



Legal Representation in Internal Employment Procedures

June 2017

The recent High Court judgment in [*Michael Lyons v Longford Westmeath Education and Training Board*](#)¹ (“Lyons”) deals with the vexed question of the right of employees to have external representation in internal grievance or disciplinary procedures.

Fair Procedure

As a general rule, it is accepted that the requirement to follow fair procedures does not necessarily require that employees be entitled to be legally represented in the course of internal procedures. It is also generally accepted that where there is an initial investigation which is designed merely to try to establish whether there is an issue which warrants further investigation to establish the facts, then external representation is not required.

However, while this case dealt with a situation in which there was a statutory disciplinary scheme in place, *Lyons* is the most recent authority in a line of cases for the proposition that where the potential consequences for an employee are sufficiently serious, such as damage to reputation or loss of their job, then the employee is entitled, by virtue of the Constitution, to the benefit of the rules of natural justice which include the right to legal representation and the right to cross-examine witnesses. This right is described by Eagar J. as “a vital safeguard to ensure fair procedure”.

¹ (Unreported, High Court, Eagar J., 5 May 2017) [2017] IEHC 272

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Issues

Mr. Lyons was the subject of a complaint of bullying by a work colleague, which comprised a number of allegations, some dating back several years before the complaint was made. The employer retained an outside company to conduct an investigation into the complaint and that company did not give Mr. Lyons an opportunity to cross-examine the colleague who had made the complaint. Mr. Lyons was ultimately informed that the bullying complaint had been upheld and that his employer would therefore be implementing its disciplinary procedure. Mr. Lyons applied to the High Court for an injunction restraining his employer from continuing with the disciplinary process on the essential basis that the finding of facts had been based on a fundamentally flawed process which denied him his constitutional right to fair procedures.

Decision

In the High Court, the employer's Counsel argued that Mr. Lyons had never requested a right to cross-examine witnesses and therefore that right had not been denied. He also argued that Mr Lyons had not identified any factual evidence with which he disagreed.

Eagar J. considered the line of High and Supreme Court authorities opened to him and concluded that the investigation was in breach of Mr. Lyons' constitutional rights as it had failed to allow him legal representation and the opportunity, through solicitor or counsel, to cross-examine the complainant. This meant he had not been afforded the opportunity to vindicate his good name. Eagar J. held that fair procedures "*manifestly indicate*" a right to confront and cross-examine an accuser. He also observed that the complainant would equally have the opportunity to cross-examine the employee.

Conclusion

Regardless of the express provisions of the employer's disciplinary procedures, which may confine the employee's right to merely being accompanied by a work colleague, the rules of natural justice will require that the employee should know exactly what accusation he faces and who has made it. The employee should be given a proper opportunity to prepare and present his defence, including challenging witnesses, and to make any submissions which he wishes to make. The process must be free from any potential bias and care should be exercised as to who conducts any investigation or makes any decision at any stage in the process.

Comment

Employers should exercise great caution in conducting disciplinary procedures where the allegations involve serious potential reputational damage to the employee and / or where the potential sanction includes dismissal.

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