Decision following a disciplinary appeal

The recent case with McMillan v Airedale NHS Foundation Trust from the Court of Appeal has confirmed that the decision following an appeal in disciplinary proceedings should not increase the original sanction issued at a disciplinary hearing unless the employers contractual disciplinary policy provides an express right to do so. The Court of Appeal's decision further confirms the ACAS guidance on the disciplinary and grievance Code of Practice, which states that employees should not be disadvantaged and made worse off by appealing an initial disciplinary decision. The purpose of an appeal should be to consider whether the sanction issued was valid or whether it should be in fact downgraded.

The case of McMillan involved a medical professional who was subject to disciplinary proceedings which resulted in a final written warning. Ms McMillan appealed and the NHS Trust sought to reconsider the appropriate sanction which could have included increasing the outcome to a dismissal. Ms McMillan pursued an injunction against the NHS Trust at the High Court which was granted preventing her employer from increasing the sanction. The NHS Trust appealed and it was the Court of Appeal who upheld the decision that an appeal should not replace a disciplinary sanction with a higher one.

Interestingly to note for members was one of the Judge's comments that in theory, an employer could increase the disciplinary sanction on appeal but only if it were provided for within an express clause within the disciplinary policy. In general it is not unusual and not likely to be reflected in members disciplinary policy and this decision may therefore cause employers to reconsider the drafting of their disciplinary policy.

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