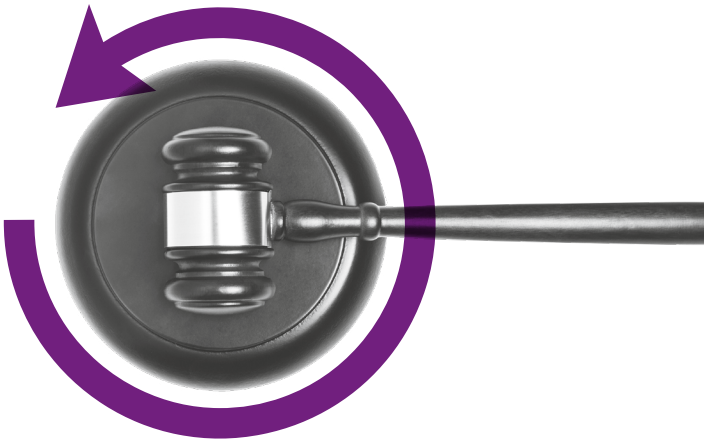
EVERSHEDS SUTHERLAND



Knowledge update
Case law roundup

As 2019 draws to a close, we bring you a roundup in this month's legal brief of some recent decisions which are particularly relevant for the education sector. From applying workplace procedures to preventing and responding to complaints of sexual harassment, these cases have some key takeaways for 2020. Our Education Team has extensive experience in advising on the types of issues presenting in these cases and is always available to discuss any queries or concerns you may have. From all of us here in Eversheds Sutherland, we wish you a Merry Christmas and a Happy New Year.

Case 1

McKelvey -v- Iarnród Éireann (Supreme Court)[1]

The Supreme Court upheld the decision of the Court of Appeal and confirmed that legal representation in workplace disciplinary proceedings will only be required as a matter of fairness in exceptional cases.

Background

Mr McKelvey (the "**Employee**") was the subject of an internal disciplinary investigation by Iarnród Éireann (the "**Employer**"). The Employee obtained an injunction in the High Court restraining the Employer from commencing with the disciplinary hearing unless the Employee's entitlement to legal representation was granted.

On appeal, the Court of Appeal[2] overturned the decision of the High Court and lifted the injunction. The Employee was subsequently granted leave to appeal to the Supreme Court.

Decision of the Supreme Court

In upholding the Court of Appeal decision and refusing to restrain the disciplinary process, the Supreme Court held that the ultimate issue which the Court must address is whether at this stage in the disciplinary process the absence of legal representation would render the process unfair.

In the circumstances, the Court held that while the allegation of theft against the Employee could result in dismissal, there was no evidence to suggest that representation by an experienced trade union official would not be adequate to secure a fair process. In this regard, the Court affirmed the proper approach to the right to legal representation is as set out in *Burns -v- Governor of Castlerea Prison*[3], namely that legal representation will only be required in exceptional cases

Commentary

Whilst the judgment is generally welcomed by employers on the basis that, in the majority of cases, legal representation for employees in internal processes should not be necessary, employers should assess each situation on a case-by-case basis. It is of particular note in this case that the Supreme Court stated that its decision would not necessarily bar the Employee from asserting at a subsequent stage that he was entitled to legal representation because of the way in which the process had evolved. Another key feature of this case is that the Employee had access to an experienced trade union official during the process and the Court was satisfied that this was adequate to meet the needs of a fair process. It is worth bearing in mind that where an employee does not have the benefit of an experienced representative, this should be a consideration in an employer's overall assessment in the context of a request for legal representation.

1 [2019] IESC 79
2 [2018] IECA 346
3 [2009] IESC 33

Case 2

Pierce Dillon -v- Board of Management of Catholic University School[4]

The High Court quashed the decision of the Board of Management of Catholic University School (the "**Respondent**") to issue a teacher, Mr Dillon (the "**Applicant**"), a final written warning but refused to quash the Respondent's finding that the Applicant had engaged in inappropriate behaviour and language.

Background

The Applicant was employed as a teacher in the School. In May 2014, the Applicant was alleged to have engaged in inappropriate behaviour and language in relation to a student. Following an investigation pursuant to the School's Parental Complaints Procedure, the Respondent made a finding of inappropriate behaviour and ultimately issued a final written warning under the Disciplinary Procedure.

The Applicant challenged the Respondent's decisions by way of judicial review proceedings, which were dismissed by the High Court in the first instance. The Applicant successfully appealed to the Court of Appeal, which remitted the matter to the High Court for a fresh determination.

Remittal to the High Court

The Court granted an order quashing the decision of the Respondent to issue a final written warning to the Applicant on the grounds that the process which led to the issuing of the final written warning was deficient, as it failed to meet the standards of an impartial investigation, as required under Circular 60/2009.

However, the Court refused to grant an order quashing the decision of the Respondent that the Applicant engaged in inappropriate behaviour and language in relation to a student, as it held that the Parental Complaints Procedure did not have a public law element capable of being judicially reviewed.

Notwithstanding, the Court held that even were the Complaints Procedure capable of being judicially reviewed, it would have refused to quash the finding of inappropriate behaviour as the Applicant failed to engage with the Parental Complaints Procedure or take appropriate action when the outcome of the Complaints Procedure became known.

The Court's concluding statement is particularly noteworthy, wherein it urges the ASTI and Boards of Management to amend the Parental Complaints Procedure so as to reflect the contents of the disciplinary procedure set out in Circular 60/2009, (since replaced by Circular 49/2018).

Commentary

This case highlights the risk when policies in the workplace are not reviewed and updated to ensure cohesiveness and consistency in their application. Policy reviews should not be considered and carried out in isolation but with regard to the potential impact any amendments can have on other policies/procedures within the organisation/school.

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Case 3

Waterford Institute of Technology -v- Louise Walsh (Labour Court)[5]

The Labour Court found on appeal in favour of a lecturer, Ms Walsh (the "**Appellant**") that her employer, Waterford Institute of Technology (the "**Respondent**") was liable for sexual harassment and harassment suffered by the Appellant on grounds of her gender, contrary to the Employment Equality Acts 1998 to 2015 (the "**Acts**").

The Appellant contended that she was the subject of a number of incidents of sexual harassment and harassment based on her gender perpetrated by students attending her lectures on various dates from October 2014 to March 2015.

The Respondent took a number of steps in response to complaints of harassment raised by the Appellant, including sending a student for disciplinary review, splitting the class and providing the students with Dignity at Work training. As a result of these steps, the Respondent argued that it was entitled to rely on the defence pursuant to Section 14A(2) of the Acts, on the basis that it took such steps as are reasonably practicable to prevent sexual harassment and harassment from occurring, and to prevent a recurrence of harassment.

Labour Court decision

While the Court found that the Respondent took steps in response to the complaints of the Appellant, it held that the Respondent failed to take such steps as were reasonably practicable to prevent sexual harassment and harassment based on gender, as it had failed to effectively communicate its Dignity and Respect Policy to all students and the specific issues were not referred to when the student body was addressed by the Head of Department and Chair of the Student Disciplinary Committee.

Consequently the Court ordered the Respondent to pay the Appellant compensation in the sum of €10,000. In addition, pursuant to Section 82(1)(e) of the Acts, the Court ordered the Respondent to review how its Dignity and Respect policy is communicated to students and the effectiveness of the arrangements in place to respond to complaints made by teaching staff of sexual harassment and harassment based on gender by students.

Commentary

This case demonstrates the standard of proof on employers seeking to avail of the defence set out in Section 14A(2) of the Acts. It is clearly not sufficient for an employer to simply point to its Dignity at Work policy, it needs to be in a position to show in each case that it has effectively communicated this policy to staff/students and that the arrangements in place for addressing complaints, if and when they arise, are effective.

4 [2019] IEHC 6584
5 EDA1931

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