

# RadcliffesLeBrosseur



## Court of Appeal Decision

July 2009

### **Dr Kulkarni v Milton Keynes Hospital NHS Foundation Trust [2009] EWCA Civ 789**

This decision represents a significant development in the law relating to doctors and dentists facing disciplinary proceedings within the NHS and may have a wider impact regarding all employees of public bodies faced with potentially career threatening disciplinary action.

The case concerned a junior doctor who faced potentially serious charges of professional misconduct who requested through his medical defence organisation, the Medical Protection Society (MPS), permission from his employer to bring a legal representative to the disciplinary hearing. The Trust refused relying upon an express term of its contractual disciplinary procedure as excluding the right to legal representation. Such disciplinary procedure had been introduced in 2005 as part of the negotiations resulting in the new consultant contract within the NHS. Before this time doctors and dentists enjoyed the express contractual right to have disciplinary charges made against them by their employers to be determined by an independent panel consisting of a legally qualified chairman together with a right to be represented by a lawyer. Those procedures were set out in Department of Health circular HC90(9).

The loss of the protection of HC90(9) meant that doctors and dentists were to be treated like any other employee and faced with serious disciplinary charges. This was of great significance given that the National Health Service is, to all intents and purposes, a single employer for the whole country and a doctor or dentist being dismissed from their post will become effectively unemployable.

Dr Kulkarni applied to the High Court for an injunction to compel his employing Trust to permit him legal representation. The High Court refused the injunction and the matter was appealed to the Court of Appeal.

The Court of Appeal determined the matter by reference to the express provisions of the new contractual disciplinary procedure and construed the relevant provisions to mean that Dr Kulkarni was contractually entitled to be represented at his disciplinary hearing by a lawyer instructed by the MPS. The consequence of the decision is that any NHS Trust doctor facing disciplinary charges on misconduct or capability grounds has the contractual right to a legal representative instructed or retained by his medical defence organisation. The decision applies to all NHS employed doctors and dentists in England. Since the procedure applies to both professional and non-professional conduct it is arguable that the decision gives a right of legal representation on a wider basis than the defunct HC90(9).

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Of potentially even wider interest are the comments contained within the Court of Appeal Judgment in relation to Article 6. Whilst the Court had no need to determine the arguments on Article 6 the leading Judgment by Smith LJ was strongly suggestive that the right to a fair trial set out in Article 6 is engaged where an NHS doctor faces charges which are of such gravity that, in the event they are found proved, he will be effectively barred from employment in the NHS.

What has been said about the engagement of Article 6 in this case may well be relied upon by other public sector employees who work for effective monopoly employers who are facing serious charges so that they should be entitled to an internal disciplinary hearing compliant with Article 6 including the right to legal representation. Furthermore, and perhaps of even greater potential impact, is that if Article 6 does apply then further elements of a right to a fair trial may be required of the public sector employee. These are likely to include the right to an independent panel to hear the case.

What will happen to cases currently under consideration will have to be determined by the NHS as employers who are currently bound by the decision of the Court of Appeal.

Given the potential impact of the decision in this case as it relates to internal disciplinary proceedings for public sector employees it is not surprising that permission to appeal to the Supreme Court has been granted on the ground that this is a point of law of public importance.

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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