

## No person may judge their own case

Nemo iudex in parte sua. Latin is prohibited from use in our courts, but, arguably, there may be a case for its inclusion in the national curriculum for our schools, especially when, judging from a recent employment tribunal case, the governors of a school argued that it had delegated, legally, the powers of a Staff Disciplinary Committee (of at least three members) (“SDC”) to its Head Teacher (of one) (“HT”) to: investigate a case against a teacher; decide whether that teacher should face a disciplinary hearing; conduct the case against that teacher at the disciplinary hearing; sit in judgment (as the SDC, now, of course, of one i.e. the HT) at the same disciplinary hearing; make submissions (as the prosecutor, wearing her HT’s hat) to herself (wearing her SDC hat); decide on the evidence put by both her and the teacher in question; decide whether or not she favoured her own submissions (made to herself); reach a decision based on the case put by herself; and, finally, impose the sanction.

Section 19(3)(k) of the Education Act 2002 (“EA 2002”) allows for regulations to make provisions as to the delegation of functions by governing bodies. Subject to various provisions, from 1 September 2003 a governing body could delegate any of its functions to (a) a committee; (b) any governor; or (c) the head teacher of the federation or of a federated school (whether or not (s)he is a governor). Where a governing body has delegated functions this shall not prevent the governing body from exercising those functions. However, a governing body must review the exercise of functions it has delegated annually: **SI 2003/1963, reg 8; 2007/1960, reg 31; sch 8, para 7. “Functions” includes powers and duties: s579(1) of the Education Act 1996**

The facts of **W. McGovern v The Governing Body of Cardinal Hinsley RC School (3314776/2006)** are interesting. In September 2000 the Claimant was employed by the school as a teacher, and in 2002 had become the Head of the ICT Department.

Part of the Claimant's terms of his contract of employment stated, "Since September 2003 regulations made under the EA 2002 have given greater power to Governing Bodies to delegate their powers, including their power to dismiss staff, to Headteachers if they so wish. Consequently Governing Bodies must have regard in applying the Disciplinary Procedure to guidance issued by the Secretary of State in relation to these powers..."

Clause 8.6.2 of the Disciplinary Procedure stated, "A final written warning may be imposed by the [HT] or [SDC]. If there is a possibility that the [Teacher] may be dismissed the matter must go to the [SDC]..."

Under the new HT's regime, between February 2005 and May 2006 the Claimant was the subject of three disciplinary matters. At one of the disciplinary hearings, the Claimant stated that he expected the hearing panel to consist of three governors of the school and not the HT and reference was made to the terms of the Disciplinary Procedure. Despite having two advisors present to assist her, the HT was not told by either that she could not be prosecutor, judge and jury in her own 'court'.

Unsurprisingly, each of the disciplinary hearings during which she wore all three hats the Claimant's defence was unsuccessful. Put another way, the HT upheld her 'own' complaints. The Claimant complained that the HT's role at each and every stage of the disciplinary process was a breach of the Disciplinary Procedure and, if nothing

else, unfair; a breach of natural justice. He appealed the HT's decisions. For various reasons the appeals were heard in his absence, and the HT's decisions were upheld. In consequence, by letter dated 8 May 2006 the Claimant resigned and subsequently presented a complaint to the employment tribunal alleging unfair constructive dismissal.

The test under s95(1)(c) of the Employment Rights Act 1996 is whether the employer has been guilty of conduct that is a significant breach of the contract of employment going to the root of the contract or which shows the employer no longer intends to be bound by one or more of the essential terms of the contract, the employee has left as a **result** and acted promptly. Applying the cases of **Western Excavation (ECC) Ltd v Sharpe 1978 ICR 221**, **Lewis v Motorworld Garages Ltd 1985 IRLR 465** and **Malik v The Bank of Credit and Commerce International SA 1997 IRLR 462** it was concluded, "in those circumstances the Tribunal has no doubt in coming to the conclusion that this Claimant has been constructively unfairly dismissed."

The Tribunal said, among other things, that in its view, there was no delegated power within the Procedure itself. Clause 8.6.2, on which the school relied so heavily, is merely stating that in the event of the SDC coming to a determination that a member of staff has been guilty of, say, misconduct, the SDC can in fact delegate the sanction to the HT rather than impose the sanction itself. The HT in such circumstances has the power to impose a final written warning. The Tribunal gained comfort for that interpretation by the fact that part of clause 8.6.2 says, "if there is a possibility that the [Teacher] may be dismissed the matter must go to the [SDC]". So, in other words, the SDC is the only body that could have imposed a dismissal but it could delegate a sanction of a final written warning to the HT. In the Tribunal's opinion, "to attempt

to incorporate the word “Head Teacher” into the Procedure in place of the words “Staff Disciplinary Committee” makes no sense whatsoever”.

Admittedly, the opening phrase, “no person may judge their own case”, does not fully cover the many breaches identified by the Tribunal, but it was the closest one could find. I guess our friends from the Classical world would have thought a phrase covering, fully, the HT’s acts would have been redundant and unnecessary. How wrong they were!

***An adapted version of this article appears at page 20 of the Middlesex Law Society Magazine Autumn 2007***

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