



Legal representation in internal disciplinary processes

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The recent Court of Appeal judgment in [Iarnrod Eireann / Irish Rail v. McKelvey](#) [2018] IECA 346 (“*McKelvey*”) deals with question of the right of employees to have external representation in internal disciplinary procedures. For previous commentary on this issue click [here](#).

Disciplinary procedures must be fair

Disciplinary procedures must be fair and so must comply with the rules of natural justice. An employee is entitled to know exactly what allegation he has to defend and what process will be followed in the course of the proceedings. The employee should know the nature of the sanction which may potentially be imposed on him and he must have the right to be heard and to make representations on his own behalf as well as to call his own witnesses and cross-examine witnesses called against him. Typically, procedures permit employees to be “accompanied by” a fellow employee of their choice or possibly by a trade union representative. Issues may arise if a policy permits the employee to be “represented by” such a person. There can be issues as to whether the fellow employee or union representative is merely there as a witness to the process or whether they may actively participate. The seriousness of these issues can occasionally increase dramatically where an employee is facing an allegation of very serious misconduct or dishonesty such that their job is in jeopardy and their reputation may be on the line. Often in

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these cases the employee will seek to be legally represented. It is the case that the employer could, at its discretion, accede to a request for legal representation. The real issue arises where a request is made and is declined by the employer. Generally and for obvious reasons, employers will not want to escalate matters by allowing lawyers into the internal process on the basis that if there is to be an appeal to an external forum such as the Workplace Relations Commission or a court then that may be the appropriate time for legal representation.

Background to *McKelvey*

Briefly, Mr. McKelvey stood accused of theft through misusing Irish Rail's fuel card system and faced disciplinary action up to and including dismissal. Due to the serious nature of the allegation he sought to be legally represented at the disciplinary hearing but Irish Rail refused on the grounds that the policy entitled him to be represented by trade union official. Mr. McKelvey went to the High Court which, applying principles laid down in the Supreme Court decision in [Burns v. Governor of Castlereagh Prison](#) [2009] IESC 33, ("the *Burns* Principles") found in his favour on the basis of the seriousness and complexity of the allegations and the potential damage to his future job prospects. Irish Rail appealed that decision to the Court of Appeal.

As is to be expected in these situations, Counsel on behalf of Irish Rail made a series of submissions to the Court and counsel for Mr. McKelvey, made a series of submissions to the completely opposite effect. The one thing that they did agree on was the principles which were to be applied – the principles set out in *Burns* above. They differed as to whether the High Court had applied them correctly to the particular circumstances of the case. Irish Rail argued that Mr. McKelvey would be represented by an experienced trade union official, that the process to be followed would be in accordance with the accepted Code of Practice and that legal representation in internal disciplinary processes should only be required in exceptional circumstances. Counsel submitted that although the alleged wrong-doing was very serious, this was not an exceptional situation. Unsurprisingly, counsel for Mr. McKelvey essentially submitted that the High Court had applied the appropriate principles correctly and that the decision was correct.

The *Burns* Principles

The Court of Appeal considered the principles laid down in the Supreme Court decision in [Burns v. Governor of Castlereagh Prison](#) [2009] IESC 33. In that case, the Supreme Court had approved of a series of factors to be considered which had been identified by the English High Court but in doing so the Supreme Court had indicated these were "starting off points", which underlines the importance of taking all of the circumstances of each individual case on its own merits. Noting that legal representation should be the exception, the non-exhaustive list of factors essentially require consideration of: the seriousness of the charge and of the potential sanction; any points of law; the capacity of the employee to present their own case, procedural difficulties, the need for reasonable

speed in making a decision and the need for fairness. The potential for reputational or career damage were not exceptional factors.

Decision in *McKelvey*

The Court of Appeal decided that the High Court had been wrong to require Irish Rail to allow Mr. McKelvey to have legal representation because, bearing in mind the desirability of excluding lawyers from internal procedures, there were no special or exceptional circumstances justifying it. While the allegation against Mr. McKelvey was serious, and could even potentially involve criminal charges, undue weight had been given to this factor. The Court held that there is nothing particularly unusual about an employer investigating an allegation of theft and anything that happened in the workplace process would not be admissible if there were subsequent criminal charges. Equally, the Court considered that there was nothing particularly unusual about a possible sanction of dismissal. The allegations, while serious, were straightforward and Mr. McKelvey would have the assistance of an experienced trade union official. The Court remarked that there remained a possibility, if matters actually arose in the disciplinary process which Mr. McKelvey or his representative considered they were not equipped to deal with, they could raise the need for legal representation at that stage. The Court also took into account that if the decision of the disciplinary process was adverse to Mr. McKelvey he had the right to a full appeal and a possibility of legal representation at that appeal remained open if the complexity of the case justified it.

Conclusion

If a request is made for legal representation which is not provided for in the employer's procedures, the employer should not simply refuse the request out of hand. The employer should make an assessment of the particular circumstances before deciding how to exercise its discretion. The right to legal representation at a preliminary investigation stage, where no sanction can be imposed, is less likely (although possible) to be justified than in the course of a formal disciplinary process where there may be a serious sanction. The net question in a given situation is whether the employee would get a fair hearing in the absence of legal representation. An employer should consider the *Burns* Principles described above before coming to a decision. An employer should remain willing to reconsider a decision to refuse legal representation if the circumstances change and a further request is made. The right to legal representation is the exception rather than the rule.

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