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## Disciplinary Investigations – Right to Legal Representation

### Right of Representation

A long-standing aspect of fair and natural justice in relation to workplace investigations is the right for an employee to be represented by either a work colleague or a trade union representative. This is provided for in the Workplace Relations Commission's Code of Practice on Grievance and Disciplinary Procedures. Within the Code it states:

*"For the purposes of this Code of Practice, "employee 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."*

### Lyons Case

However, a landmark ruling in 2017, in the case of Lyons V Longford-Westmeath Education & Training Board, confirmed the right of an employee to legal representation when facing possible dismissal or an adverse impact on his/ her reputation.

In this particular case the complainant, Mr. Lyons, a teacher with the Longford-Westmeath Education & Training Board had been accused of bullying by a work colleague. In accordance with their procedures (i.e. Bullying Prevention Policy) the school appointed an external investigator to review the matter. Having taken statements and compiled a report, the external investigator concluded that Mr. Lyons had carried out the bullying behaviour. His employer indicated that they intended to adopt the findings of the external investigators' report into the allegations of bullying which had been made against him and he was subsequently summoned to a Stage 4 disciplinary hearing, the outcome of which (per the Company's Disciplinary Procedure) could have resulted in his dismissal. He lodged a procedural appeal with the Workplace Relations Commission, which was rejected, however he subsequently appealed (the procedural issued) to the High Court.

While the presiding judge, Edgar J., noted that both the organisations' own policies and those of most public and private sector organisations do not allow for legal representation at such meetings/ hearings a deciding factor for him was that, where investigative processes can lead to dismissal, cross-examination is vital to uphold and ensure fair procedures take place and are followed.

Accordingly, he concluded that the procedures adopted by the external investigator were in breach of Article 40.3.1 and 2 of the Constitution and that they:

*"failed to vindicate the good name of the applicant, in their refusal to hold an appropriate hearing, whereby the applicant through solicitor or counsel may have cross-examined the complainant. Equally, the complainant ought to be entitled to then cross-examine the applicant (Mr Lyons)" and reiterates that "it is clear that as a matter of law and as a matter of fair procedures an individual whose job is at stake and against whom allegations are made would be entitled to challenge and cross-examine evidence"*

Whilst Edgar J. noted that, upon receipt of a report finding that bullying has taken place, it is reasonable for an employer to consider a very serious sanction such as dismissal, however the procedures leading to the report in the first instance need to be carried out in a fair manner and in this case, in his view, fair procedures had not been followed and therefore LWETB could not fairly summon Mr. Lyons to a Stage 4 disciplinary hearing.

The Lyons case therefore appeared to imply a requirement and onus on employers to consider permitting legal representation in certain workplace investigations, i.e. those whereby the employee might be facing possible dismissal and an adverse impact on his/ her name/ reputation.

## McKelvey Case

However, in a further development in this area in 2018, specifically in the case of Irish Rail V Barry McKelvey, the Court of appeal found that **an entitlement to legal representation exists only in exceptional circumstances**.

In this case, Mr. McKelvey had been accused of gross misconduct by way of theft of fuel arising from Company issued fuelcards. As in the Lyons case, Irish Rail's internal company procedures did not allow for legal representation in relation to the investigation of such matters.

Based on the earlier judgement in Lyons (2017), the High Court found that it would be contrary to the principles of natural justice and fair procedures to require Mr McKelvey to engage with the proposed disciplinary hearing without the benefit of legal representation. However, the Court of Appeal took a different view in this case.

The presiding judge, Irvine J., commented as follows:

*“While it is true to say that Mr McKelvey faces a disciplinary inquiry which could lead to his dismissal and which has the further potential to impact on his future employment prospects and his reputation, in this regard he is no different to a very substantial percentage of employees facing allegations of misconduct in the workplace. In my view, the allegation of misconduct made against Mr McKelvey is a straightforward one and I am not satisfied that he has identified any factual or legal complexities that may arise that he should not be in position to deal with adequately with the assistance of [his trade union representative].”*

In rejecting the appeal and delivering his judgment, Irvine J., referenced a leading case on disciplinary investigations, *Burns and Hartigan v Governor of Castlereagh Prison of 2009* and the tests within this case as to circumstances surrounding which legal representation might be considered/ permitted, i.e.:

- the seriousness of the charge and the proposed penalty;
- whether any points of law are likely to arise;
- the capacity of the particular person to present his or her own case;
- procedural difficulty;
- the need for reasonable speed in making the adjudication, that being an important consideration; and
- the need for fairness between the different categories of people involved in the process

It was found that, taking all of the above into consideration, the circumstances did not exist so as to allow Mr. McKelvey a legal representative during the operation and application of the company's internal procedures.

Therefore, the more recent McKelvey case provides a precedent for the position that there is **no routine right** to legal representation in workplace investigations and that a number of factors should be taken into account.

## What to Consider

The nature of allegations against an employee, any potential adverse impact on his/ her reputation, the potential for an employee to lose his/ her job and an overriding commitment to adhering to fair procedures are a number of factors to consider when deciding on whether or not to permit an employee to bring a legal representative to a formal workplace investigation.

The issue of cross examination should be adhered to regardless of legal representation in order to ensure fair procedures. Whilst courtroom type cross-examinations are not anticipated, an accused employee should always have the right to challenge and respond to allegations being made against him/ her and evidence presented to them which could have an adverse impact on their job and reputation.

## **Going Forward**

It is worth noting that the Code of Practice on Grievance and Disciplinary Procedures remains unchanged at present although a review of those procedures has been initiated. However, an interesting comment to note from Irvine J. in the McKelvey case is as follows:

*“the fact that the code is silent on legal representation is perhaps indicative of the view that it should be possible for organisations to carry out inquiries into alleged misconduct on the part of employees on an “in house” basis without the need to involve lawyers.”*

## **Need Assistance or Further Information?**

Do you need to find out more about this issue and what it means for your business?

Do you have a workplace issue requiring the appointment of an independent/ external investigator?

Are you dealing with a workplace investigation and are you unsure whether or not to permit the employee to bring legal representation?

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