&|Ampersand

Fair Procedures in Disciplinary Proceedings

WORKSHOP NOTES

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Introduction

&|Ampersand associates and staff encounter more than their fair allocation of procedural queries and questions, as well as engaging in discussion about fair and proper procedures and due process issues.

The volume of queries, and their increasing complexity, prompted us to invite a leading employment law barrister to join us in a workshop to evaluate with us what we had begun to experience. Inevitably a legal Judgement in a case can prompt discussion and give rise to re-evaluation of in-house procedures, or internal case handling practices. We felt it was timely to take a thorough look at the current procedural terrain.

Having spent a day identifying and discussing various issues we asked our learned friend to set out for us the position in respect of 'Fair Procedures' in employment situations today.

We are pleased to publish here our notes from the **&|Ampersand 'Fair Procedures' Workshop** as some assistance to those called on to navigate the terrain.

If all parties to a dispute are operating to the same procedurally fair 'playbook', managerial confidence in case handling processes will tend to make for better and more secure outcomes, both for individuals and the organisations to which they belong.

In this way we hope that organisations who know they operate fair procedures, will also know that this reflects well with their audiences and has positive affects on employee morale and staff confidence.

We welcome comments or observations on this short paper. We will endeavour to keep the paper up to date and publish additions or amendments from time to time. You can forward your comments and observations to us on www.ampersand.ie/Contact/

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FAIR PROCEDURES IN DISCIPLINARY PROCEEDINGS

Introduction

Section 14(1) of the Unfair Dismissals Act 1977 requires an employer, not later than 28 days after entering into a contract of employment with an employee, to give that employee "a notice in writing setting out the procedure which the employer will observe before and for the purpose of dismissing the employee". Curiously, the section provides no remedy or redress in the event that the employer does not comply with this obligation. Nevertheless, failure to follow a procedure prior to disciplining an employee will have certain consequences for an employer.

As is now well established through the case law of the Employment Appeals Tribunal and the Labour Court, an employer who dismisses an employee will be required to establish, in defending an unfair dismissal claim, not only that there were "substantial grounds" justifying dismissal (such as capability, competence or conduct) but also that "fair and proper procedures" were followed before dismissal: see, most recently, *Silicon & Software Systems Ltd v A Worker* LCR 22162 (16 December 2019).

In those cases where a disciplinary process is contained in an employee's contract, either directly or by reference to a collectively agreed procedure with a trade union, the employer will be expected to comply with it. In many employments, however, there is no such agreed procedure. In either case, the procedure followed or adopted should conform to the general provisions of the Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000 (S.I. No. 146 of 2000).

Section 42(5) of the Industrial Relations Act 1990 provides that a failure on the part of any person to observe any provision of a Code of Practice shall not of itself render that person liable to any proceedings, but subs.(4) of s.42 states that, in any proceedings before the Workplace Relations Commission, the Labour Court or the civil courts, a Code of Practice "shall be admissible in evidence and any provision of the code which appears to be relevant to any question arising in the proceedings shall be taken into account in determining that question".

The Code of Practice, at para. 4.1, stipulates that the "essential elements" of a disciplinary procedure are that "they be rational and fair, that the basis for disciplinary action is clear, that the range of penalties that can be imposed is well-defined and that an internal appeal mechanism is available". The Code continues at paras. 4.6 and 4.7:

> "The procedures for dealing with such issues, reflecting the varying circumstances of enterprises/organisations, must comply with the general principles of natural justice and fair procedures which include:

(i) that employee grievances are fairly examined and processed;
(ii) that details of any allegations or complaints are put to the employee concerned;
(iii) that the employee concerned is given the opportunity to respond fully to any such allegations or complaints;
(iv) that the employee concerned is given the opportunity to avail of the right to be represented during the procedure; and
(v) that the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors or circumstances.

These principles may require that the allegations or complaints be set out in writing, that the source of the allegations or complaint be given or that the employee concerned be allowed to confront or question witnesses."

Natural Justice and Fair Procedures

It is clear from the case law of the Superior Courts that, in taking a decision to dismiss or otherwise sanction or discipline an employee, employers must apply fair procedures: see the Supreme Court decision in *Glover v BLN Ltd (No. 2)* [1973] IR 388 (*per* Walsh J. at 425) which was followed by the Supreme Court in *Gunn v National College of Art and Design* [1990] 2 IR 168 and *Mooney v An Post* [199] 4 IR 288. In *Glover*, Walsh J. said (at 425) that "public policy and the dictates of constitutional justice" required that "agreements setting up machinery for the taking of decisions which may affect rights or impose liabilities should be construed as providing for fair procedures".

The position was well summarised by the Employment Appeals Tribunal in *Gearon v Dunnes Stores* UD 367/1988:

> "The right to defend herself and to have her arguments and submissions listened to and evaluated by the respondent in relation to the threat to her employment is a right of the claimant and is not the gift of the respondent or of this Tribunal….As the right is a fundamental one under natural and constitutional justice, it is not open to this Tribunal to forgive its breach."

It is also clear, however, that there is no fixed standard of "fair procedures"; what these procedures demand will depend upon the terms of the contract of employment, in particular whether a disciplinary procedure is contained therein, and the circumstances surrounding the proposed sanction.

There are certain fundamental requirements of fair procedures that cannot be dispensed with, regardless of the specific circumstances of the case. The minimum that an employee is entitled to is to be informed of the complaint/allegation; to know the case that he or she has to meet; to be given an opportunity to answer it

and to make submissions; and to a decision from an impartial/unbiased decision maker. It is important to emphasise that a disciplinary procedure is not a criminal trial. Although the process must be fair, the formal rules of evidence and the procedures which govern court proceedings do not necessarily apply. It is equally important to emphasise that an employer's obligation is to put the case that the employee has to meet so that, on a common sense reading of the relevant documentation, the employee can be expected to know what charges he or she should have to address. An employee should not have to speculate what may or may not be in issue.

Consequently, different cases will require the application of different principles. The requirements of fair procedures will depend on the circumstances of the case, the nature of the inquiry, the rules under which the inquiry is acting, the subject matter that is being dealt with and the consequences for the parties involved. So, the Supreme Court has held that there is no reason in principle why there has to be an oral hearing unless there is a legitimate basis for determining that there is a factual issue which needs to be resolved in order for appropriate conclusions to be reached: see *Rowland v An Post* [2017] IESC 20; [2017] 1 IR 355, 369 (*per* Clarke J.). As is noted below, Clarke J. was clear that the appeal failed because the application to restrain the disciplinary proceedings was premature, in that it had not been established that the process had gone "irremediably wrong".

The fundamental requirements of fair procedures include a number of sub-requirements.

These include:

1) The right to know the nature of the complaint/allegation made against him/her.
2) The right of access to witness statements and materials being relied upon.
3) The right to know the procedure to be followed in the course of the investigation.
4) The right to know the potential implications of the complaint/allegation should it be established, i.e. the sanction that might be imposed.
5) The right to be heard in relation to the complaint/allegation and to make representations in relation thereto.
6) The right to challenge such evidence as might be called to establish the complaint/allegation.
7) The right to call witnesses in support of his/her stated position.
8) The right to be represented.
9) The right to an impartial decision maker.
10) The right to no more than a proportionate sanction where adverse findings are made.

So in *Cassidy v Shannon Castle Banquets and Heritage Ltd* [1999] IEHC 245; [2000] ELR 248, the High Court held that the plaintiff's dismissal was wrongful because the company had failed to provide him with access to witness statements and a medical report thus depriving his representative of the ability to scrutinise the allegations and identify any inconsistencies. See also *Tierney v An Post* [1999] IESC 66; [2000] 1 IR 536, where a disciplinary hearing was held notwithstanding that the applicant was not furnished with the reports containing the evidence against him, whereas the decision maker was furnished with them. The Supreme Court held that the procedure was unfair and quashed the decision.

Cross-examination

Whether the right to challenge the evidence includes a right to cross-examine was considered in both *Gallagher v Revenue Commissioners* [1995] 1 IR 55 and, more recently, in *EE v Child and Family Agency* [2016] IEHC 777. In this latter case, Humphreys J. stated:

> "It is clear that the right to cross examine in a purely investigative context is a constitutional right even where all that is at stake is the good name of the person against whom an allegation is made and where the body concerned is not actually administering justice."

In the former case, at the oral disciplinary hearing, the applicant sought, but was denied, the opportunity to challenge, by cross-examination, certain evidence that had been adduced. The Supreme Court held that, having regard to the seriousness of the charge and the consequences for the applicant, this was contrary to fair procedures.

Legal Representation

Although the Code of Practice recognises the right to be represented during a disciplinary process, para. 4.4 defines "employee representative" as including a colleague of the employee's choice and a registered trade union "but not any other person or body unconnected with the enterprise". Whether the right to be represented includes a right to legal representation has now been considered by the Supreme Court in *McKelvey v. Iarnród Éireann* [2019] IESC 79.

The issue had previously arisen in the context of prison officers. In *Garvey v Minister for Justice* [2006] IESC 3; [2006] 1 IR 548, 558-559, Geoghegan J. said:

> "It would seem obvious that there could be no automatic right to legal representation but, on the other hand, I would be of the opinion that in an important enough case where the prison officer's employment was at stake

> the requirement of fair procedures may include an entitlement to legal representation. Each case would depend on its own facts."

The matter was further considered by the Supreme Court in *Burns v. Governor of Castlerea Prison* [2009] IESC 33; [2009] 3 IR 682 which ruled that, on the particular facts of the case, it could not be said that the applicants could not receive a fair hearing without legal representation. Geoghegan J. said (at 688):

> "The cases for which the respondent would be obliged to exercise a discretion in favour of permitting legal representation would be exceptional. They would not necessarily be related even to the objective seriousness of the charges if the issues of proof were purely ones of simple fact and could safely be disposed of without a lawyer. In any organisation where there are disciplinary procedures, it is wholly undesirable to involve legal representation unless in all the circumstances it would be required by the principles of constitutional justice."

The Supreme Court in *Burns* adopted, as proper matters for consideration by a prison governor faced with a request that a prison officer should be entitled to legal representation at a disciplinary hearing, the six factors identified by Webster J. in *Reg v. Home Secretary, ex parte Tarrant* [1985] 1 QB 251 (a case involving the disciplining of prisoners) namely:

1. The seriousness of the charge and of the potential penalty.
2. Whether any points of law are likely to arise.
3. The capacity of a particular prisoner to present his own case.
4. Procedural difficulty.
5. The need for reasonable speed in making the adjudication, that being an important consideration.
6. The need for fairness as between prisoners and as between prisoners and prison officers.

In *McKelvey*, the Supreme Court emphasised that these were not matters which needed to be separately established but rather were factors to be taken into account in an overall assessment as to whether a fair process could take place without legal representation. In this case, the plaintiff had been the subject of an investigation concerning the potentially irregular purchase of fuel using a company card. As a result of that process, disciplinary proceedings were commenced alleging, in substance, theft. The plaintiff sought to be legally represented during those proceedings, a request which was refused by the company on the basis that there was no provision for legal representation in the collectively agreed Disciplinary Code.

It was not in dispute that the company had a discretion to permit an employee to be legally represented; what was in dispute was whether the plaintiff had a right to be so represented. The Supreme Court applied the principle that it was undesirable to involve lawyers in workplace investigations, in light of the delay and increased costs which would result, unless it was established that there were special or exceptional circumstances to warrant the conclusion that the plaintiff would not receive a fair hearing in the absence of legal representation. Consequently, the issue was whether legal representation was "necessary" to ensure a fair process.

Clarke C.J. said:

> "There may be many cases where the forensic skills of an experienced advocate with a legal qualification may enable the presentation of a case in a more favourable light. But it seems to me that to say that a case might be somewhat better presented by a lawyer falls a long way short of saying that the presence of a lawyer is necessitated in order for the process to be fair …. When considering whether any process is fair the question is not whether a particular type of representation might give some added value but whether its absence can be said to leave the person concerned without an adequate level of representation."

A significant factor in the Supreme Court's decision was that the plaintiff was being represented in the disciplinary proceedings by a trade union official experienced in the conduct of those proceedings. Had the plaintiff not been a union member, the decision may well have been different. In any event, Clarke C.J. emphasised that nothing in his judgment was to be taken as indicating that the plaintiff, at some future stage of the proceedings, might not become entitled to legal representation if the situation demanded it.

Bias

The principle that no person should be a judge in their own cause is fundamental to fair procedures; but it is not just actual bias which taints the process but also apparent bias. Apparent bias is not, however, a matter that can be established by way of speculation or possibility. So, in *Nasheuer v National University of Ireland, Galway* [2018] IECA 79, the applicant was the subject of an internal disciplinary process following a complaint by a colleague. An outside independent adjudicator was appointed who, it turned out, had many years before, in her former capacity as a trade union official, briefly represented the complainant.

The Court of Appeal ruled that "the reasonable and fair-minded observer with full knowledge of all the facts" would not have apprehended bias on the part of the proposed adjudicator. In *Heneghan v Western Regional Fisheries Board* [1986] ILRM 225, however, the dismissal was set aside by the High Court because the "prime mover" in the dismissal process had acted as "witness, prosecutor, judge, jury and appeal court".

Distinction between an investigation and a disciplinary hearing

The purpose of an investigation is to get the employee's response to alleged wrongdoing; determine to what extent the facts are disputed; and explore what, if any, witnesses may assist in resolving any disputed facts. Consequently, an investigation is merely an evidence gathering exercise to determine whether there are issues that an employee should be required to answer and what would be involved in same. A disciplinary hearing, however, is concerned with making specific findings upon that evidence and the issues and determining an appropriate sanction if necessary. The distinction is important because an evidence gatherer should not presuppose or close off avenues of investigation by being judgemental on a particular issue.

The High Court has held, in *Joyce v Board of Management of Coláiste Iognáid* [2015] IEHC 809; [2016] ELR 140, that the principles of natural/constitutional justice do not apply as fully to an investigation as they would at a disciplinary hearing. So, in both *EG v Society of Actuaries in Ireland* [2017] IEHC 392 and *NM v Limerick and Clare Education and Training Board* [2017] IEHC 588, McDermott J. confirmed that, where the investigation was merely an "information gathering" process which went no further than a decision as to whether there was a *prima facie* case, the full remit of fair procedures did not apply, in particular the right to cross-examine witnesses. Where, however, the investigator went beyond the mere gathering of facts and made findings or drew conclusions without affording the employee any opportunity to respond, he or she would be in breach of fair procedures.

When should the courts intervene?

In both *Rowland* and *McKelvey*, the Supreme Court indicated that the courts should be reluctant to intervene while a disciplinary process is ongoing but rather should wait until the process has come to an end and then decide whether that process is sustainable in law. The Supreme Court acknowledged, however, that there would be cases where it was clear that the process had "gone off the rails" to such an extent that there could be no reasonable prospect that any ultimate determination could be legally sustainable. This may be taken as meaning that a process which is still capable of correcting itself in terms of ensuring fair procedures will not be interfered with by the courts.

Conclusion

In *Kelly v Minister for Agriculture, Fisheries and Food* [2019] IECA 299, Costello J. distilled the case law of the courts into the following main points:

1. The precise application of the rules of natural/constitutional justice in respect of any particular process can be quite case specific.

2. The court looks at the entirety of the procedure and determines whether, taken as a whole, the ultimate conclusion can be sustained having regard to the principles of natural/constitutional justice.
3. Decision makers in such a process have a significant margin of appreciation as to how the process is to be conducted, subject to the contractual or legal terms governing the process.
4. Before the process reaches a stage where an adverse decision can be made, the person concerned is entitled to any material which might be relied upon for making such a decision.
5. Before the process reaches a stage where an adverse decision can be made, that person must be given an opportunity to test any evidence (by cross-examination if necessary) where the process to date has established that there is a conflict or issue on the facts requiring to be resolved.
6. If there is no such conflict or issue on the facts requiring to be resolved, there is no entitlement to test the evidence by cross-examination, *a fortiori* where the person concerned admits those facts.
7. Before the process reaches a stage where an adverse decision can be made, the person concerned is entitled to make submissions to the decision maker.
8. Whether the person concerned requires legal representation depends on establishing the necessity for same.