STATES OF JERSEY

DISCIPLINARY AND GRIEVANCE HEARINGS: RIGHT TO A FRIEND

Lodged au Greffe on 7th June 2011
by the Deputy of St. Martin

STATES GREFFE

2011 Price code: B P.112

PROPOSITION

THE STATES are asked to decide whether they are of opinion –

(a) to request the Minister for Social Security to bring forward for approval by the States appropriate amendments to Article 78A of the Employment (Jersey) Law 2003 to provide that, when an employer requires or requests an employee to attend a disciplinary or grievance hearing, and the employee wishes to be represented at the hearing, the employee shall have the right to be represented by any person who the employee wishes and not only by a trade union representative or another employee of the employer as at present;

(b) to request the States Employment Board to amend the terms and conditions relating to the employment of all public employees to provide that in any disciplinary or grievance hearing relating to a public employee's employment, the employee will have the right to be represented at the hearing by any person who the employee wishes to represent them.

DEPUTY OF ST. MARTIN

REPORT

In the wake of an ever-increasing number of States employees being suspended, in early 2009 I carried out research into the reasons for the suspensions and what could be done to improve what appeared to be an outdated and unfair process. It soon became apparent that suspensions were causing undue hardship to those involved and also at great public expense.

As a result of my findings, on 31st March I lodged P.46/2009 which sought States support for a number of proposals to make the suspension process more transparent and fairer to both the employer and employee. Apart from establishing a formal procedure for the actual suspension, there was also a proposal to establish a Panel to sit every month to consider whether the continuation of the suspension was justified. I also proposed that at the actual suspension and when appearing before the Suspension Review Panel, suspended employees could be accompanied by a union representative, workplace colleague or friend.

My reason for including the word "friend" was to ensure that States employees had the right to be assisted by the person of their choice at a time when their livelihood was at stake. This right became apparent following interviews with suspended employees who told me that not all employees were members of trade unions or there were occasions when their work colleagues did not want be seen assisting them in case of repercussions. By having the option of friend, it allowed for a wider choice which could include spouses, partners, States Members or legal advisors to assist if asked.

Just prior to the debate on 30th April 2009, the Chief Minister lodged amendments to my proposition, one of which was to delete the word "friend". The Chief Minister was of the view that including a "friend" presented difficulties.

The Chief Minister claimed that the States Employment Board and trade unions invariably tried to avoid allowing lawyers to participate in in-house employment matters. Their adversarial approach had a tendency to over-complicate matters and to bring criminal law tests to the proceedings which were out of place in the employment context. By using the term "friend" in this respect, the proposition was effectively allowing lawyers to join proceedings.

The Chief Minister also stated that under the Employment (Jersey) Law 2003, employees had a legal right to be represented by workplace colleagues and trade union representatives in grievance issues. The Jersey Advisory and Conciliation Service (JACS) had apparently also confirmed that that it did not support the use of lawyers in in-house grievance and disciplinary matters and that the intention of modern employment practice, as reflected in the current Employment Law, is to encourage settlement of issues in a "non legal" framework whenever possible. Chief Minister claimed that by not allowing a friend would achieve that aim whilst still allowing a broad level of support.

It is quite probable that the Comments were written for the Chief Minister; however, he obviously endorsed them otherwise they would not have been published.

Unfortunately, the Comments showed how the author and the Chief Minister were out of touch with reality and public opinion. They were also oblivious of Human Rights judgements, which I will cover later.

When the Chief Minster's amendment was debated, he soon ran into difficulties from Members who pointed out that it should be the employee's right to choose who to assist them and it was not for Governments to decide for them. The right of choosing a friend did not mean that lawyers would always be assisting, but it would allow for a suspended employee to have the aid of a spouse, partner, friend, or even States Member. It was also acknowledged that even if a suspended employee did have a work colleague or a union representative available, they may not have the knowledge to adequately assist.

Due to lack of support and facing a possible heavy defeat, the Chief Minister successfully sought leave to withdraw his amendment. My Proposition with a minor amendment relating to police officers was adopted by 29 votes to 19, 12 of which were from Ministers and Assistant Ministers.

Two years on, whilst the number of suspensions has dramatically reduced, the denial of the right to have a friend of their choice at Disciplinary Hearings and at Appeals is causing difficulties for some States employees, It is also evident that some terms and conditions permit the right for a friend, but others do not.

There are other anomalies whereby arbitrary restrictions are placed on the role played by the friend. For example, if a States Member accompanies an employee, then the Member can only appear in a private capacity. There are also restrictions placed on legally qualified friends. In the Policy for the Handling of Concerns and Disciplinary Procedures relating to the Conduct and Performance of Doctors and Dentists, the following can be found.

"**Stage 4 (investigation):**

5.2.13 As soon as the decision has been taken to commission an investigation, the Case Manager will inform the practitioner, in writing, of the name of the Case Investigator, and of the specific concerns/allegations that have been raised against them (this information will be as comprehensive as possible, in terms of incidents, dates, persons involved, etc.). The practitioner will also be given the opportunity, as early as is reasonably practicable; to see any correspondence relating to the case, together with a list of the individuals the Case Investigator intends to interview. The practitioner will be able to add to this list if important witnesses are not scheduled to be interviewed.

NB 1: The practitioner will be afforded the opportunity to put their view of events to the Case Investigator and informed of their right, at any stage of this process (or subsequent disciplinary action) to be accompanied in any interview or hearing by a companion. The companion may be another employee of HSS; an official or lay representative of the British Medical Association (BMA), British Dental Association (BDA) or defence organization; or a friend, partner or spouse. The companion may be legally qualified, but they will not be acting in a legal capacity."

I believe that the placing of restrictions on friends is against the spirit of the policies and should be removed. Why should it be necessary to impose restrictions on anyone accompanying a suspended employee?

I have read many States employees' Terms and Conditions of Employment and also the Employment (Jersey) Law 2003; and as mentioned above, there are some policies that allow friends, and some do not. Most notably the Employment Law makes no provision for friends. Also, most worryingly, neither does the Human Resource Policy Manual, which includes the States Whistle-blowing Policy. The inability for a friend to accompany a suspended employee is also absent in the Civil Service and Manual Workers' Terms and Conditions.

I believe that, given that the States approved my proposition for suspended employees to have the right to be accompanied by a friend at the suspension process and before the Suspension Review Board, this right should be extended to all States employees in any disciplinary matter or grievance relating to their employment.

It should be noted that at present in the Terms and Conditions for employees such as lecturers at Highland's College, for teachers employed by Education, Sport and Culture and for doctors and dentists, employees may be accompanied by friends, albeit with restrictions.

Above, I mentioned Human Rights implications, and it is possible that the Employment (Jersey) Law 2003 may no longer be Convention-compliant. This follows recent cases which have held that. As a result of the Governors of X School v G, R (Withdrawal of right to practice), it has now been held that the gravity of the consequences meant that a professional in such circumstances was entitled to legal representation, under the European Convention on Human Rights, Article 6, providing for a fair and public hearing. The gravity of the consequences rather than a distinction between criminal and civil cases was important.

Quite clearly if schoolteachers lose their job it would be unlikely that the Education Authority would employ them again. There has been a similar ruling in connection with a doctor who, if he lost his job, would be unlikely to be employed by the NHS.

Should a doctor or teacher be dismissed in Jersey, it is unlikely that they would be employed by Education, Sport and Culture or by the Health and Social Services Department. Therefore, both Departments could face challenges should they refuse to allow an employee the right of legal assistance.

However, my proposition seeks to clarify and simplify the position whereby States employees have an automatic and unfettered right to be assisted by a person of their choice and at a time when their livelihood is at stake. Getting the process right at the early stage will invariably lead to the most cost-effective outcome in the long run.

The States and the States Employment Board cannot keep their head in the sand. The days of "might being right" should be gone. Recent high-profile disciplinary cases have shown that denial of justice can cause extreme hardship to those at the receiving end and prove very costly for the long-suffering taxpayer.

One way of putting injustice aside is by making grievance and discipline matters more open, transparent and fairer. My proposition aims to achieve that goal.

Financial and manpower implications

I do not believe there will be any financial or manpower implications for the States arising from this proposition.