Representation rights at work: who can and who can't?

Gerry McMahon*

Whilst the subject of trade union recognition for collective bargaining purposes in Ireland continues to commandeer headlines, the representative role of unions in individual scenarios (e.g. grievance and discipline) in non-union establishments is also continuing to cause some confusion.

Of course, it is a well-established principle of natural justice that grievance and disciplinary issues at work warrant a role for a representative. That is, should employees have a grievance or be subject to the disciplinary process, alongside their right of reply, there is a right to representation. However, what is unclear is exactly who is entitled to represent employees in such scenarios.

The prospects for the transposition of the Adequate Minimum Wages Directive and the implementation of the associated 2022 High Level Group's report on collective bargaining remain unclear.

There is no automatic right to legal representation in internal disciplinary hearings

Whilst consultation with and periodic public statements from the social partners continue to surface, all eyes are on the European Union and its Court of Justice to see what the next move might be. But alongside this uncertainty remains the role of union representatives in grievance and disciplinary scenarios where unions are not recognised for bargaining purposes.

PROPER PROCEDURE

In such scenarios, industrial relations and human resource practitioners are only too well aware that care is required when it comes to procedural matters. As the WRC put it in 2022 - in respect of the dismissed bookkeeper that overpaid herself €7,000 - there's no such thing as an open and shut case. No matter how inadequate the explanation, .. accused is entitled to a fair hearing .. There are no exceptions to the rules of natural justice' (ADJ-00034380).

Indeed, as far back as 2007, a study at the University of Limerick found that over 3 in 4 Employment Appeals Tribunal members agreed that dismissal cases are often decided on procedural grounds and that over 4 in 5 cases based on procedural grounds are successful. More recently, in 2017, a study at the Technological University Dublin, found that nearly two-thirds of almost 500 third party dismissal decisions referred to 'procedural-type' issues when explaining their determinations.

A key part of this procedural process relates to the right to representation. This right is a longstanding rule of natural justice. Indeed, such is the status of the right to representation that in 2024 the Labour Court acknowledged its duty to enable a fair opportunity for attendees to present their case, stating that it 'will try to minimise any disadvantage arising for an unrepresented party' (*http://www.irn.ie/article/31412*).

SUCCESSFUL REPRESENTATION

Of course, parties are under no obligation to have representation at hearings. In fact, a WRC report from 2020, reviewing adjudication decisions, found that less than half (47%) of the parties had third party representation.

Of those with representation, legal professionals accounted for half, which was nearly double the level of representation by trade unions and Ibec combined. Significantly, it also found that higher proportions of represented complainants and respondents secured successful outcomes (than non-represented parties).

Similarly, when reviewing WRC and Labour Court decisions under the Employment Equality Acts 1998-2015, spanning the Oct. 2015 to August 2019 period, Legal Island's research team found that 49% of complainants and 86% of respondents had some form of representation; and 71% of successful complainants were represented, of whom 74% had legal representation.

This led to the research team's conclusion that: 'it is a good idea to be represented and … it is an even better one to be legally represented'.

However, only late last year the Labour Court announced that whilst parties are entitled to legal representation for employment rights-based claims, industrial relations issues are 'a significantly different matter' and 'rarely of a kind such that legal representation ought to be permitted'.

IN-HOUSE HEARING

Notably, there is no automatic right to legal representation in internal disciplinary hearings as provided for in either statute law or the WRC's 'Code of Practice on Grievance and Disciplinary Procedures' (i.e. S.I. 146/2000).

Furthermore, the 2019 Supreme Court decision in *McKelvey v Irish Rail* (2019 - IESC 79) confirms that an employee is only entitled to legal representation in internal disciplinary processes in 'exceptional circumstances' (e.g. legal complexity, the seriousness of the charge and the potential penalty).

It would be rare for any such assessment to conclude that legal representation is warranted. As the High Court held in 2023: "None of these issues require an in-depth grasp of either legal or factual complexities. The court is satisfied that the services of a legal representative are not necessary to ensure that the applicant will obtain a fair hearing in the remainder of the disciplinary process" *(H v Governor of a Prison and the Irish Prison Service, [2023] IEHC 262)*.

NO RIGHT TO UNION REP

Turning to the right to trade union representation at internal hearings, according to Ronan Daly Jermyn (RDJ) Solicitors: "unless the internal policy in place in an organisation provides otherwise, employers may provide only for work colleagues to accompany employees to internal meetings … this practice is generally acceptable".

In support thereof, RDJ refers to the Employment Appeals Tribunal decision in 2011, wherein the respondent employer had a policy in place "which is in general conformity with the guidelines in SI 146/2000. In affording the claimant the opportunity to bring a colleague of her choice with her to the scheduled disciplinary meetings, the respondent was in compliance with its own policy and indeed with Clause 4 of SI 146/2000, which defines 'employee representative' as including, inter alia, a colleague of the employee's choice". (UD1503/2009).

RDJ also refers to a WRC decision in 2023, that the aforementioned Code of Practice "clearly provides a right of representation by a trade union official, or a co-worker". (ADJ-00044496)

However, RDJ also recall a Labour Court ruling from 2005, that concluded: “it is the employee and not the employer who has the right of election as between the modes of representation provided for by the Code of Practice” (LCR18364).

Despite this precedent – and alluding to a ‘slight statutory ambiguity’ in the relevant Code – they conclude that once employers are in compliance with the Code of Practice, they “can rely on their policies and procedures and are not required to accede to requests for alternative types of representation”.

This conclusion is also reached via an analysis of the Supreme Court’s judgment in the Ryanair (collective bargaining representation) case in 2007, that constituted a major impediment to trade union aspirations in respect of recognition rights *(Appeal No. 377/2005: Ryanair Ltd and the Labour Court and IMPACT)*.

EVERY RIGHT TO UNION REP

Noting the distinction between union representation on ‘collective’ and ‘individual’ issues, under the Industrial Relations (Amendment) Act, 2001, the Labour Court held, in 2002, that where a respondent’s grievance procedures extended to issues like pay and conditions, complaints could be progressed via union representation, albeit on a worker-by-worker basis (rather than collectively).

Referencing the aforementioned Code, the Court concluded that: “Consistent with this code, the company procedure should provide for trade union representation in processing individual grievances and disciplinary matters, where an employee wishes to avail of such representation” (LCR17236).

In the following year, in the Nobel Waste case, the Court issued a legally binding determination endorsing the right to be represented by a trade union in respect of individual grievances and disciplinary matters (DIR031).

Most significantly, in a case in 2006, where the respondent employer did not recognise unions for collective bargaining purposes, the Labour Court issued an ‘Opinion’ that the aforementioned Code allows union officials to process grievances in respect of individual employees.

It was the Court’s ‘Opinion’ that: “the Code allows for a Trade Union to process grievances in respect of an identified individual employee and for the employer to meet with that official as representative of the employee” (Opinion 62-INTO62).

The impact of this ‘Opinion’ was evident (subsequent to the aforementioned consequential Supreme Court decision in the Ryanair case) in 2012, when the Labour Court held that an employee had the right to be represented by a trade union under the grievance procedure, concluding that where one so chooses, he or she is entitled (under the aforementioned Code), to be so represented (LCR20283).

In its recommendation, the Court stated that: “Section 42 of the Industrial Relations Act 1990 provides a statutory mechanism by which this Court may give an interpretation of a Code of Practice made under the Act. Pursuant to that provision the Court has given its interpretation of the Code of Practice on the point now in issue. In Recommendation LCR18364 - Dunnes Stores Tralee and MANDATE Trade Union - the Court pointed out that the right of election as between the modes of representation provided for by the Code of Practice rests with the worker. Hence,

where a worker elects to be represented by a trade union in dealing with either a grievance or a disciplinary issue he is entitled, under the Code to be so represented".

Yet again, in 2019, this issue re-surfaced when a WRC adjudicator upheld an unfair dismissal claim on procedural grounds, finding that an employer who offered representation to a non-union worker by a work colleague (which he declined), "may not be satisfactory especially if that colleague does not have any representational experience and taking into consideration the fact that dismissal was at stake". (ADJ-00020741)

CONFORM IN WRITING AND PRACTICE

In the same year, a WRC AO inquired into a case where a dismissed employee refused to engage with the respondent employer unless she had her trade union official as her representative.

The employer's objection to this mode of representation was based on its disciplinary procedure, that only provided an employee with a right to be represented by a colleague. Pointing to the relevant Code, the AO held that this rendered the dismissal procedurally unfair (ADJ-00019791).

More recently, in 2020, the Labour Court heard that whilst the respondent employer was willing to allow union representation in respect of individual grievances, when it came to disciplinary matters, "such representation will not be allowed".

This gave rise to the Court's recommendation that both processes should, "conform both in writing and in practice with the provision in Para 4.4 (of the Code) regarding the right to representation" (LCR22202).

In a similar vein, in 2022 a WRC adjudicator held that an employer's refusal to allow representation by a registered trade union breached the Code (ADJ-00028021).

As recently as June 2025, the Labour Court recommended that Eli Lilly recognise SIPTU on a collective and individual basis in respect of all grievance and disciplinary matters (LCR23139).

CONCLUSION

Arising from such precedents, it's little wonder that the Peninsula Group should conclude that the relevant Code of Practice: "clearly states that employees are entitled to avail of trade union representation" and that, "declining an employee request to be accompanied by a trade union representative for a disciplinary hearing could lead to allegations that the process does not comply with fair procedures and the principles of natural justice".

Hence, they advise that in disciplinary situations, "even employers who don't recognise trade unions should still allow the trade union representative to accompany the employee".

Arthur Cox Solicitors explain that the reason for the aforementioned 'ambiguity' in respect of union representation in such scenarios is that the Code itself is unclear as to whether:

- an employee has the right to elect between a trade union official or a work colleague as their representative; or
- the employer can comply with the Code by specifying that one may only have a work colleague attend.

Notably, they point out that, “in our experience, a significant number of employers have adopted the latter interpretation”.

However, they conclude that an employer who refuses an employee representation by a trade union official may fail to defend any unfair dismissal claim arising on procedural grounds.

Given the aforementioned case precedents and the Labour Court’s ‘Opinion’, it would seem that they have a valid point. Indeed, given that one can be professionally represented at an external third-party forum, it’s hard to see the sense of running the risk of an unfavourable finding purely on this procedural ground.

Dr Gerry McMahon is the M.D. of Productive Personnel Ltd., specialising in H.R./Employee Relations and training assignments. He is a former Adjudicator at the Workplace Relations Commission and lecturer at T.U.D. Email: ppl1gerry@gmail.com