

## Workplace Investigations and Disciplinary Meetings

### Introduction

The rights of employees in workplace investigations have been the subject of intense scrutiny of late, following the decision of the High Court in *Lyons v. Longford and Westmeath Education and Training Board* [2017] IEHC 272 (judgment delivered 5th May 2017), which appeared to broaden the rights of employees in such investigations and the subsequent Court of Appeal decision of *Iarnrod Eireann / Irish Rail -v- McKelvey*, [2018] IECA 346.

The general principles of fair procedures and natural justice are set out in S.I. No. 146/2000 - Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000. These are generally incorporated into company disciplinary policies. Employers are expected to adhere to their policies and the requirements of natural justice in carrying out workplace investigations.

### Q. What are Fair Procedures in the Employment context?

In *Re Haughey [1971] I.R. 217*, the Supreme Court considered Article 40.3 of the Constitution and determined that in any proceedings during which a person's conduct is called into question, that person must be afforded a reasonable means of defending himself or herself. These are collectively known as "*In Re Haughey Rights*".

The person who is the subject of an allegation should be afforded, at a minimum, the opportunity to be:-

- a. furnished with a copy of the evidence against that person;
- b. allowed to cross-examine the accuser or accusers;
- c. allowed to give rebutting evidence; and
- d. permitted to address the body concerned in that person's own defence.

In addition to the rights above, an employee should also be offered the opportunity to be accompanied to investigation and disciplinary meetings. The question of whether legal representation should be permitted is addressed below.

### Q. When do Fair Procedures Apply?

Workplace investigations generally do not attract the full range of fair procedures that employees are entitled to at the disciplinary stage. This is because these rights are engaged at the stage when the findings can be made in respect of whether the employee is "guilty" or "innocent" of the allegations made against them.

However, the case of *Lyons*, mentioned above, created uncertainty as to employee's entitlement to fair procedures at the investigation stage. In *Lyons*, the investigation report upheld certain allegations of bullying made against the accused employee. Accordingly, binding findings of fact were made that could not then be overturned at the disciplinary stage. The disciplinary stage concerned the imposition of sanction only and did not reconsider the findings made at the investigative stage.

The High Court's decision in this case suggested that an accused employee undergoing a workplace investigation has the right to legal representation in investigation meetings. The Court also stated that such an employee would have the right to cross-examine their accuser and any relevant witnesses at the investigation stage, where the matter is sufficiently serious that it may result in their dismissal.

The Unfair Dismissals Acts 1977 to 2015 established procedural fairness in the employment context. The reasonableness of the employer's conduct and adherence to accepted or contractual procedures is essential to fairness. The burden rests on the employer to act reasonably and comply with fair procedures, whether in relation to a termination or other disciplinary matter. Procedures should be set down in writing and provided to employees. Once proper procedures are in place, employers are expected to follow them.

#### **Q. Can an employee be suspended pending the outcome of an investigation?**

Depending on the seriousness of the issue, an employee may be suspended with pay, pending the outcome of the investigation, provided the employer has reserved the right to do so in their policies. Suspension of employees should be handled carefully as this may have reputational consequences for an employee. If suspension is required, it must be emphasised that this is not indicative of any guilt on the part of the employee.

#### **Q. Do fair procedures include the right of an employee to be legally represented during an internal process?**

Confusion arose after *Lyons* as the Court held that an employee is entitled to be legally represented at the investigation stage if the investigation will result in binding findings against the accused employee.

However, this decision has now been overturned by the Court of Appeal in *McKelvey v. Iarnród Éireann* [judgment delivered on 31 October 2018], where the Court found that no entitlement to legal representation arose during a disciplinary process in that case, even where the allegations were of a serious nature.

Irvine J. (giving judgment for the court) stated:

*“Whilst an employee facing a disciplinary inquiry in respect of alleged misconduct may be at risk of inter alia dismissal from their employment and significant damage to their good name, it should nonetheless generally be possible, save in exceptional circumstances, for such an employee to obtain a fair hearing in accordance with the principles of natural justice without the need for legal representation.”*

The Court of Appeal has clarified that employees are not entitled to be legally represented in internal processes unless exceptional circumstances exist. The leading authority in this area is the decision of the Supreme Court in *Burns v. The Governor of Castlereagh Prison* [2009] 3 IR 682.

In this case, Geoghegan J. approved a list of criteria to be considered in deciding whether to allow legal representation during an internal process. These criteria are as follows:-

- (i) The seriousness of the charge and of the potential penalty;
- (ii) Whether any points of law are likely to arise;
- (iii) The capacity of a particular prisoner to present his own case;
- (iv) Procedural difficulty;
- (v) The need for reasonable speed in making the adjudication, that being an important consideration;
- (vi) The need for fairness as between prisoners and prison officers.

Geoghegan J. also noted that legal representation should be the exception rather than the rule.

Normally, disciplinary policies do not provide for legal representation. In accordance with the Code of Practice mentioned earlier in this article, employees must be given the opportunity to avail of the right to be represented during a disciplinary process. The Code sets out that this representative "*includes a colleague of the employee's choice and a registered trade union but not any other person or body unconnected with the enterprise.*"

However, where the allegations are serious and may have reputational consequences for an employee, an employer may consider facilitating a request by an employee to have their solicitor present during a disciplinary procedure. However, the decision in *McKelvey* has clarified that requests from employees for legal representation should only be permitted in "*exceptional circumstances*".

Where an employee declines any representation, they should be reminded of this right, and the meeting, if necessary, adjourned to allow him or her to procure a representative.

### **Q. Are employees entitled to cross-examine accusers in all internal workplace investigations?**

In general, employees are entitled to cross-examine accusers at some stage in the process before findings are made against them. This depends on the scope of the investigation and the seriousness of the allegations.

Where an investigation goes beyond evidence-gathering and makes findings of fact, the employee will be entitled to cross-examine at the investigation stage

If an investigation involves merely evidence gathering and no findings will be made as a result of the investigative process, the employee under investigation will generally not be entitled to cross-examine accusers at the investigation stage. Once the investigation progresses to a disciplinary hearing, an employee should be permitted to cross examine accusers as adverse consequences towards the employee may arise out of the disciplinary hearing.

An accused employee should always be given the opportunity to challenge the evidence against him or her. However, the manner in which this may be carried out remains unclear.

**Q. What if an employee refuses to attend a meeting?**

Where an employee refuses to attend a meeting, this may be for various reasons, including illness or some other genuine reason. Employers should consider carefully how they should proceed in these situations. They should consider the following:

- Refer to the company policies and check if they provide for this situation;
- The seriousness of the issue under investigation;
- The employee's current disciplinary record;
- Any medical evidence available to the employer.

Ultimately, they should act reasonably and act on the best available evidence as to why the employee cannot attend a meeting.

A meeting may only proceed in the employee's absence where an employee is continually unavailable to attend a meeting without good cause.

**Q. Can the same person conduct the initial investigation and the disciplinary process?**

Generally, fair procedures dictate that the decision maker should have no prior involvement in the matter to eliminate any perceived or actual bias. This is because the employee is entitled to a fair and impartial determination of the issues.

In smaller organisations, this is not always possible. However, if there is a clear overlap between the decision maker and the investigator, then the employee may challenge the process as being in breach of their right to fair procedures.

In minor disciplinary matters, the investigation and disciplinary may be combined. This only arise where the full raft of fair procedures may not be necessary or appropriate to the situation. However, in most matters, there should be a separate investigator and a separate person chairing the disciplinary meeting. Neither should have any prior involvement in respect of the complaint under consideration.

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