When HR goes too far | back to top

In early September 2015, the Employment Appeal Tribunal handed down its decision in the case of *Ramphal -v- Department for Transport* (UKEAT/0352/14/DA). The case concerns the crucial question of how far HR professionals should get involved in and influence the outcome of internal disciplinary proceedings.

It is our experience over many years that disciplinary cases, performance management, and other internal processes in higher education often require complex and lengthy investigations and internal hearings. Unsurprisingly therefore, the role of HR is crucial in guiding and supporting colleagues dealing with investigations, hearings and appeals. What are the proper limits of HR's role in such cases?

Facts

The detailed facts of the *Ramphal* case don't matter. The essential points were as follows:

- Mr Ramphal was investigated in respect of expenses claims.
- The disciplinary officer (who was also the investigating officer, something always best avoided) was unfamiliar with disciplinary proceedings. He therefore had a large number of discussions and exchanges of emails with HR.
- The disciplinary officer appears to have changed his mind about his decision, evidenced in various drafts, the crucial point being that he was initially inclined to give a final written warning.
- After input from HR, favourable comments about Mr Ramphal were removed from the decision, the statement of culpability was changed from "misconduct" to "gross misconduct", and it followed that the final sanction was changed to summary dismissal.
- HR had provided critical comments about the strength of Mr Ramphal's case, invited the disciplinary officer to look at it more critically, and suggested changes to key factual conclusions.

The EAT's decision

The three main points of the decision were as follows:

1. That in at least one crucial respect the advice from HR was wrong - they seemed to suggest that it was not necessary to a finding of theft on Mr Ramphal's part that he had been dishonest.
2. The HR officers had completely overstepped the proper limits of their role – "HR must be very careful to limit advice essentially to questions of law and procedure and process and to avoid straying into areas of culpability, let alone advising on what was the appropriate sanction…".
3. An employee facing disciplinary charges and potential dismissal should know who is taking this decision; if the dismissing officer receives representations from colleagues which have not been put to the employee, beyond legal advice and advice on matters of process and procedure, those further matters should be put to the employee before a final decision is taken.

Implications

On one level, it might be thought that this was an extreme case. Indeed the EAT described the changes in the dismissing officer's views as "striking". It is far from uncommon however for busy managers to rely heavily on input from HR in making these kinds of decisions. The case is therefore a useful reminder of the following key principles which will help universities minimise the risk of constructive dismissal when decisions are being made at warning stage, and of ordinary unfair dismissal at the dismissal stage:

1. Factual decisions, i.e. conclusions as to what actually happened, must be made by the disciplinary/dismissal officer.
2. The employee's level of culpability (e.g. misconduct/gross misconduct) must also be a decision for the disciplinary/dismissal officer.
3. The same goes for the penalty to be applied.
4. The disciplinary/dismissal officer should also consider and weigh up the significance of matters tending to assist the employee, whether they go to the factual findings or to the question of what sanction should be applied i.e. factors in mitigation.
5. The proper role of HR, and indeed anyone else who is not involved in making the disciplinary/dismissal decision, is to advise on:

- Due process
- The law
- The options available to the disciplinary/dismissal officer
- Consistency – within the institution and within the decision itself
- Ensuring that all issues have been properly covered
- And of course the wording of the decision

All of the above would apply to the investigation as well as the decision stage.

Finally, this case is also a good reminder that internal (even deleted) emails and draft decisions will be subject to a disclosure process in Tribunal or other litigation. The same would apply to draft investigation reports and correspondence about investigation reports even if carried out by an external party. Some, though not all, correspondence with external (and often also in-house) lawyers would be privileged and not subject to disclosure.

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