



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Briefing: Employment

Please note that this briefing is written in plain English and is not meant to be legal advice. We provide information on human rights but other laws, rules and more up-to-date information may apply. We recommend that you seek further advice.

Introduction

In this Briefing we talk about issues that might affect you at work. The Briefing covers discipline and dismissal, bullying and harassment, whistleblowing and bringing a claim to Tribunal.

The Human Rights Act 1998

The Human Rights Act 1998 (HRA) became law in the United Kingdom in October 2000. It covers most of the rights set out in the European Convention on Human Rights (ECHR) and means that people in the United Kingdom can rely on their ECHR rights in the local Courts.

Public authorities must respect human rights. A public authority is an organisation that carries out a public function, such as a nursing home or a school. If your employer is a public authority, you may bring a case to court under the HRA if your rights have been breached. For employees who do not work for a public authority, the HRA is still important. Employment tribunals, and the courts, are public authorities and so must consider your human rights when deciding your case. The following rights may be relevant in employment cases:

Right to a fair trial:

Article 6 of the ECHR protects the right to a fair trial. Article 6(1) reads:

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. Judgment shall be

pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Not all employment issues are covered by article 6(1); it only applies where, for example, the outcome of disciplinary proceedings will affect your ability to work in your profession. If you bring a claim to the Industrial or Fair Employment Tribunal (or appeal onwards to a higher court); that Tribunal or court must give you a fair hearing under article 6. Access to a judicial body which complies with article 6, therefore, may solve any shortcomings in the employer's internal processes.¹

Article 6 does not give you the right to legal representation at internal employment disciplinary hearings. However article 6 may be relevant if there is a good chance that the disciplinary proceedings will substantially influence the outcome of later proceedings which determine the right to practice ones profession (or another civil right)²

Right to respect for private and family life:

Article 8 of the ECHR protects the right to respect for private and family life. Article 8 reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 is not an absolute right and in some situations it is legal for your employer to intrude on your privacy or your family life. Those situations must be allowed in law and must be for one of the reasons listed in paragraph 2 of article 8 (above). In all the circumstances of

¹ Le Compt, Van Leuven and De Meyere v. Belgium (1982) 4 EHRR 1, para 51

² R (G) v Governors of X School and Y City Council [2011] UKSC 30 SC

the case, it has to be reasonable for your employer to intrude on your private or family life.

Article 8 is relevant in a number of ways to employment; communications by employees, disclosure of information or dress codes. For example, in the case of *Copland v. the United Kingdom*,³ the Mrs Copland complained that her telephone, email and internet usage at work had been monitored. The ECt.HR accepted that sometimes it may be acceptable to monitor or control an employee's usage. However in this case there was no valid reason for doing so. Therefore, there had been a breach of article 8.

Right to freedom of thought, conscience and religion:

Article 9 of the ECHR protects the right to freedom of thought, conscience and religion, which states that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Freedom of thought, conscience and religion is an absolute right which means that the state cannot tell you to stop thinking or believing something or stop you from believing in a particular religion. However, the state can put limits on how you practice your religion or beliefs. When they can, and for what reasons, is set out under article 9(2) (above).

In the case of *Eweida and Others v. the United Kingdom*,⁴ two employees were not allowed to wear a religious cross at work; a third employee refused to conduct civil partnerships for her employer (a local authority) and a fourth employee was dismissed for refusing to provide psycho-sexual therapy to same-sex couples in his position as a counsellor.

³ *Copland v. the United Kingdom* [2007] ECHR 253

⁴ *Eweida and Others v. the United Kingdom* [2013] ECHR 37

The ECt.HR did not find violations of article 9 in three of the cases as these fell “within the margin of appreciation” of the UK government. This means that governments can balance the rights of each party in a dispute and make its own decision on what the proper balance should be. However, the ECt.HR found that government must take positive action to protect the right to practice religion. In the case of Miss Eweida, they did not take enough steps to do so.

Right to freedom of expression:

Article 10 of the ECHR protects the right to freedom of expression, and states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

You have the right to freedom of expression in the workplace regardless of whether you work for a public authority or a private employer.⁵

In the case of *Guja v. Moldova*,⁶ Mr Guja was sacked for disclosing political interference in criminal proceedings. The ECt.HR said that the right to freedom of expression is very important and includes the right of employees to report illegal conduct at their place of work. The Court decided that Mr Guja’s freedom of expression had been breached as his dismissal was not necessary in a democratic society.

⁵ Fuentes Bobo v. Spain (2000) 31 EHRR 1115

⁶ *Guja v. Moldova* [2008] ECHR 144

Non-discrimination:

Article 14 of the ECHR bans discrimination in the enjoyment of another human right. For example you would have a claim under article 14 and under article 8 if your right to privacy was breached because of your sex, race, colour or any of the other grounds listed in article 14. However, you could not bring a claim under article 14 by itself; you have to connect it to another right in the ECHR. Article 14 reads:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Discipline and dismissal

Disciplinary rules set down the standard of behavior expected from employees in the workplace. A clear and easily understood procedure for dealing with discipline allows misconduct and unsatisfactory performance to be dealt with fairly.

By law, employers are required to follow a minimum procedure when considering disciplinary sanctions or dismissal. The Labour Relations Agency has produced a Code of Practice on Disciplinary and Grievance Procedures which provides further detail on each process.⁷

The employer should first investigate the allegation (or misconduct or poor performance) promptly to establish the facts. Then a decision should be taken whether to deal with the matter informally or formally. If the matter is to be dealt with formally, the following procedure should be followed:

- the employer should tell the employee about the problem in writing. The letter should give sufficient information about the case against them and invite them to a meeting to discuss it. The employee will be informed of the consequences of the meeting and their right for a fellow employee or a trade union representative to attend the meeting with them;
- the employer will hold a meeting to discuss the problem and the employee will have the opportunity to answer the allegations against them. The employer will then decide what action to take and will let the employee know what that is;

⁷ Labour Relations Agency, http://www.lra.org.uk/44301_final_low_res_web_-4.pdf

- the employer must give the employee a chance to appeal. The appeal meeting should be held with someone who was not involved in previous meetings. The employee should be told the outcome of the appeal promptly and in writing.

Following these procedures is important because, if the case goes to the Employment Tribunal, the Tribunal will look at whether this has been done. The Tribunal has the power to increase the amount of compensation awarded to an employee if the procedures were not followed.

Unfair Dismissal

A dismissal happens when an employer ends an employee's contract of employment. If you have been employed for one year or more you have the right not to be unfairly dismissed. Exceptions to this rule are dismissals for asserting a statutory right (asking for something you are entitled to by law) or discrimination.⁸

If an employer wishes to dismiss you, the procedures set out in law must be followed. If the employer does not follow these procedures the Tribunal will consider your dismissal automatically unfair.

Discrimination

Employers have a legal duty to make sure they do not treat an individual less favourably because of their age, gender, marital status, disability, race/nationality, sexual orientation, religious belief or political opinion. This is the case in applying for a job, during employment and even after the employment relationship has come to an end. Discrimination can happen in three ways:

- Direct discrimination - treating a person less favourably because of their sex, race, sexual orientation, disability, religious belief, political opinion or age; for example, not appointing a female to a job because the employer would prefer a man in the job.
- Indirect discrimination – this can happen where, even though the same rule applies to everyone, the rule impacts less favourably on a particular group and this cannot be justified. For example where the employer imposes rules about clothing or uniforms that disadvantage a racial group and cannot be justified.

⁸ Employment Rights (Northern Ireland) Order 1996

- Victimisation – this can happen where a person is treated less favourably because they have either taken action in relation to discrimination in the past, or have assisted or been involved in action taken by someone else in relation to discrimination.

In the case of *McConkey and others v. the Simon Community*,⁹ Mr McConkey argued that he was refused a job because of his belief in the use of violence. The Courts decided that the use of violence for political reasons does not count as a political opinion under the fair employment legislation. Therefore, Mr McConkey was not discriminated against.

Bullying and Harassment

There should be an easily understood and strong policy on bullying and harassment that makes clear what behaviour is not acceptable in the workplace. This may be as a part of the organisation's grievance procedure or as a separate policy.

There is no legal definition of bullying at present. The Labour Relations Agency has produced guidance on good practice at dealing with bullying and harassment in the workplace.¹⁰

The European Directive on equal treatment in employment identifies harassment as a form of direct discrimination, occurring when "unwanted conduct... takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment."

Harassment on the grounds of sex, sexual orientation, gender reassignment, marital or civil partnership status, religious belief, political opinion, race, disability and age is against the law. A common definition of harassment applies, and states:

A person (A) subjects another person (B) to harassment where, on the grounds of (insert social identity basis), A engages in unwanted conduct which has the purpose or effect of (i) violating B's dignity or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.' 'The conduct shall be regarded as having this effect only if, having regard to all the circumstances and in particular the alleged victim's perception, it should be reasonably considered as having that effect

⁹ *McConkey and Others v. The Simon Community* [2009] UKHL 24

¹⁰ Labour Relations Agency, http://www.lra.org.uk/har_bullying0306_f_-1.pdf

This definition is used in a number of laws which protect against harassment in the workplace:

- Fair Employment and Treatment (NI) Order 1998 (as amended), Article 3A;
- Race Relations (NI) Order 1997 (as amended), Article 4A;
- Disability Discrimination Act 1995 (as amended), Article 3B;
- Employment Equality (Sexual Orientation) Regulations (NI) 2003, Article 5;
- Sex Discrimination (NI) Order 1976 (as amended), Article 6.

Whistleblowing

Whistleblowing is your right to speak out against something that is wrong. If you make a qualifying disclosure (also called whistleblowing) to your employer or someone else, you are protected from dismissal or other disadvantage (under the Public Interest Disclosure (Northern Ireland) Order 1998). To get this protection, the type of disclosure you make must fall under one of a number of categories. The information must disclose:

- that a criminal offence has been committed, is being committed or is likely to be committed;
- that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
- that a miscarriage of justice has occurred, is occurring or is likely to occur;
- that the health or safety of any individual has been, is being or is likely to be endangered;
- that the environment has been, is being or is likely to be damaged; or
- that information tending to show any matter falling within any one of the preceding sub-paragraphs has been, is being or is likely to be deliberately concealed.

It is automatically unfair to dismiss an employee or subject them to a disadvantage for making any of these disclosures. Employees can complain to the Industrial Tribunal if this happens.

Bringing a Claim

The Industrial Tribunal deals unfair dismissal, breach of contract and discrimination on the grounds of sex, race, disability, sexual

orientation, age, part time working or equal pay. The Fair Employment Tribunal deals with discrimination on the grounds of religious belief or political opinion.

Any claim for breach of contract, unfair dismissal, whistleblowing or discrimination must be brought to the employment tribunal within 3 months. The time limits for bringing a claim can only be extended by the Tribunal itself and it will only do so if there are exceptional circumstances.

The Tribunal will decide if your claim is successful and, if so, what your remedy will be. The Tribunal may require your employer to give your job back to you or pay you compensation. You and your employer will have to pay your own costs as they are not automatically payable by the party that loses. The Tribunal may award costs against you if you have acted abusively or unreasonably in bringing or during the case, even if you have been successful.

A decision of the tribunal may be reviewed in certain circumstances. This is a review carried out by the Tribunal itself and can only be done in cases where:

- an error was made by staff at the Office of the Tribunal;
- a party did not receive notice of the proceedings;
- the decision was made in the absence of a party;
- new evidence has become available; or,
- the interests of justice require such a review.

An appeal to the Court of Appeal is also possible but this must be on a point of law and not just because you do not agree with the decision.

Useful Contacts

For information and guidance on a range of employment issues or assistance in resolving disputes you should contact the Labour Relations Agency:

Labour Relations Agency

Head Office
2-8 Gordon Street
Belfast, BT1 2LG

Tel: 028 9032 1442

Website: www.lra.org.uk

For information and assistance relating to discrimination in the workplace, you should contact the Equality Commission for Northern Ireland:

Equality Commission Northern Ireland

Equality House
7-9 Shaftesbury Square
Belfast, BT2 7DP

Tel: 028 9050 0600

Website: www.equalityni.org

For information relating to an employment claim you should contact the Office of the Industrial Tribunal and Fair Employment Tribunal:

Office of the Industrial Tribunals and Fair Employment Tribunal

Killymeal House, 2 Cromac Quay
Belfast, BT7 2JD

Tel: 028 9032 7666

Website: www.employmenttribunalsni.co.uk

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