

# Sanctions in disciplinary procedure could not be increased on appeal

written by BDBF

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# Sanctions in disciplinary procedure could not be increased on appeal

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The Court of Appeal has held that the sanction in a contractual disciplinary procedure could not be increased on appeal from a written warning to a dismissal. It held that interpreting the procedure to allow the employer to do this would be inconsistent with the contract and had the employer wanted this right, it should have been made explicit.

Ms McMillan was an employee at Airedale NHS Foundation Trust. The Trust's disciplinary procedure was incorporated into her employment contract. The contractual documentation made it clear that an employee had one right of appeal against a warning or dismissal and thereafter would have no further rights of appeal.

Ms McMillan was subjected to disciplinary proceedings by the Trust who upheld allegations of misconduct and gave her a final written warning. She appealed against the sanction. The Trust informed her that an internal appeal panel would consider her appeal and could increase or reduce the sanction. The Trust's disciplinary procedure was silent on this. The appeal panel upheld the allegations and the Trust told Ms McMillan that her employment would not be continued. She brought a breach of contract claim arguing that the disciplinary procedure did not allow the appeal panel to increase the sanction.

The Court of Appeal held that there was no contractual power to increase the sanction against Ms McMillan on appeal. The court also noted that the power to increase the penalty would mean Ms McMillan had no right of appeal against the more serious sanction and issued an injunction preventing the Trust from reconsidering it. However, the court said that there was nothing in principle to prevent employers, as a matter of contract law, having a power to increase sanctions on appeal if this were expressly set out in their disciplinary procedures.

In light of this case, employers may be tempted to amend their

disciplinary policies to include an express right for the employer to increase a sanction on appeal. As the court said, in principle, this is fine. However, fundamental principles of unfair dismissal protection mean that in the event of an increased sanction, especially dismissal, a further right of appeal should be offered.

*McMillan v Airedale NHS Foundation Trust [2014] EWCA Civ 1031*

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