegations against him namely:

(i) That he was involved in the malicious damage of council property by creating graffiti in Down Leisure Centre;

(ii) That the content of the graffiti was sexual in nature and amounted to offensive behaviour to both staff and the public;

(iii) That these actions demonstrate a failure of respect for fellow work colleagues as required by the Council's Core Values;

(iv) That these actions are in breach of the Council's Harassment and Bullying Policy.

The letter advised the applicant that as this matter was being dealt with under the Council's Disciplinary Procedure he could be accompanied by an appropriate work colleague or an accredited trade union representative of his choice.

[5] The applicant sought advice from his solicitor regarding his attendance at the investigation meeting and, as a result, he decided not to attend. He was subsequently assessed on 22 July 2009 by Edel McCullough, Occupational Health Advisor and on 6 August 2009 by Karen Brown, Occupational Health Manager.

[6] The applicant had previously applied for judicial review of the Council's failure to permit him to be legally represented at a disciplinary investigation meeting. The applicant was refused leave to apply for judicial review on 30 June 2009 by Mr Justice Weatherup. The applicant declined to attend the disciplinary investigation meeting held on 10 August 2009.

[7] On 26 August 2009 the applicant received notification to attend a disciplinary hearing. This meeting was rearranged and has since been put back pending the outcome of these proceedings. The respondent has refused the applicant's request to allow him to have a legal representative present at the hearing stating:

> **"Legal representation is not considered appropriate and will not be permitted. The disciplinary hearing is part of an internal process and, in accordance with both the relevant statutory requirements and Down District Council's internal disciplinary procedure, [AB] has been offered the opportunity to have a work colleague or accredited trade union representative of his choice accompany him at the disciplinary hearing."** [Letter from the respondent to the applicant's solicitor dated 8 September 2009]

[8] In a psychological assessment report from Joanne Douglas, Chartered Psychologist, she concluded:

> **"Formal assessment of [AB]'s intellectual functioning indicates that his thinking and**

reasoning skills fall well below the average range of ability. Indeed his cognitive functioning has been formally assessed to fall within the learning disability range of ability (IQ: 66). His general thinking and reasoning skills are significantly impaired by the limitations imposed by his intellectual development. Formal assessment of attainment skills places [AB]'s literacy skills significantly well below that which would be expected for an individual of his age.

In addition to the above, [AB] presents as a young man with social and communication difficulties. He is socially naïve and vulnerable.

However, despite all of the above, [AB] presents as a hard working individual who is very eager to please. He has made a good effort to overcome his difficulties and despite the challenges has managed to gain some qualifications. [AB] reports to very much enjoy his current employment within the Leisure Centre. …"

[9] In a report from Gwen Savage, Recruitment Consultant dated 24 November 2009 under the title "Employment Opportunities" it was stated:

"Joanne Douglas' report highlights[AB]'s limited intellectual ability. His thinking and reasoning skills fall well below the average range of ability. These skills are significantly impaired by the limitations imposed by his intellectual development.

[AB]'s employment opportunities are limited. Clearly, his lifeguard qualification would enable him to apply for positions in this line of work, but, if he loses his current position in Downpatrick Leisure Centre, he would be unable to produce a reference. This would certainly prevent him from finding employment within the Public Sector. If he were to seek employment within a hotel environment, it would most probably be on a part-time basis and at minimum wage.

Given [AB]'s learning disability, he should be protected under the Disability Discrimination Act where an employer is required to make reasonable adjustments and take appropriate action to reflect

his learning disability. I am surprised that his current employer does not appear to have taken his disability into consideration during the present difficulties. …"

[10] In a letter from the respondent's solicitor to the applicant's solicitor dated 3 December 2009 they stated:

"We have taken our clients instructions on the contents of your report. The Council were surprised to learn that Ms Douglas had formed the view that [AB] had an IQ within the learning disability range. [AB] discharges a responsible role in the Council and has never raised any suggestion that he has a disability within the terms of the Disability Discrimination Act 1995. Indeed, [AB] has recently obtained a National Pool Lifeguard Qualification which required a demonstrable affinity for cognitive functioning. [AB] has never asked Down District Council for any reasonable adjustment to be made for a disability.

The Council do not necessarily accept the opinion of Ms Douglas that [AB] has a learning disability and may, in due course, require him to attend for appropriate medical assessments. However, for the purpose of the forthcoming disciplinary hearing the Council are prepared to make reasonable adjustments to its customary conduct of hearings on the assumption that [AB] may have a cognitive impairment in the range suggested. [AB] has the right to be accompanied by a trade union representative or colleague. In addition to the Council's customary procedure that person will also be provided (in addition to [AB]), in advance, with copies of all documentation which will be relied upon at the hearing. That person will also have the opportunity to view the CCTV evidence with [AB] in advance of the hearing. This will ensure that any complex issues can be explained to [AB]. The Council note that [AB]'s reading and cognitive skills may be impaired and so the disciplinary hearing will ensure that all documents and visual evidence relied upon at the hearing are, as appropriate, either read to him or described to him by his companion or the panel members. At the outset of any disciplinary hearing participants are advised that a break can be requested at any stage. In this case in addition to the

> **Council's customary procedure, it will be emphasised to [AB] and his companion that the hearing will be punctuated by breaks after the first hour and every hour thereafter, in the absence of any specific request, to prevent fatigue on the part of [AB]. At the conclusion of a hearing it is customary to invite the parties to review any record of the hearing to check for any inaccuracies so that these may be rectified and the parties may sign the record if they wish or they make [sic] take away a copy to review later. In this case it is proposed that any record is read through with [AB] and his companion to confirm his understanding and to clarify any queries before they have an opportunity to consult in private on whether they wish to sign the record or review later.**
>
> **If there are any other reasonable adjustments which you consider to be necessary to address his apparent cognitive impairments please advise us in writing of same by close of business on 10th December 2009 and the Council will consider implementing same.**
>
> **Having read the reports provided by you the Council do not consider that the Applicant's alleged intellectual and cognitive impairments will necessitate the attendance of a legal representative. The Council do not consider that, even if [AB] had a learning disability, the duty to make reasonable adjustments would require that a professional lawyer assist a person with cognitive impairments at a disciplinary hearing. Such deficits as exist in [AB]'s intellectual functioning can be addressed by making modifications and by allowing him to be accompanied by his union representative or a work colleague."**

[11] The applicant relies on the seriousness of the allegations against him including the fact that the graffiti has been described by Jo Orr as being of a "sexual and lewd nature".

[12] The applicant also relies on a statement by Jo Orr which states "the content matter of the graffiti brings into question the suitability of this person in a position of trust working with the public".

The Issue

[13] The issue in the present case is whether Article 6 is engaged at all in the context of the applicant's disciplinary proceedings and if so, whether that has the effect of requiring legal representation.

[14] Article 6, so far as relevant, states:

> *"ARTICLE 6*
> *RIGHT TO A FAIR TRIAL*
> **1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …"**

Parties Submissions

[15] In short compass, whilst the applicant acknowledges that employers' disciplinary hearings do not generally engage Article 6 he submits that there are exceptions of which this case, he submits, is one. He relied principally on the decisions in ***R (G) v Governors of X School*** **[2009] EWHC 504** and ***Kulkarni*** **[2009] EWCA Civ 689**.

[16] The respondent, on the other hand, submits that Article 6 is not engaged and that the authorities relied upon can be readily distinguished. If Article 6 is not engaged the respondent submits that the matter is not justiciible by judicial review. If Article 6 was held to be engaged they contended that, on the facts of this case, Article 6 did not require the attendance of a legal representative before the disciplinary hearing.

The Authorities

[17] ***R (G) Governors of X School*** (deputy high court judge Stephen Morris QC) considered the issue of legal representation in non-criminal proceedings in the context of Article 6. In particular at para 69 of the judgment the court stated:

> **"In my judgment, the *gravity* of the particular allegations made against the Claimant (*sexual impropriety with a person under 18* and abuse of position of trust), taken together with the very serious impact upon the Claimant's future working life of a potential *s.142 direction*, are such that he was, and is, entitled to legal representation at hearings before the Disciplinary Committee and the Appeal Committee. On such matters, the Claimant could not fairly be expected to represent himself,**

> **and being accompanied by a trade union official or a work colleague (even if available) was not sufficient."** [Emphasis added]

[18] Unlike ***G*** the disciplinary proceedings in this case do not however take place against any background of criminal proceedings or statutory reporting and prohibition from teaching pursuant to Section 142 of the Education Act 2002. ***G*** concerned allegations of sexual impropriety with a minor and abuse of a position of trust [see ***G*** at para.69]. The present case involves allegations relating to *graffiti.* The applicant is not in immediate jeopardy of dismissal as he enjoys *appeal rights* under the contractual disciplinary procedure **and** access to an appropriate remedy in the Industrial Tribunal if dismissed. In the latter forum he would, of course, be entitled to engage legal representation on his behalf.

[19] In ***Kulkarni*** the Court of Appeal (Smith and Wilson LJJ) said:

> **"63. I will therefore make some brief observations on the other grounds. What I say is necessarily *obiter.* The important question is whether it is lawful for the employer to restrict the employer's rights of legal representation in the way that I have held them to be restricted under paragraph 22. That question could be framed as a question of natural justice in purely domestic law or of breach of Article 6 rights (if engaged). I do not think that it should matter how the question is framed; the answer should be the same.**
>
> **64. In *Le Compte v Belgium* [1981] 4 EHRR the appellants, who were medical practitioners had faced disciplinary proceedings before the Belgian *Ordre des médecins,* as a result of which they were suspended from practice. Dr Le Compte had defied the suspension; criminal proceedings followed and he was imprisoned and fined. The applicants appealed to the ECHR alleging *inter alia* that the disciplinary proceedings had not been Article 6 compliant. The Court said that Article 6 rights were not usually engaged in disciplinary proceedings but that they could be in some circumstances. What those circumstances might be was not explained. In the present case, *the right to practise medicine* was a civil right and article 6 was engaged.**
>
> **65. It appears to me that the distinction which the court was drawing was that, in ordinary disciplinary**

> **proceedings, where all that could be at stake was the loss of a specific job, Article 6 would not be engaged. However, where the effect of the proceedings could be far more serious and could, as in that case, deprive the employee of *the right to practise his or her profession*, the article would be engaged."**

[20] In ***Kulkarni*** the Court identified the factors which were pertinent to the consideration of whether Article 6 required access to legal representation at a disciplinary hearing. At paras 66-68 the Court stated:

> **"66. The difficulty is to know where to draw the line. Mr Stafford and Miss Lee both submitted that Dr Kulkarni was facing ordinary disciplinary proceedings brought by his employer and the only effect, if the charge were found proved, would be that he would lose his job. Only proceedings before the General Medical Council can deprive a doctor of the right to practise. But, as Mr Hendy pointed out, the National Health Service is, to all intents and purposes, a single employer for the whole country. Indeed, for a trainee doctor, that is literally true as a doctor cannot complete his training in the private sector. If Dr Kulkarni is found guilty on this charge he will be unemployable as a doctor and will never complete his training. If he applies for any other position he will be obliged to declare the finding against him and the fact of his dismissal. Moreover, submitted Mr Hendy, it is highly likely that the system of 'alert letters' would be operated in this case if Dr Kulkarni were found guilty. An alert letter is a letter warning other NHS employers not to employ the doctor named, who is regarded as presenting an unacceptable risk to patients. The alert letter procedure is currently governed by the Healthcare Professionals Alert Notice Directions 2006.**
>
> **67. It seems to me that there is force in Mr Hendy's submission and, had it been necessary for me to make a decision on this issue, I would have held that *Article 6 is engaged where an NHS doctor faces charges which are of such gravity that, in the event they are found proved, he will be effectively barred from employment in the NHS*.**

> **68. The next question is whether, in the context of civil proceedings, Article 6 implies a right to legal representation. In my view, in circumstances of this kind, it should imply such a right because the doctor is facing what is in effect a criminal charge, although it is being dealt with by disciplinary proceedings. The issues are virtually the same and, although the consequences of a finding of guilt cannot be the deprivation of liberty, they can be very serious."** [Emphasis added]

[21] The obiter observations of the Court indicate that Article 6 might be engaged in *some* employment cases where the effect of an adverse finding will be a lifetime ban from practising ones chosen profession -in that case where the NHS was a single monopoly employer. Such a finding is plainly in harmony with ECHR decisions such as ***Le Compte***.

[22] In ***Kulkarni*** the court emphasised that the applicant was a trainee medical doctor and that the only arena for the completion of that training in the United Kingdom is ordinarily the National Health Service which enjoys a monopoly position in medical training; he would be permanently unable to complete his training within the NHS and could never, therefore, realise his career aspiration. The effect of an adverse decision would be the end of his professional career.

[23] This applicant is not restricted in his search for employment to the public sector or to leisure centres. It has to be acknowledged however that if an adverse finding is made against him he may be very significantly impaired in his employment prospects. In this respect however he is not significantly different from others who are dismissed from their employment in similar circumstances. I can readily understand however why the applicant and his family, given the importance of what is at stake for him and his limited intellectual capacity, would wish him to be represented by someone other than a trade union representative or work colleague at the disciplinary hearing.

[24] The ECHR has more than once emphasised that Article 6 rights are **not** usually engaged in disciplinary proceedings when all that could be at stake was the loss of a specific job. The loss of a job (particularly in the present climate) will, in many cases, have profound consequences for the person concerned and his or her family. In many cases people are dismissed from their employment following allegations of what may well amount to suspicion or allegations of criminal misconduct e.g. dishonesty, assault, criminal damage, harassment etc. The intellectual capacity of those subject to disciplinary proceedings will inevitably vary – in some working contexts more so than others. These considerations of themselves do not however lead to the conclusion that Article 6 is engaged.

[25] If it were the case that the seriousness of the consequences and an implication of criminal misconduct were sufficient to engage Article 6 creating a potential entitlement to legal representation this would have plainly far reaching and undesirable consequences, inter alia, for employers. It is therefore not surprising that the circumstances in which the ECHR has held Article 6 to be engaged in a disciplinary context have been very circumscribed. It appears that the line has been drawn where what was at issue was not solely the loss of a job (no matter how serious that might be) but cases where the person could be deprived of his *civil right to practice* his or her profession. A feature of such professional disciplinary hearings is that they are frequently regulated by statute or other provisions giving them a distinctly public law flavour.

[26] Mr McCann, on behalf of the applicant, persuasively argued that it would be illogical, unfair and classist (not his word) to afford such protection to professionals but to decline it to someone in the position of the applicant bearing in mind the factors said to be in play in his case namely (i) seriousness of the allegations; (ii) of an allegedly criminal nature; (iii) his alleged limited intellectual capacity; (iv) the alleged complexity of the case; and (v) the consequences of an adverse finding, particularly by way of dismissal. All of these factors, with the exception of number (iii), are present in a very large number of disciplinary proceedings in which it is clear and established law that no civil right within the meaning of Article 6 is engaged.

[27] As presented at the moment this case is devoid of the key features present in ***Le Compte, R (G)*** and ***Kulkarni*** namely the exclusion from the *civil right* to practise ones profession. It was the potential denial of this right that triggered the engagement of Article 6 in these cases and which exceptionally removed them from the general principle that Article 6 rights are not usually engaged in disciplinary proceedings. In the context of the present case there is nothing equivalent to the professional adjudicatory mechanisms and their capacity to remove an individuals civil right to practice in a given field. The *consequence* that if this applicant is dismissed it will negatively impact on his future employment prospects (an inexorable outcome for many who are dismissed) cannot convert what is not a *civil right* into one.

[28] The one factor that remains to be considered is the effect of this applicants limited intellectual capacity and whether the existence of that limitation could operate to engage the Article 6 civil right limb. In my judgment a personal characteristic of an individual cannot have a transpositional effect in terms of what constitutes a *civil right.* However it may engage other specific protections enjoyed by members of a vulnerable group, for example, under the provisions of the Disability Discrimination (NI) Order 2006. That order strengthens the protections for persons of impaired intellectual ability and it is certainly open to the Respondent in this case to

allow legal representation as part of the "reasonable adjustments" they make in discharge of their obligations under the legislation. This is a matter entirely for the Respondent. However should the Respondent maintain their decision that legal representation is not required as a reasonable adjustment the applicant has indicated that they may wish to challenge that in the appropriate forum. The availability or viability of that course was not canvassed in argument nor does it arise for decision. I would only comment that if such a course is available significant expenditure of resources will be inevitable. And the irony is that the applicant and the Respondent will, in all probability, both be represented by a coterie of lawyers to test what has the hallmarks of that expensive legal option "the interesting point"!

Conclusion

[29] In light of the foregoing I have therefore concluded that Article 6 is not engaged in the present case and for the above reasons the application is dismissed.