



## Legal representation during disciplinary hearings – the exception rather than the rule?

### An Important Court of Appeal decision

#### Speedread

A topic of debate for some time relates to what extent employees are entitled to be accompanied by a lawyer during internal disciplinary hearings. While the Code of Practice on Grievance and Disciplinary Procedures (the **Code**) provides that employees can be accompanied by a colleague or trade union official, last year's High Court decision in *Lyons v Longford Westmeath ETB* appeared to permit lawyers into workplace investigations and hearings as part of the employee's right to fair procedures.

Last month the Court of Appeal brought some much needed clarity to this topic in its decision in *Irish Rail v McKelvey*. Significantly, it unequivocally endorsed the original Supreme Court position in *Burns and Hartigan v Castlereagh Prison*, which found that legal representation need only be permitted in "exceptional circumstances".

#### What happened in Irish Rail v McKelvey

Mr McKelvey, an Inspector with Irish Rail, was suspended on pay to facilitate an investigation into allegations of "theft of fuel through the misuse of a company fuel card". On being notified that Irish Rail was commencing a formal disciplinary inquiry into the matter, Mr McKelvey asked to be represented by a solicitor and counsel at the disciplinary hearing. When this request was refused by Irish Rail, Mr McKelvey sought injunctive relief from the High Court to halt the disciplinary process on the basis that he was not being afforded fair process.

#### What did the High Court decide?

The High Court agreed with Mr McKelvey and granted the order restraining Irish Rail from proceeding with the disciplinary process without letting Mr McKelvey be accompanied by his lawyer. In particular, the Court was guided by six factors (the **Six Factors**), identified in *Burns* as the "starting point", when reaching this decision:

- (i) The seriousness of the charge and the proposed penalty;
- (ii) Whether any points of law were likely to arise during the disciplinary hearing;
- (iii) The capacity of Mr McKelvey to present his own case;
- (iv) Procedural difficulty;
- (v) The need for reasonable speed in making the adjudication; and
- (vi) The need for fairness between the different categories of people involved in the process.

The High Court concluded that the charges involved were serious and could not only lead to Mr McKelvey's dismissal, but could adversely affect his employment prospects and potentially significantly impact his reputation. The Court formed the view that multiple points of law were likely to arise during the disciplinary process and, given what the Court regarded to be a "complex" case, it would be "ridiculous" to consider that Mr McKelvey could

"navigate" the disciplinary process "unaided". The Court was satisfied that Mr McKelvey "should be entitled to retain lawyers should he desire to do so".

Irish Rail appealed to the Court of Appeal.

### **What did the Court of Appeal decide?**

Significantly, while the Court of Appeal agreed that the Six Factors should be considered in determining whether Mr McKelvey had the right to be accompanied by his lawyer, the Court disagreed with the High Court's conclusions in respect of the Six Factors.

In particular, the Court found that the High Court had "ascribed undue weight" to the "seriousness" of the charge on the basis that it might result in criminal prosecution at a later date. Taking the opposite approach, the Court of Appeal was of the view that there was "nothing particularly unusual or exceptional about an inquiry into an incident of theft in the workplace" and, in fact, the charge was "relatively straightforward".

In addition, the Court of Appeal commented that "the sanction of dismissal is hardly an exceptional or unusual feature of disciplinary hearings in the workplace". On this basis, the simple fact that Mr McKelvey may or may not face dismissal following the disciplinary hearing was not, in the Court's view, sufficient to elevate the situation to one of "exceptional circumstances" justifying the attendance of a lawyer during the hearing. Similarly, the Court was not persuaded that the potential for "adverse consequences" for Mr McKelvey's future employment prospects or good name justified his demand for legal representation.

### **What about the Lyons decision?**

The Court briefly referred to last year's decision in *Lyons*, in which the High Court held that where an investigative process can lead to dismissal or adversely impact the employee's reputation, a refusal to allow the employee to be accompanied by a legal representative was in breach of the employee's constitutional rights.

However, the Court of Appeal observed that the *Lyons* decision "departs to a significant extent from the jurisprudence of *Burns*"; in which the Supreme Court stated: "it is wholly undesirable to involve a legal representative unless in all the circumstances it would be required by the principles of constitutional justice".

The Court of Appeal stepped back from situations identified in cases like *Lyons* - where the outcome of the hearing may i) result in dismissal, ii) adversely impact the individual's future employment prospects; or iii) negatively impact their reputation. The Court concluded that such outcomes were not "unusual" and were "disconnected" from the key issue – whether or not the employee can be assured of a fair hearing without legal representation at the disciplinary hearing.

The Court concluded that lawyers at disciplinary hearings "should be the exception rather than the rule". The fact that Mr McKelvey had the right to be accompanied by an experienced trade union official also influenced the Court's conclusions in this regard.

### **What about the Code?**

The Code identifies key features of a robust disciplinary process for employers in Ireland. It expressly provides for a right of an employee to be represented by a fellow colleague or a registered trade union representative, but not any other person or body. In line with this wording, the traditional approach for employers in Ireland (pre-*Lyons*) had been to (almost always) refuse an employee's request to involve their lawyer during an internal workplace process.

Helpfully, the Court of Appeal has now endorsed this approach, noting that "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".

### **What does this mean in practice?**

It is clear from the Court of Appeal's detailed judgment that an employee who wishes to be legally represented in a disciplinary process has a very high bar to clear. It is no longer sufficient for the employee to advance good reasons as to why they should be legally represented; they must now be able to point to "*exceptional*" circumstances justifying their need to be represented.

Given the potential impact of involving lawyers at an early stage in an internal HR process, ranging from i) delaying the process, ii) increasing the cost, iii) escalating litigation, and iv) fracturing relationships between employer and employee, this decision is a welcome development.

While this decision undoubtedly bolsters the position of employers who do not wish to permit their employees to be legally represented, employers still need to tread carefully when dealing with such requests from employees. While the rule of thumb – allowing lawyers only in "*exceptional circumstances*" - has helpfully been confirmed, the key point going forward will be stress-testing the specific facts of each case. This is necessary to ascertain whether they may ultimately justify an exception to that rule and considering whether the alternative representation options (e.g. a colleague or trade union official) are appropriate in the circumstances.

For more information in relation to this topic, please contact [Ailbhe Dennehy](#), Senior Associate, or any member of the [A&L Goodbody Employment Team](#).