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LawTalk Blog

Can I have a support person at my work disciplinary meeting?

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The line between an advocate and support person in the context of disciplinary meetings has been a grey area in the law for some time. The *Fair Work Act 2009 (Cth)* ("**FW Act**") does not provide an inherent right to be "represented" by a lawyer, union official or support person during any form of disciplinary proceedings. However, the FW Act does provide that an employer cannot unreasonably refuse the presence of a support person in the course of disciplinary or termination meetings.

Common questions that we encounter include:

1. What is the role of a support person?
2. Does it matter if the support person is a union representative?
3. What if the support person is a lawyer?

The most recent and pertinent decision on this point is *Teaching of English Inc v Debra de Laps [2014] FWCFB 613* which discussed the role of a support person in the context of disciplinary proceedings. The Full Bench overturned a decision of Commissioner Ryan on 19 February 2014. The substantive issue of these proceedings concerned whether an employee had been 'dismissed' within the meaning of the FW Act.

A letter providing notice of a formal meeting was provided to the employee including the following statement:

You may bring a support person if you wish. Please note that the role of the support person is to provide you with emotional support. The support person is not to act as your advocate and should not speak on your behalf. In the event a support person attends the meeting with you, please provide us with your support person's details prior to the meeting.

Commissioner Ryan held that the dismissal was procedurally unfair because the employer unreasonably refused an "advocate" at the disciplinary meeting.

Commissioner Ryan held at paragraph [94] and [112] respectively:

"... the letter from Ms Wagner, as President of the Council of VATE, merely reiterated that Ms de Laps could have a support person in attendance and thus must be accepted as being a refusal to allow Ms de Laps to have an advocate on her behalf [at 94]

"...and together with the refusal to allow Ms de Laps to have an advocate at the meeting on 17 December 2012 all strongly point to a process that was not intended to be fair" [117]

However, on appeal, the Full Bench took a different view when it noted at [52]:

"Given that legislative provision and in the absence of any other obligation to allow an advocate, we do not think a refusal by VATE to allow Ms de Laps an advocate at the meeting on 17 December 2012 can be regarded as constituting an element of procedural unfairness"

This decision of the Full Bench provides some guidance on how the Fair Work Commission will view the role of a support person in comparison with an advocate. A refusal by an employer to allow an advocate will not amount to procedural unfairness in the context of an unfair dismissal.

We would continue to advise representatives to be mindful of this case when advocating for an employee in the context of a disciplinary meeting. However, we strongly encourage that all employees are made aware of their right to have a support person present to provide emotional support, to take notes and adjourn any meeting which becomes untenable for the employee. Often, we find that an employer may not necessarily take issue with a lawyer or union representative representing or advocating during a disciplinary meeting. If this is the case, we advise to take this opportunity to advocate for an employee. However, if an employer at the outset makes it clear that a representative's role is only a support person, we advise that to adhere to this request.

The FW Act does not explicitly provide that an employer has to offer a support person. Therefore, education on the importance and right to have a support person is fundamental to ensuring all employees are treated fairly and with dignity during disciplinary proceedings.

Please note, this Blog is posted in Adelaide, South Australia by Andersons Solicitors. It relates to Australian Federal legislation. Andersons Solicitors is a medium sized law firm servicing metropolitan Adelaide and regional South Australia across all areas of law for individuals and businesses.