

FAIR IS FAIR

In recent days we have seen a welter of publicity surrounding the tragic case of Baby P. He died on 3 August 2007 at the age of 17 months. For many months he had been the subject of a child protection plan devised by Haringey because of the justifiable concerns about neglect and abuse. His mother, her boyfriend and his brother were convicted on 11 November 2008 of causing or allowing Baby P's death.

A public outcry followed these convictions. Media attention focused on Haringey, the very same Borough where Victoria Climbié had been tortured and killed by family a few years earlier. On 12 November 2008 Ed Balls, the then Minister in charge, called for an urgent Ofsted report into what had gone wrong and why. On 30 November Ofsted reported. Individual names were not mentioned but the report was damning of Haringey and many concerns identified.

Press Conference

On 1 December Ofsted senior management met Ed Balls. Later that day Balls appointed a stand-in Director of Children's Services for the Borough for the remainder of that month. On 1 December Balls also held a press conference. In it he said that as Sharon Shoemith (the Director on whose watch Baby P had died) was employed by Haringey, it would be considering the employment relationship "this afternoon and immediately". He made it clear that his view was that she "should not be rewarded with compensation or pay-offs" but that "that's a matter for Haringey".

Following Directions

Taking its cue from Ed Balls, Haringey immediately suspended her on contractual pay. She attended a disciplinary hearing on 8 December. There the decision was taken to dismiss her summarily and without payment in lieu of notice or compensation of any kind. Haringey expressly said in the reasons given for her dismissal that they were

following Ed Balls' directions as Secretary of State coupled with a fundamental breach of trust and confidence. Ms Shoemith pursued an internal appeal and that was dismissed on 12 February 2009.

Fight Back

In the intervening period of nearly 2½ years, Sharon Shoemith has fought for her reputation and for what she regarded as a quest for justice. Being thwarted in the High Court she appealed to the Court of Appeal. She sued Ofsted for failing to allow her to give feedback to their draft report, for failure to comply with the requirements of statute, and for breach of the common law requirement of procedural fairness. The Appeal Court rejected that part of her appeal. It held Ofsted had acted fairly and appropriately in the circumstances. It also held that in its recommendations to Haringey it made no difference to her fate.

Acted Unfairly

She also sued the Secretary of State. In finding in her favour, the three Appeal Judges made some extremely trenchant comments about Ed Balls' handling of her dismissal. He was the one effectively to dismiss her when he convened the press conference, held aloft the Ofsted report, and announced he had invoked special powers available to him in order to remove her. His public comments, designed as they were to create maximum impact, were completely bereft of procedural fairness. He had given her a fait accompli. She was left with nowhere to go, except to the Courts.

Unfairly Dismissed

She also sued her employers, Haringey. The Appeal Judges again found in her favour. They pleaded they were following the Secretary of State's directive, even though that was to be held unlawful. The Court had little sympathy with their argument. The Judges said their decision to sack her in the way they did was unlawful in public law, was contractually unfair, and amounted to unfair dismissal. Haringey breached the rules of natural justice. It had gone about terminating her employment in entirely the wrong way.

Unrepentant

Ed Balls has been quoted as saying that the Judges got it wrong, that he was right, and that if he was confronted by the same set of circumstances today, he would do precisely the same thing. As one editorial commentator pithily puts it: "Ms Shoemith was entitled to be treated in a procedurally proper way. Mr Balls brushed all that side. He was too ready to do the bidding of the media, which wanted Ms Shoemith's head immediately on a platter. He puts his political convenience above his ministerial responsibility. Haringey followed where Mr Balls led. Incredibly, that cavalier approach to law has turned Ms Shoemith into a victim."

Remedy

She will now have a remedies hearing in the Court to determine her level of compensation. She will get that from Haringey, although the Court suggested they should look to the Secretary of State for a suitable voluntary contribution. The press speak of her getting up to £500,000, plus of course her costs. Haringey and the Secretary of State are now mulling over whether to appeal to the Supreme Court.

Open and Shut?

In a 1970 case, *John v Rees*, Mr Justice Megarry said this:-

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalienable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being offered any opportunity to influence the course of events."

I think decision-makers, especially in employment situations, should study these thoughts before making decisions which may well prove to be wrong and unfair if they don't give the other person a fair chance to explain themselves.

Action

No matter what an employee may be thought to have done, they must be given a chance to state their case. An employer may feel they have had every right to dismiss their employee, but they must be seen to have done so in a procedurally fair way. If you need help in employment situations feel free to get in touch with me on **01288 35 9000**.

John Busby

Busbys Solicitors

Bude and Holsworthy