

Employers beware – a failure to follow the correct dismissal procedure gives rise to valuable employee rights

As highlighted by the recent success of Sharon Shoemith in the Baby P case.

By Philip Landau
 Employment Law Solicitor

Many people are aghast at the fact that the Director of Children's Services at Haringey Council has won her right of appeal against her unfair sacking in the Baby P case. This came after the critical nature of the way her department was run by OFSTED.

Ms Shoemith held a position as Director of Children and Young People's Services at Haringey Council, which was a role specifically provided for by statute. It was the holding of this statutory position that has given her the right to apply for judicial review of the decision to remove her from her role, and one that also potentially gives her a greater compensation level than what she could achieve in an employment tribunal. This is notwithstanding that she was at the same time an employee of Haringey Council.

For a dismissal to be fair, there has to be a substantive reason for the dismissal (for example that there has been gross misconduct) and there also has to be a fair process.

The Court of Appeal in the Baby P case was concerned solely with the issue over the fairness of the process by which Ms Shoemith was removed from office and instantly dismissed. After the OFSTED report was published in November 2008, Ms Shoemith was removed from her Director's post by the Secretary of State. Shortly afterwards, the Council summarily dismissed her as an employee without compensation or payment in lieu of notice.

The Court of Appeal held that the direction from the Secretary of State that Ms Shoemith be removed from her Director's post was unlawful because she should have been afforded the same protection as other office holders in a similar position and not be subject to a sweeping removal of her position without notice, let alone one made in such a public manner.

With regard to her subsequent dismissal as an employee by Haringey Council, the biggest procedural failing here was that the Council did not allow proper investigation into the OFSTED reports crucial findings before steps were taken pursuant to it, and also that it founded its decision to dismiss Ms Shoemith based on the unlawful directions of the Secretary of State.

The fact that Ms Shoemith was accountable for the department in Haringey did not disentitle her to elementary fairness, such as being afforded an opportunity to put her case across before being removed from office.

So what obligation do employers have to ensure that they comply with procedural fairness in disciplinary cases? At the very least, they should carry out an investigation of potential disciplinary matters without unreasonable delay to establish the facts of the case. Different people should carry out the investigation and the disciplinary hearing.

If there is a disciplinary case to answer the employee should be notified in writing with sufficient information of the problem and be given details of the meeting time and venue. The disciplinary meeting should be held as soon as possible and the employee should have a reasonable time to prepare his case.

Employers should explain the complaint against the employee and provide evidence of wrongdoing. Employees should then be allowed to answer any allegations, ask questions, present evidence and call relevant witnesses.

If an employer does get the process wrong which leads to a finding of unfair dismissal, an employer can still subsequently challenge the amount of damages that an employee should be awarded if they can show that even if a proper process had been followed, the decision would have still been the same. This will undoubtedly be an argument used in the Baby P case where damages have yet to be determined. Not every employer will get home and dry on this argument, however. It is a significant risk not to follow a fair and transparent process in the hope that they can later argue if would not have made the slightest bit of difference.

The Baby P case has shown the willingness of the courts to protect individuals in situations where employers flagrantly breach established employment law practice. By also finding against the Secretary of State in this case, it has shown that nobody is above the law.

For further information please contact Philip by telephone on 020 7357 9494 or email:

Philip Landau pl@lzwlaw.co.uk