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Workplace Investigations and Fair Procedures

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DATE: 13.07.2018

Workplace investigations have been cast into the spotlight in the last 12 months. The High Court decision in May 2017 in the case of *Lyons v Longford & Westmeath Education and Training Board* was the subject of much controversy as it appeared to significantly widen the extent of fair procedures that an employee is entitled to during an internal workplace investigation. The #MeToo movement gave rise to a global conversation about sexual harassment in the workplace and elsewhere and employers across the globe have seen a sharp rise in the number of sexual harassment allegations and investigations. As a result, employers are now revisiting their anti-bullying and harassment policies to ensure they are in compliance with law.

The *Lyons* case was concerned with the procedures applied in the case of an investigation into an allegation of bullying made by a teacher against the applicant, a deputy principal of a school. The findings of the High Court could potentially have far-reaching consequences for many kinds of internal workplace investigations. In *Lyons*, the investigation was carried out by an external investigating body and its report upheld certain allegations of bullying made against the applicant. The High Court's decision appeared to suggest that an individual subject to a preliminary workplace investigation has the right to legal representation in any investigation meetings and the right to cross-examine (by their legal representative) his or her accuser and any witnesses to the matter under investigation at the investigation stage, where the matter is sufficiently serious that it may warrant dismissal.

The decision of the High Court has raised a number of questions: Are employees now entitled to fair procedures at the preliminary investigation stage? And if so, does this mean employees are entitled to bring legal representation into investigation meetings and are entitled to have their legal counsel cross-examine their accusers, who may well be their colleagues?

Indeed, in practice, we are seeing many employees and their lawyers seek to rely on *Lyons* in seeking rights to cross-examine witnesses and legal representation at a preliminary investigation stage in many forms of workplace investigations, such as investigations into bullying or harassment allegations or misconduct allegations. Facilitating such requests will undoubtedly result in significant additional time, cost and complexity in conducting such investigations, long before the matter even proceeds to a disciplinary hearing or to a dismissal. Investigations with the intent of establishing the true facts and circumstances surrounding allegations of bullying, harassment or other misconduct could turn into lengthy formal enquiries akin to a criminal investigation, the outcome of which could potentially turn on the strength or otherwise of each party's legal representation.

So what are employers and HR practitioners to do? In the first instance, it is useful to go back to basics and consider what fair procedures and natural justice mean in the employment context. Secondly, employers should consider the nature of the investigation as well as the particular facts and circumstances surrounding that investigation before determining the level of fair procedures that are appropriate and at what stage in an investigation or disciplinary process those fair procedures should apply.

Fair procedures and natural justice in the employment context

A constitutional right to fair procedures and natural justice is implied into contracts of employment. These rights particularly apply in disciplinary matters where any potential dismissal may have a negative bearing on the employee's reputation and/or his or her prospects for future employment. An employer's disciplinary policy should be carefully applied before making any decision to dismiss, and any disciplinary hearing should be preceded by a thorough investigation into the matters that have given rise to the disciplinary hearing. The subject of the disciplinary process should be provided with a full and fair opportunity to state his or her case as part of the investigation process, and to respond to any information that is raised as part of the investigation. It is widely accepted that fair procedures and natural justice require that an employee has a right to challenge his or her accusers before any findings are made. Just how far does this right to challenge one's accusers extend?

Legal representation in disciplinary matters

As noted above, as a result of the *Lyons* decision, many employees (often through their legal representatives) are claiming a right to legal representation at an investigation stage to challenge allegations made against them.

In *Lyons*, the High Court criticised the external investigating body's failure to allow the accused the right to challenge and cross-examine the allegations made against him. The Court noted that this is the practice adopted

by many companies when dealing with complaints against employees and it stated that it is “quite clear” that the exclusion of solicitors and counsel and the refusal to allow cross-examination in internal employment procedures is unconstitutional. This latter statement referring to the exclusion of solicitors and counsel must be interpreted in the context of the facts in the *Lyons* case. Otherwise, it is at odds with the accepted legal position to date, endorsed by the Supreme Court in the 2009 case of *Hartigan v Castlereagh Prison*, that legal representation should only be permitted in disciplinary hearings in exceptional cases. In the *Castlereagh Prison* case, the kind of factors that the Supreme Court held might be relevant in considering whether legal representation is desirable in the interests of a fair hearing included the seriousness of the allegations and the potential penalty, whether any points of law are likely to arise and the capacity of an individual to present his / her own case.

In practice, our advice to employers has been to resist this development in *Lyons* save where the gravity of the alleged conduct could warrant dismissal. Alternatively, it can be beneficial to permit a legal representative to attend in circumstances where the employer may want to explore an agreed severance with the employee. Having legal representatives present at the investigation stage may facilitate an off the record discussion between the representatives about a potential severance package, if this is desirable.

Cross-examination in disciplinary matters

Similar factors (to those set out in the *Castlereagh Prison* case above) have been taken into account by the courts over the years in assessing to what extent the right to cross-examine witnesses applies in disciplinary matters. The High Court has previously held (in the 2004 case of *Borges v Fitness to Practice Committee*) that where the consequences of an inquiry into an allegation of conduct may reflect on a person's good name or reputation and / or may also prevent him from practising his profession either for a specified period or indefinitely, he should be allowed to have his legal counsel cross-examine his accuser or accusers. However, it is clear from other cases on this issue that whether or not such rights are appropriate must be considered based on the facts as a whole. For example, the Supreme Court held in the case of *Mooney v An Post*, a case in which allegations of misconduct were made against the plaintiff which called into question the integrity of the postal service, that the plaintiff was not entitled to cross examine witnesses in circumstances where An Post would not be in a position to establish an independent tribunal and subpoena witnesses even if it wanted to do so. Similarly, in the 2016 case of *O'Leary v An Post*, a case relating to an allegation of misconduct which led to the plaintiff's dismissal, the High Court demonstrated a reluctance to introduce “the procedures of a criminal trial into an essentially civil proceeding” and held that the plaintiff concerned was not wrongfully deprived of the right to cross-examine witnesses in a disciplinary hearing. It was also noted that the plaintiff in that case did not seek to invoke any such entitlement to cross-examine witnesses either before or during the disciplinary hearing in question. As one of the most recent High Court judgments on this point, *Lyons* was quite clear on the employee's right to cross-examine relevant witnesses.

When do such rights to fair procedures apply?

Much of the case law on fair procedures and natural justice in the employment context examine the procedures that apply at a disciplinary hearing, rather than at the preliminary investigation stage.

The one serious question that remained unclear in *Lyons* was whether the decision was unique to the particular circumstances of that case or if the purported extension of the scope of fair procedures applicable during investigations was to be of more general application. In *Lyons*, final and binding findings were, unusually, made regarding the bullying allegations at the investigation stage. In light of decades of case law on fair procedures in the employment context, this point is of critical importance in seeking to distinguish the *Lyons* decision.

What is the nature of the investigation? Fact finding or fact gathering?

The extent of fair procedures and natural justice that applies during a workplace investigation depends on the actual nature of the investigation and the potential consequences of the investigation. In a 2009 case, *O'Sullivan v Law Society of Ireland*, the High Court ruled that if the investigation has the potential to result in the making of an adverse finding and / or the imposition of sanctions against the person under investigation, that person should be afforded fair procedures and natural justice appropriate to a formal disciplinary enquiry. If, on the other hand, the investigation is a preliminary step and the investigator does not have the power to make findings or impose sanctions upon the subject, but it is merely a fact gathering exercise to determine if there is a basis for a disciplinary enquiry, then less formal procedures may be adequate and appropriate.

Two more recent decisions of the High Court, which were issued shortly after the *Lyons* decision (but do not refer to *Lyons*) provide further support for this principle. In both decisions, *E.G. v The Society of Actuaries in Ireland* and *N.M. v Limerick and Clare Education and Training Board*, the High Court was satisfied that fair procedures do not apply in full at the preliminary investigation stage, assuming the investigation is not the final decision on the allegations, and that the full range of appropriate fair procedures apply only at the disciplinary stage, the point at which a decision is made on the matter. Therefore, based on these decisions, an employee who is the subject of an investigation, whether a bullying, harassment or misconduct investigation, is not entitled to be legally represented in any investigation meeting and is not entitled to cross-examine his accuser, or to have his solicitor or counsel cross-examine his accuser, during an investigation where that investigation is just a preliminary step in the process and does not result in a final decision on the allegations. Depending on the facts and circumstances of the matter, those rights may exist at the disciplinary hearing stage where that is the point at which a final decision on the matter may be made.

Guidance for employers

Employers seeking to ensure that they are affording employees with the appropriate level of fair procedures at a preliminary investigation stage are advised to ensure that any initial investigation should very clearly just be a fact gathering exercise to determine if there is a case to answer, before a separate disciplinary hearing that will decide if the allegations are proven or not. As a practical guide, the outcome at the investigation stage should avoid any reference to fact finding or detailed conclusions on the allegations. A clear distinction should be evident between the fact gathering stage and the final decision making stage.

Where, on the other hand, the investigator appointed will reach formal findings or conclusions on the issues investigated, which cannot be challenged at a subsequent disciplinary hearing, the full range of fair procedures and natural justice appropriate to the particular inquiry will apply during that investigation process. The impact of *Lyons* is, therefore, very much within an employer's control. In those circumstances, depending on the potential consequences of the investigation, including the possible sanction and any adverse impact on the person's reputation, the extent of fair procedures that may be appropriate may include the right to legal representation at that stage. In terms of whether a right to cross-examination should be afforded to employees at the stage where final or binding findings are made, case law to date does seem to favour a general right to cross examination at the final decision making stage.

To control the extent of either right at the decision making stage, employers are also advised to consider limiting the scope of the potential sanction before the hearing where the matter or allegation is not such a serious matter as to warrant dismissal. For example, in a disciplinary matter involving allegations of minor misconduct that would not be of sufficient gravity to warrant a dismissal, employers should consider advising the relevant employee in advance of the disciplinary hearing that the possible sanction that may be imposed, if the allegations are substantiated, may be a first or a final written warning, as appropriate.

This article was first published by [Industrial Relations News](#) on 3 May 2018.