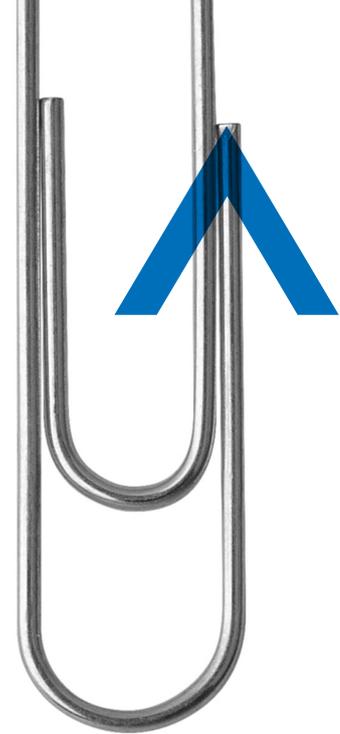


## Possible 'U' turn

A retreat in the requirement for fair procedures in disciplinary procedures?



The High Court recently handed down two significant decisions, *NM -v- Limerick and Clare Education and Training Board* and *EG -v- The Society of Actuaries in Ireland*, relating to fair procedures in workplace investigations. These cases suggest a potential retreat from the earlier decision in *Lyons -v- Longford Westmeath Education and Training Board* where it was held that the exclusion of legal representatives and the refusal to provide the opportunity for cross-examination at the preliminary investigative stage is in violation of the constitutional guarantee of fair procedures. However, it is important to note that *Lyons* was not discussed in either case.

### **NM -v- Limerick and Clare Education and Training Board**

In *NM*, the applicant, a secondary school principal, was placed on administrative leave with pay by the Chief Executive of Limerick and Clare Education and Training Board pending the outcome of the investigation into two separate complaints of gross misconduct made against him. The applicant brought Judicial Review proceedings where he claimed that the investigative process breached fair procedures.

The High Court refused to grant the reliefs sought, holding that the investigative process carried out by the respondent was in compliance with Circular 59/2009. In relation to fair procedures, the Court noted that "the full panoply of natural justice rights" does not necessarily apply to every phase of an investigative process. The Court stated that a court

must consider the decision made in a particular case "on its own terms and in the context of the overall decision-making process" and "if there are successive steps to be taken in the course of that process, these must be considered not only separately but as a whole". In this regard, the High Court drew an important distinction between the standard of fair procedures applicable to investigations which are "information gathering" processes and the standard applicable to later stages of the disciplinary process where final or binding findings of fact are made. At these later stages, the employee is entitled to make his case in full, challenge evidence and has the right to cross examine any persons making allegations against him or whose testimony he seeks to challenge. However, this was not required at the investigatory stage of the process.

## EG -v- The Society of Actuaries in Ireland

The approach taken in NM is also reflected in another recent High Court decision EG -v- The Society of Actuaries in Ireland. This case involved an investigation into an allegation of professional misconduct, where a prima facie finding of misconduct was found by an investigating committee appointed by the respondent.

In this case, the High Court again held that the full extent of fair procedures rights do not apply at the investigative stage and that "an appropriate standard of fair procedures must be applied at all stages of a tiered process". It was noted that there may be situations where "a stronger degree of procedural protection may be required having regard to the decision to be taken at the investigative stage or its potential consequences". The High Court again underlined the distinction between the standard of fair procedures applicable to an investigation "which is in essence 'information gathering'" to ascertain whether a prima facie case exists, stating that the "full panoply of rights" including the right to cross-examination, is not required at this stage, in contrast to the later stages of the disciplinary process.

### Comment

NM and EG offer some clarity with regard to the rights individuals are entitled to in workplace investigations following the decision in Lyons, particularly through the statement made in both cases that the "full panoply" of natural justice rights, including the right to cross-examination, are not guaranteed at the preliminary stages of the disciplinary process where no binding findings of fact are made. However, it is important to note that the High Court stated that an individual is entitled to these rights at the later stages of the disciplinary process.

The more recent cases indicate a more workable approach for employers. They suggest that at the preliminary investigative stage at least, the full range of fair procedures rights and the right to legal representation and cross examination in particular, might not need to be provided and thus the Lyons decision may be confined to its own facts.

## For further information, please contact:



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