

The representation in workplace disciplinary hearing law employment essay

[Law](#)



**ASSIGN
BUSTER**

MODULE NO: LW543 LOGIN: VEA4MODULE TITLE: Clinical Option LW543

Module OutlineSUPERVISOR: Helen StrottonDATE SUBMITTED: WORD COUNT:

7237DISSERTATION TITLE: ILP- Please tick if you wish to draw attention to

an Inclusive Learning Plan that has implications for marking e. g. dyslexia,

dyspraxia, dyscalculia or ADHDSTUDENT DECLARATION: The dissertation,

which I have submitted, is my own work and, with the exception of

quotations (which are clearly marked and referenced), is written in my own

words. STUDENT'S SIGNATURE: Table of Contents

Case 1 (Part 1)

Facts of the Case:

This case is an employment case, the case number attach to this case is M1082, our client (Ms C) at been working as a manager for a Nursery. She was employed from 2007 till 2012. She started as a nursery nurse, then a deputy manager, before she became the manager of the Nursery. In January 2010, our client was approached by Melanie to take over the Nursery and that after five years she would sign over the business to her. A new contract was made to this affect and was dated on the 3rd of February 2010. While she was in charge as the manager she and a team of others helped in built the company back up. In April 2010, Melanie moved to North Wales and I ran the business and I was then put on the Ofsted register in the beginning of 2010. In February 2011 we had a good Ofsted report. Our client was advised by her employer that it would be a good idea for her to do a course that was coming up as it would be a benefit to both, which was a degree in Professional Studies in childcare, which is a two years foundation study. Our client took her leave on the 17th of August and on the 22nd she received a

<https://assignbuster.com/the-representation-in-workplace-disciplinary-hearing-law-employment-essay/>

text message from the company mobile stating, she should not return back to work and that she will be contacted again regarding further instructions. Our client was informed that her Inadequate Filing, Bullying and Health and Safety were the contributing factors in her investigation meeting, at the end of the meeting the bullying was dropped while the other two were upheld and as a result of that she was dismissed for gross misconduct.

Law and procedure:

The relevant law (main piece of legislation) that was used in this case was the Employment Relations Act 1996[1]. Section 86 of ERA, which refers to the notice of dismissal, was looked at, also the test for fairness in relation to unfair dismissal which is covered under section 98 (1) ERA. Section 98(4) (1) (a) which dealt with dismissal, the section commented that dismissal depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. We therefore need to establish whether the dismissal of our client by her employer was fair and reasonable. The test for reasonableness (section 98 (4)), applies when the employer satisfies these points.

Determining the outcome of this test of reasonableness can be problematic, however case law helps set a standard, a leading case *Williams v Compair Maxam Ltd*[2], sets out stages which a reasonable employer should seek to act in accordance with, however not all of the points are relevant to every case. An employer should seek to give as much prior warning as possible and instead of dismissing, think whether it is possible to offer an employee alternative employment. These are not ultimately principles of law, more

<https://assignbuster.com/the-representation-in-workplace-disciplinary-hearing-law-employment-essay/>

standards of behaviour. A later case known as the Polkey Case[3], decided that even if an employer does not act reasonably and strictly speaking unfairly dismisses an employee, if the employee would have been dismissed anyway even if the employer had acted reasonably then the employee would not receive any compensation. Time limit was a factor that we look at; to ensure that the client's claim for unfair dismissal is within three months from the beginning of the termination of employment, see section 111 (2) ERA.

Steps taken:

At first, I was not sure of what I needed to be doing, but I then had a look at the Case Management Guidelines[4], which for me was a big help, as it was a new case, I started by creating a folder with our clients surname with a case number, this gave me the opportunity to put into practise all the necessary administrative procedures that was in the CMG. Once that was done I then got out a new cardboard folder, I then created a file sheet, which I then stapled to the inside cover of the cardboard folder. The file sheet for Ms C's case was fairly standard as it was standardised for our entire client, which made it user friendly, it contains basic information such as name, address, date of birth, national insurance number, contact number, date of dismissal, date of hearing, client conflict check, supervisor, student name and number. It helps to put things in order and in check. When that was done, I then had a meeting with my supervisor Helen Strotton[5]; at the end of the meeting I had clear instruction and guide as to what my next step was to be. Shortly afterwards I telephone (filling in the pink slip known as the telephone slip) our potential new client inviting her down for an interview. Once the date and time was confirm over the phone, I then sent her a standard client letter,

<https://assignbuster.com/the-representation-in-workplace-disciplinary-hearing-law-employment-essay/>

and included two authorisation form for her to fill in and sign to bring with her and directions to get to us. I had my first meeting with our client with my supervisor HS on xxth August and our client provided us documentation that she had put together and also a copy of the authorisation form complete and sign. It was at this meeting that we formally took the case, which allowed us to act on behalf of our client. Before the meeting, I had to do some research about the case and I had to write down what questions that I would like to ask our client, this was to enable to give her the best advice possible. On the day of the meeting, I was a bit nervous, but I was determine to go ahead with this, I started by setting out the room, making sure that there is water for our client and ensuring that the environment was okay and that the room was warm and comfortable and put up the sign on the outer door saying ‘ meeting in progress’. The interview was long, and I was writing down everything that was been said and at the same time maintain eye contact with our client, it was hard but it was worth doing, because it enable me to obtain the correct account of events from our client and gave me the opportunity to ask questions, subsequently it enable me to make a transcript of all the facts of the meeting, once the transcript was type I then show it to my supervisor HS, who then check it over. It was only after it was check was it sent to our client, it was establish during the meeting that we could communicate with her through email phone and post, which was fantastic. With the same transcript of the meeting I was able to use the information to fill in the Employment Tribunal[6]1 form. Soon afterwards we received a Notice of a Claim from the Employment Tribunal, outline the Case Management Orders and a copy of the Respondent’s ET 3 form. I then did a

Schedule of Loss and submitted it to the Respondent by the deadline imposed by the Case Management orders.

Outcome:

The outcome of this case was a good result, after three emails with the other parties solicitor, our client agree to the offer that was made to her. When I put the schedule of loss together the amount was in the region of £13, 000, during one of our meeting we ask her what would be her final offer if there were to make one, it was at that point that she said that if she get £3000 she will be okay with it. After a couple of emails exchange the other parties solicitors came back to us on the 24th January with an offer of £2298, at which point I call our client to inform her of the offer and to get instructions from her, at which point our client decided that we should take the offer as she no longer wants to go through the process of her name been drag through the mud as information where going back and forward to Ofsted and she did not want anything bad against her name. It was at that point that I inform her, that she will need to email us her instruction of what she had just said. At which point she said that she will be doing as soon as she gets back home from work. The next step, will be to wait for the email from our client that she is accepting the offer and once that is done, HS will inform the other parties solicitor, also at the same time ask them if they would like to get in touch with ACAS, so that they could finalist everything, which is done by completing COT3 form. This is an ACAS settlement, which will then make it a legally binding contract between our client and her ex employer. If at any point the payment due to our client is not paid, then our client will be able to phone the ACAS conciliator regarding the matter, who will eventually get in

<https://assignbuster.com/the-representation-in-workplace-disciplinary-hearing-law-employment-essay/>

touch with the other party and remind them of their obligations that were set under the settlement agreement, which can be enforced through the courts if needed to do so under section 142 of the Tribunals Court and Enforcement Act 2007. The case was settle out of court and the next step was to get my client to come in to sign a copy of the COT3 form that was send to us by the other party solicitor. I phone our client to inform her to come in to sign the document so that I could forward it to back to the solicitor, so that they could get their client to sign the COT3 form, which was the agreement stating what the agreement was and what the next step was. After 14 days we email the solicitor as we have not received the cheque that was due to our client basis on the settlement agreement, but we got no respond to start with, about two days later we got an email that the cheque was send to our client directly, at which point I called her to let her know of the update, only for to tell me that she had received the cheque a week ago and that she has banked it and that she was meant to inform, but forgot about it. During the phone call conversation, I informed her that we are now in the position to close her case from our end and wish her all the best in the future and also reminded her to knowledge that she has received the cheque from the other party solicitor directly to them. I then log into the system and closed her case file and at the same time I send her a letter stating that I file is closed with a questionnaire form for to fill in, which I then posted to her.

Reflection:

This case M1082 was my first and it was my way into the Employment Law, it allowed me to research and gain knowledge in the area of unfair dismissal and as well as termination of employment in the terms of employment

<https://assignbuster.com/the-representation-in-workplace-disciplinary-hearing-law-employment-essay/>

legislation and it allowed me to stay focus on what I was doing. It also gave me the opportunity and the ability to understand and analyse all types of complex situation surrounding within ERA. During my research I encountered two problems when dealing with this case. Firstly was the issue of the guidelines of three months in which you have to raise a claim against an employer if you were to be terminated, the problem here like in my case was that the employer kept delaying the appeal which our client raised and told our client that the three months do not start until he has dealt with her appeal, in a situation like that if our client have not kept us in the loop of things. It could be quite easily for that three months in which our client could raise a claim to fail to meet the deadline, due to the fact that employers, sometimes delay for no reason, our client was delay because the person hearing the appeal was ill and kept postpone the date which was very close to our client's deadline. This became clear to me that if our client would have listen to her employer she would not have been able to raise a claim of unfair dismissal in the employment tribunal. Thus I would be very critical as to whether the system that we have is fair to employees, in my view it look in favouring the employers, which makes the system flaw. It would be a fair system if it were six months in which an employee can raise a claim in the ET and also, penalty for employers who use delay tactics. Although filling in a claim form to the Employment Tribunal, I was amazed at the level of responds, I had an acknowledgement letter which contained a time line of the case preparation, which both parties were to follow, and at the same time listed the date and time of the hearing. The Employment Tribunal is a branch of the Judicature. This enable the Tribunal to have wide range of

discretion over the procedure of a case and can issue Orders with which both parties are duty bound to comply with or to perform a certain task and to refrain from performing a specific action (in most cases both parties have to disclose their information). If it has been established that there was a failure to comply with the Tribunal Order, the tribunal may ask for the case to be thrown out, then a default judgement would be made against a party and/ or conviction of an offence with a fine. The Employment Tribunal acts, in general as an impartial mediator between two parties in an adversarial system. In a claim there is only one claimant to a claim. When an order arrives from the Employment Tribunal, it would state what needs to be done and at what point it should be done this is known as the Case Management Orders issued by the Employment Tribunal, within it, it carries out sanctions for non-compliance, this acts as a guide for parties that are involved and it is something that they need to work on. For example, it could include the clients deadline and as to when the witness statement should be exchanged.

Case 2 (Part 1)

Facts of the Case:

This case is an immigration case, the case number attached to this case is M1172; our client (Ms M) is an overstayer and has been in the country with her two children since December 2008. She is worried about going back to Nigeria for two reasons; firstly there is nothing to go back to; secondly no house and nobody to go back to. She has mentioned that both of her parents are dead and so is the children's father, she also said that she would not be able to look after the children once back in Nigeria as all of the family are in the USA. Her brother that she came to live with as now move to Sierra Leone

<https://assignbuster.com/the-representation-in-workplace-disciplinary-hearing-law-employment-essay/>

instead of going back to Nigeria. The children now are 11 and 15. At the moment our client organise and sell films.

Law and procedure:

The relevant law (main piece of legislation) that was use in this case was the Immigration Act 1971; Chapter 8 – Appendix FM (family members); EX. 1 – consideration of a child best interests under family rules and also the European Convention on Human Rights 1998 Article 8 (Right to respect for private and family life). Overstaying is an offence, contrary to s. 24 (1)(b)(i) of the Immigration Act 1971. Section 24(1A) of the 1971 Act, which was inserted by s. 6 (1) of the Immigration Act 1988, provides that a person commits the offence on the day when he or she first knows that leave to enter or remain has expired, and continues to commit it until such time as his or her position is regularised, for example through a further grant of leave. An overstayer is here ‘ in breach of the immigration laws’ and, as such, does not meet the residence requirement for naturalisation in paragraph 1(2)(d) of Schedule 1 to the British Nationality Act 1981 (see Annex C to Chapter 18)." The criteria to be applied in assessing whether to grant leave to a family member on the basis of their family life with a child in the UK. The criteria reflect the duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK, as interpreted in recent case law, in particular, ZH (Tanzania). EX. 1 This paragraph applies if(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-(aa) is under the age of 18 years;(bb) is in the UK;(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately

<https://assignbuster.com/the-representation-in-workplace-disciplinary-hearing-law-employment-essay/>

preceding the date of application; and(ii) it would not be reasonable to expect the child to leave the UK."[7]

Steps taken:

In this case it was easy for me, because of the first case that I did, I knew where to go for information. This case is immigration; I then opened a new folder in the law clinic's drive and then created a file sheet with the client's name. I then contacted the client to try to make an appointment for her to come in to see my supervisor, and myself but she declined that the information that my supervisor gave her over the phone was sufficient enough and that she had made plans. I thought of leaving it there, but was encouraged in checking whether there was any case law that could help her case. So I started by looking in Lexis and Nexis and then looked the United Kingdom Boarder Agencies[8]to see if there were any case similar to hers. In *The Secretary of State For The Home Department v Uchenna Eucharia Izuazu (Izuazu Article 8 - new rules[9])*, in this case it apply the new Immigration Rules which was introduced as from 9th July 2012 by HC194; *The Secretary of State For The Home Department v MF (MF Article 8-new rules) Nigeria[10]*; *ZH (Tanzania) (FC) v Secretary of State for the Home Department[11]*, which look at the best interest of a child. In the view of getting to grasp of this I then looked at the Immigration Directorate Instructions[12], Chapter 8, and Section FM 3. 2. It was then that I invited the client to come and see my Supervisor and myself. I had the first meeting with the client on 19th of March 2013 with her and a friend of hers who is a Pastor in the church that she attends with her children. The meeting was to establish what are her options in the event if she was to apply for leave to remain. Before the

<https://assignbuster.com/the-representation-in-workplace-disciplinary-hearing-law-employment-essay/>

meeting started, I had a discussion with my Supervisor to set out the plan of the meeting. The meeting took sometime and by the end of the meeting, I had a chronological transcript of all the facts.

Outcome:

The outcome of this case was that the client was going to go away and think about what we had said to her and at the same time, she was going to weight up her options, because of new immigration rules; consideration of a child's best interests under the family rules and in article 8 claims where the criminality thresholds in paragraph 399 of the rules do not apply unless the criteria as been met (see EX. 1 above). She did mention that she is not willing to risk everything and that she may just wait it out and then approach the UKBA and apply.

Reflection:

My reflection in this case is totally different from that of the first one that I did, because it is not as straight forward as it looks, this was a very complicated case and one which as great impact in so many people's lives. It is very hard for someone like me, because I look back and ask myself what would I do if the situation was reverse and for once I was stuck. So for me this was a sad case, I believe that it is not an easy task for anyone when there are immigration issues, so I started by asking myself as the government and those in authority got it right.

Part 2

Representation in workplace disciplinary hearing

Representation - In general the rule concerning internal disciplinary representations at grievance hearings is that, legally, only a trade union official and / or work representative may accompany an employee. This rule can be found in section 10 of the Employment Relation Act 1999[13]. The idea of being accompanied to a disciplinary and grievance hearing is a relief to most employees, as it gives a ' voice' mechanism allowing employees to air grievances[14]. The structure thus helps in resolving disputes and minimise dismissals[15]. However the law that surround can be seen to be one sided only. In *Compass Group UK & Ireland t/a Eures v Okoro*[16], where the employee was dismissed for taking home an iPod without consent, the matter was brought in front of a senior manager. The iPod was returned by the employee who claimed that it was all a joke. The investigation meeting was cancelled by the employer because the employee admitted taking the iPod home and then eventually dismissing the employee for gross misconduct. When the case was before the Employment Appeal Tribunal[17], it was said that the employer should have carried out the investigation and should have considered all the circumstances. It was noted that practical jokes were commonly played between the employee and her manager but there was no record of poor discipline. Thus the employee's dismissal was found to be unfair by the EAT[18]. Hence care should be taken by employers to ensure all the steps in a disciplinary process are followed: such as investigation, appeal and disciplinary meetings, before disciplinary action is taken. In order to ensure that an employee is fairly treated[19], in case of

dismissal, an Act ensuring procedural justice was enacted. Hence the right to be accompanied during disciplinary and grievance hearing was introduced by Employment Relation Act 1999 s. 10 - 13 as amended by Ere1A 2004. The Act allows the employee to be accompanied by a fellow worker or a trade union official who, not necessarily, is also an employee of the same company. The Act states: "The companion has the right to address the hearing on the workers' behalf, including putting the case, summing it up and responding to any views expressed, but she cannot answer questions on the workers behalf[20]". It can be argued that the companion ought to be allowed to partake in the hearing in order to elaborate on the worker's case or to sum it up or to respond to any views stated during the meeting. But it would be fair to say that the companion is not allowed to answer questions on the worker's behalf: s. 10 (2B) and (2C) of the Employment Relations Act 1999. When the worker's companion is unable to attend the hearing in which the worker suggests an alternative time which is within 5 working days of the hearing, the employer is under a strict obligation to postpone the hearing to the time proposed by the worker: ss. 10 (4) and (5) of the Employment Relations Act 1999. This therefore means that NHS Doctors and Dentists in England are contractually allowed legal representation at disciplinary hearings. The Court made comments stating that an employee has an inherent right to legal representation at internal disciplinary hearings under Article 6 of the European Convention on Human Rights where disciplinary charges could affect the employee's chances of gaining future employment. When an employee wants legal representation and how he should present himself when he is arguing for legal representation was highlighted in the

case of *Kulkarni v Milton Keynes Hospital NHS Trust*[21], heard in the High Court, and reported to PPMA members in September 2008. In this case, it was said that someone who is not a legal representative could represent Kulkarni by profession. The employee tried to argue that this would however have amounted to a breach of the implied term of trust and confidence. The Medical Protection Society in support of the employee suggested that the Trust had the discretion to allow legal representation. Under the Employment Relations Act 1999, employees have a statutory right to be accompanied at internal disciplinary hearings by a worker or their trade union representative. However, external representation, by lawyers is not generally allowed. The High Court did not find this argument convincing and said that such a right could not be implied where an express term, i. e. the Trust's disciplinary policy, specifically ruled out legal representation. The employee also argued that his right to legal representation arose under Article 6 of the European Convention on Human Rights 1998. He said that Trust, as a public authority, was required to comply with Article 6. This argument was also denied by the High Court in which there were doubts that this provision applied at a disciplinary level. It was noted that appeals could be made to the General Medical Council and complaints could be lodged with the employment tribunal, thus, there was no prospect of establishing a breach of the Convention. The decision in this case supports public sector employers whose disciplinary policies and procedures allow internal representation (i. e. by a workplace colleague or trade union representative) only, and implied that such policies and procedures were consistent with the statutory provisions. The effects of the judgment are important as it extends

well beyond the NHS. It stated that public sector employees who work for ‘monopoly’ employers and who are confronting serious charges are entitled to a disciplinary hearing that complies with article 6 of the European Convention of Human Rights Act 1998[22], including the right to legal representation. It should be noted that the court ruled on the issue again in *Kulkarni v Milton Keynes Hospital NHS Foundation Trust*[23], in which a doctor was not allowed to have legal representation present at a disciplinary hearing. The allegations against him were that he touched a patient improperly. The High Court initially said that he was not allowed to have legal representation present during the hearing and that it did not breach Article 6 of the ECHR. This ruling overruled, however, when heard at the Court of Appeal. It was held that doctors have a right to legal representation. This is because of an NHS document called 'Maintaining High Professional Standards' which permitted representation by a colleague, friend etc. who although not be acting in an legal capacity could hold a legal qualification. Unfortunately, another High Court case, *R (on app'n of " G") v Governors of " X" School*, made matters unclear: if the matter lead to the employee's name being on the POCA register, where names of those who are deemed unsuitable to work with children are added, then their right to a fair trial under the Article 6 of the ECHR can give him the right to legal representation at a disciplinary hearing. In *R (on the application of G) v Governors of X School*[24], G was employed on work-experience part-time as a music assistant. Disciplinary procedures commenced against him as he was accused of abuse of trust involving a 15-year-old male pupil. Following an internal disciplinary hearing, he was dismissed. He was informed that the

authorities would be notified for his possible inclusion in the POCA register of those who are unsuitable to work with children. However, from the case it seems that employers need to think carefully and seek legal advice, when they receive a request for legal representation in situations where the disciplinary and/or appeal hearing outcome could affect the employee's ability to continue working in their respective professions. The ERA 1999, ss10-13 as amended by ERe1A 2004 states that in disciplinary hearings, the worker has the right to representation. Prior to the disciplinary hearing taking place G was informed by the school that he had entitlement to representation at the hearing, provided by his trade union or a colleague. His solicitors replied for him. They pointed out being a part-time casual employee, G was not able to find a representative. Furthermore, he had no trade union membership. His solicitors continued: " We appreciate that in ordinary cases the employee could have the matter dealt with without legal representation but this is an extraordinary case that could result in a lifetime disadvantage for our client"[25]. The school response was, " We have been instructed by the [Local] Authority that 'An employee may be represented by a colleague or a trade union representative' and that any other person will not be permitted to enter the hearing"[26]and on this basis legal representation was denied. The claimant attended the disciplinary hearing with his father. He did not answer the questions as he felt that that would be unfair. Following the disciplinary hearing, G appealed to the Staff Appeal Committee against its findings. He asked if he could be granted legal representation at the appeal, but permission was refused as before. His solicitors then started an action for a judicial review on 19 May 2008. They

sought a declaration that by denying his right to legal representation prior to the School's disciplinary hearing a breach of article 6 ECHR had been committed. Concurrently the appropriate POCA register authorities were notified by the Chair of the Governors. During the judicial review hearing it was made clear by the School that under the Employment Relations Act 1999 s. 10[27], an employer is obliged to allow an employee to be accompanied at a disciplinary hearing by a companion who is either " employed by a trade union of which he is an official, or an official of a trade union whom the union has reasonably certified as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings; or another of the employer's workers." [28] The High Court ruled that in the context of the Education Act 2002 s. 142, it could not deny legal representation to G as part of his right to a fair trial under the Human Rights Act. However Article 6 ECHR applies where there is a " determination of ... civil rights and obligations" [29]. The civil right concerned the claimant's right to work as a teaching assistant and to work with children. The judge said: " 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 are such that he was, and is, entitled to legal representation at hearings before the Disciplinary Committee and the Appeal Committee" [30]. It was held that it was difficult to reconcile the High Court rulings in these two cases. But it ought to be noted that the specific and particular circumstances of the R (on app'n of " G") v Governors of " X" School will not appear to lead to any general change in the interpretation of

the right to be accompanied in ordinary disciplinary cases. In *London Underground Ltd v Ferenc-Batchelor*[31] the employer termed the meeting as an ‘informal oral warning’ but the writing would be considered in any future disciplinary hearings was held by EAT as disciplinary hearing in which the employee was wrongly denied her right to accompaniment. The requirements of timely action and fairness underpin the ACAS Code. This reflects the case law prior to the introduction of the Code. In *WA Goold (Pearmak) Ltd v McConnell*[32], the EAT confirmed that a failure to afford employees a reasonable and prompt opportunity to seek redress of any grievance can constitute a repudiatory breach of contract, thereby entitling the employee to resign. The EAT said as follows: It is clear that Parliament considered that good industrial relations require employers to provide their employees with a method of dealing with grievances in a proper and timeous fashion. This is also consistent, of course, with the codes of practice. That being so, the industrial tribunal was entitled, in our judgment, to conclude that there was an implied term in the contract of employment that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. Further[33], it seems to us that the right to obtain redress against a grievance is fundamental for very obvious reasons. The working environment may well lead to employees experiencing difficulties, whether because of the physical conditions under which they are required to work, or because of a breakdown in human relationships, which can readily occur when people of different backgrounds and sensitivities are required to work together, often under pressure[34]. Goold was subsequently endorsed by Lord Hoffman in

Johnson v Unisys Ltd^[35] Other instances where employers have been found to have breached the fundamental implied term of trust and confidence by failing to deal with a grievance properly include *Waltons & Morse v Dorrington*^[36] and *Reed v Stedman*^[37]. However, in *Sweetin v Coral Racing*^[38] made it clear that there can be no obligation on an employer to deal with a grievance, which has not been properly communicated, to the employer. In the recent Employment Appeal Tribunal (EAT) case, *Ministry of Justice v Parry*^[39], the EAT was asked to determine whether a tribunal had correctly decided that legal representation at an internal disciplinary appeal hearing was mandated and whether a decision to dismiss an employee was necessarily "procedurally" unfair in the absence of legal representation. The claimant, a district probate registrar, had received a final written warning for gross misconduct and further complaints were upheld within the currency of that existing warning. This prompted her dismissal. The claimant's request for legal representation at her appeal hearing was declined. The EAT recognised that an employer's contractual right to dismiss an employee could impact on their broader civil rights, therefore, the right to practice a particular job or profession. However, the EAT found that there was no prima facie right to a legal representative at internal disciplinary hearings unless, the circumstances fell within an exceptional class of case in which the decision to dismiss from employment is also a decision which creates a legal barrier to the employee working again in their chosen profession so that, Article 6 of the European Convention on Human Rights, did guarantee legal representation at an internal disciplinary hearing. In this case, the matter was remitted to a fresh tribunal as it was held that, the tribunal did not have

sufficient evidence to decide on the facts whether the decision to dismiss would have prevented the claimant from practising as a district probate registrar. However, the decision is of interest as it reinforces the general point that the right to legal representation at internal hearings will usually only be engaged in exceptional circumstances. According to Saundry, R. and Antcliff, V. (2006) *Employee Representation in Grievance and Disciplinary Matters – Making a Difference?* DTI Employment Relations Research Series, No. 69, London: DTI. ,) the accompaniment and representation procedure was uneven and haphazard. They found that 42 per cent of workplaces failed to meet at least one element of the statutory requirements regarding accompaniment at grievance hearings. Even when one examined only those workplaces with a formal grievance procedure, nearly one third (36 per cent) failed to comply with the legislation. Similarly, 39 per cent of all workplaces failed to meet at least one of the legal requirements for accompaniment at disciplinary hearings. Among those workplaces where employees were always given the opportunity of a formal disciplinary hearing and those with formal disciplinary procedures, 35 per cent failed to offer employees their full statutory rights to accompaniment. Saundry and Antcliff (ibid.) found that application of the law in respect of individual grievance hearings and disciplinary hearings was patchy. Around one in five workplaces did not allow companions to ask questions on behalf of the employee, something they were clearly allowed to do under the Employment Relations Act 1999. At the same time approximately half allowed companions to answer questions on behalf of the employee, a practice, which the employer is not, required to permit under the legislation. Given the uncertainty on both sides of the

employment relationship, it is perhaps not surprising that application of the statutory right to accompaniment was inconsistent. (Accompaniment and Representation in Workplace Discipline and Grievance, Richard Saundry, Valerie Antcliff, Carol Jones, University of Central Lancashire) Furthermore, Saundry and Antcliff (2006) found that observation of the right to accompaniment at disciplinary hearings, in it, did not moderate disciplinary outcomes. They argued that by the time the right was effective, when the employee is invited to a disciplinary hearing, the chances of avoiding any disciplinary sanction would be slim. Instead, they argued that representation might be most effective prior to the onset of formal proceedings. They did find that workplaces that observed the right to accompaniment at grievance hearings were likely to experience lower rates of employment tribunal applications. However, Saundry and Antcliff (ibid.) found strong evidence that pointed to the importance of employee representation. In short where union density was higher, workers were less likely to be disciplined or dismissed. Edwards, P. K. (1995) 'Human resource management, union voice and the use of discipline: an analysis of WIRS3', *Industrial Relations Journal*, 26(3): 204-220, has claimed that union involvement tends to make dismissal and the use of disciplinary sanctions less likely. He provided two explanations for this. Firstly unions offered employees protection from unfair treatment, and secondly, provided a means through which rules and procedures were agreed, minimising the use of sanctions. Edwards concluded that unions acted as a restraining force on managerial prerogative and 'punitive modes of discipline' A small scale ' pilot' research project carried out by the University of Central Lancashire explore the impact of the

accompaniment and representation of employees within disciplinary and grievance procedures. In terms of accompaniment, all had some provision to accompaniment or representation that would meet employees' statutory rights. In most this was simply stated as: 'at all stages the employee will have the right to be accompanied by a work colleague or a trade union representative'. However the procedure of one large private sector organisation, in which unions were recognised, stated that, 'the employee will have the right to the presence and assistance of a recognised trade union representative or work colleague'. This is much more broadly framed than the statutory right and suggests the acceptance of a more representational role. Another notable reference to representation was contained in the Grievance Policy and Procedure of another highly unionised private sector business. Under the heading of 'Informal Resolution' it stated that: 'It should be recognised that the TU Reps have considerable experience of assisting employees with grievance issues, and they can provide considerable assistance with the process and in working to resolve the issue'. To some extent the level of formality was dependent on the nature of the organisation but the main factor appeared to be sectoral. The most formal procedures that we found were in public sector organisations. This related both to the nature of the procedure and its operation. Public sector procedures tended to be more complex and detailed than those in the private sector.

CONCLUSIONS

Importantly, our findings support the argument that trade unions can play a key role in moderating disciplinary outcomes (Edwards, 1995). Within

<https://assignbuster.com/the-representation-in-workplace-disciplinary-hearing-law-employment-essay/>

unionised organisations in our sample, representatives were central to informal processes of dispute resolution, before, during and after the onset of formal procedure. They acted as an early warning system, a channel of communication and even as an additional arm of management in trying to ensure that unacceptable behaviours were corrected. At best, trade union representation ensured that employers adopted followed fair 61procedure. But, generally, their presence tended to formalise proceedings with both sides adopting defensive and adversarial positions. This is not a criticism of either employer or trade union, but merely serves to reinforce the point that effective handling of disciplinary and grievance issues must be underpinned by high-trust relationships. As pointed out above, one must be careful about drawing firm conclusions from a small-scale study. Nonetheless, the findings provide useful insights relevant to the ongoing policy debate. The inevitable message from the research, to date, is that strong structures of employee representation underpinned by high-trust relations are critical in minimising disciplinary sanctions and dismissals. They are particularly important in ensuring that employees are not disadvantaged within the informal processes, which facilitate effective dispute resolution. Such relationships cannot be created by governmental intervention and legislation. Indeed the issue of employee representation in the large number of workplaces with no trade union presence is particularly problematic.