

Lyon(s) King – no more

The right to legal representation in disciplinary inquiries



November 2018

The recent Court of Appeal decision of *Iarnród Éireann/Irish Rail v Barry McKelvey*¹ has provided much needed clarification for education bodies on the right of employees to be legally represented in formal disciplinary inquiries.

The law regarding legal representation in disciplinary procedures was relatively clear. The Code of Practice on Grievance and Disciplinary Procedures² (the “Code”) provides that an employee has the right to be represented during the disciplinary process by a colleague or trade union representative but not any other person or body unconnected to the enterprise. Furthermore, the Supreme Court decision of *Burns and Hartigan v Governor of Castlerea Prison*³ provided that an employee could be entitled to legal representation in disciplinary proceedings but only in certain “exceptional” circumstances. In determining whether exceptional circumstances existed, the Court held that the employer may have regard to:

- The seriousness of the charge and the potential 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 people involved in the process.

Lyons decision

The position was thrown into a state of flux after the decision in *Lyons v Longford Westmeath ETB*⁴. In stark contrast to the *Burns* decision, the Court held that a failure to allow an employee legal representation in a disciplinary procedure conducted under Circular 71/2014 was in breach of an employee’s right to fair procedures.

The Lyons decision created uncertainty as

education bodies were unsure which line of authority to follow when conducting their disciplinary processes. The position remained unclear until the McKelvey decision.

The facts

Mr McKelvey (the “Employee”) was employed by Iarnród Éireann. As part of his responsibilities, the Employee was provided with fuel cards to facilitate the re-fuelling of company vehicles and machinery. In 2016, Iarnród Éireann became concerned about the significant level of purchases made with the Employee’s fuel cards. After conducting a preliminary investigation, Iarnród Éireann informed the Employee that he would be subject to a disciplinary investigation into allegations of theft of fuel through the misuse of company fuel cards.

When Iarnród Éireann invited the Employee to attend a disciplinary hearing, the Employee sought to have a solicitor and barrister present with him. Iarnród Éireann denied his request and informed him that he had the right to be represented by a colleague or a registered trade union in line with Iarnród Éireann’s policies and procedures. Iarnród Éireann also informed the Employee that while he was entitled to cross examine the evidence against him, there was no provision in the process which would allow him to be represented by a solicitor or barrister. The Employee initiated High Court proceedings against Iarnród Éireann as a result.

1. [2018] IECA 346.
2. SI 146/2000.
3. [2009] IESC 33.
4. [2017] IEHC 272.

The High Court decision

The High Court held that the disciplinary hearing proposed would not be fair as the Employee was being denied his constitutional right to fair procedures and natural justice. Accordingly, the High Court made an order restraining Iarnród Éireann from conducting the disciplinary hearing unless it agreed to allow the Employee legal representation at the hearing.

The Court of Appeal decision

Iarnród Éireann appealed the decision of the High Court to the Court of Appeal, which took a different view. The Court of Appeal considered the substantial issue to be addressed by it was whether, on the facts of the case, the Employee could not have a fair hearing in the course of the formal disciplinary inquiry absent legal representation by a solicitor and a barrister. The Court found that the High Court misapplied the factors set out in the Burns decision and concluded that, despite the seriousness of the allegations, there were no factual or legal complexities that the Employee would not be able to deal with adequately with the assistance of his trade union representative. It also considered relevant the fact that the Employee had the right to a full appeal from any findings made against him in the course of the disciplinary inquiry.

Cross examination

The Lyons decision held that an accused whose job is at stake is entitled to challenge and cross examine evidence. This issue was not addressed in the McKelvey case as Iarnród Éireann made it clear that the Employee was entitled to cross examination at all times. However, the Court did state that workplace disciplinary processes should not ape the type of hearings similar to civil or criminal court hearings. It is important to note that Lyons envisaged cross examination by Counsel, however, McKelvey has now outlined that Counsel will generally not be available to employees.

Takeaways

The McKelvey decision makes it clear that the Burns decision is the leading authority on the law relating to legal representation in work place disciplinary inquiries. This should provide education bodies with a degree of comfort in that the Burns decision acknowledges that the right to legal representation in workplace inquiries should be the exception rather than the norm. It will of course be necessary to consult your institution's own procedures to see what is provided regarding representation.

In the primary and post-primary sectors, Circulars 48/2018, 49/2018 and 50/2018 provide that teachers and principals have the right to be represented at disciplinary inquiries "**normally** by a work colleague or trade union representative". Previously Circulars 60/2009 and 71/2014 excluded legal representation. These revised Circulars appear to make provision for the Lyons decision. The McKelvey decision confirms that only in exceptional circumstances will the principles of natural and constitutional justice require legal representation in a workplace disciplinary inquiry. It is also clear from the decision that employees must show that exceptional circumstances exist so as to afford them the right to legal representation at workplace inquiries.

We have extensive experience advising education bodies on disciplinary investigations/hearings and the correct process to be followed so as to ensure compliance with fair procedures and natural justice.

Contacts

For more information, please contact:



Margaret Gorman

Partner & Head of Education

+353 1 6644 325

margaretgorman@eversheds-sutherland.ie



Kara Turner

Consultant, Education

+353 1 6644 222

karaturner@eversheds-sutherland.ie



Bernard Martin

Associate, Education

+353 1 6644 234

bernardmartin@eversheds-sutherland.ie

Disclaimer

The information is for guidance purposes only and should not be regarded as a substitute for taking legal advice.

Data protection and privacy statement

Your information will be held by Eversheds Sutherland. For details on how we use your personal information, please see our Data Protection and Privacy Policy.

[eversheds-sutherland.ie](https://www.eversheds-sutherland.ie)

© Eversheds Sutherland 2018. All rights reserved.

EVE.DUB.2057 12/18