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White Paper Conference, 5 December 2017

Fair Procedures and Disciplinary Processes: Recent Developments

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Financial Times 2012-2013

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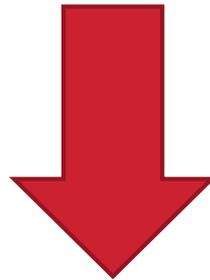
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Overview

- Fair procedures and disciplinary processes
- Recent developments in case law
- Practical tips for running grievance and disciplinary processes

Importance of fair procedures

- **Unfair dismissal:** Employer must demonstrate potentially fair reason for dismissal and fair dismissal process applied
- **Wrongful dismissal:** Employee can apply to High Court to halt process / prevent dismissal in High Court if fair procedures not applied



Main focus in any disciplinary process is now on
the process itself

Principal focus points in recent cases

- When do fair procedures kick in?
 - Noticeable shift away from traditional reluctance to intervene in an ongoing process
 - Suspension: *Reilly v Bank of Ireland*
 - Investigation: *Lyons v Longford Westmeath ETB*

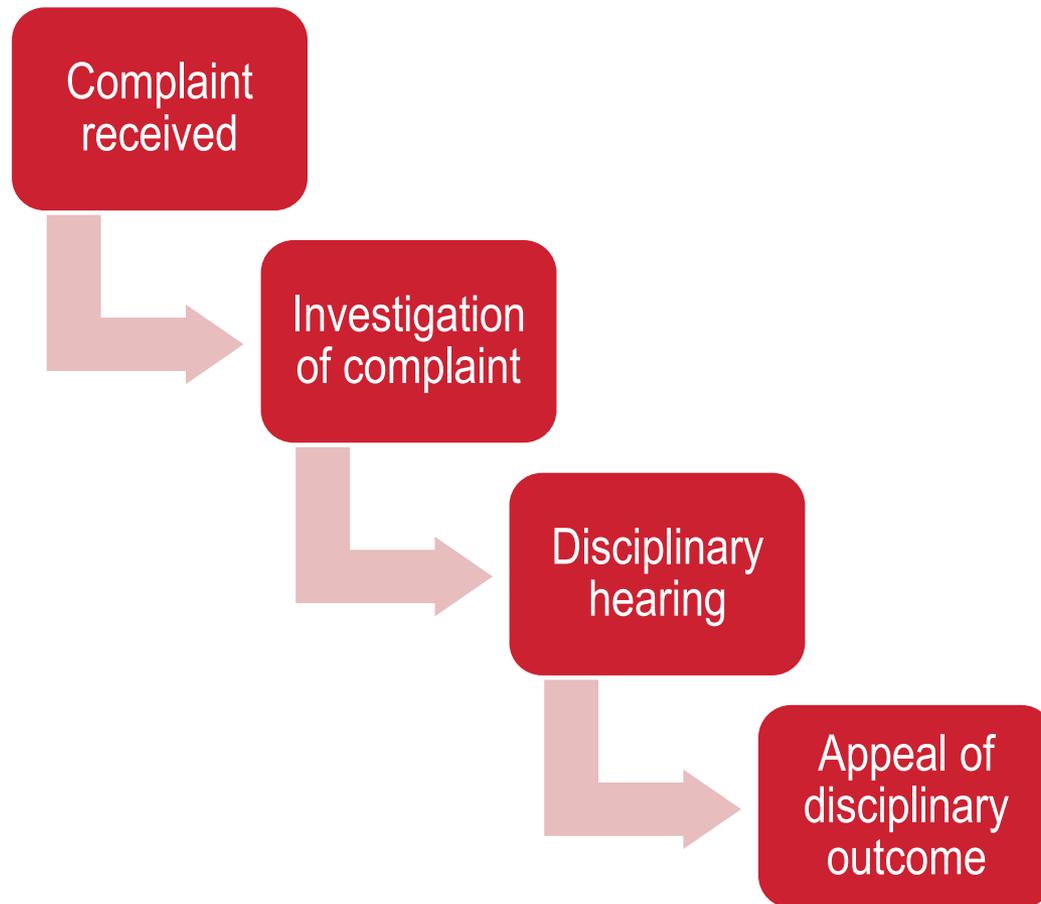
- What rights are employees entitled to in a “fair” process?

What are “fair procedures”?

- *“One can’t be a judge in your own case”*
 - Potential bias
 - No prior involvement in the case

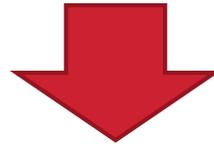
- *“Hear the other side”*
 - Right to know identity of accuser & nature of allegations
 - Sufficient notice and time to prepare
 - Right to representation
 - Right to cross-examine witnesses

Core elements of a disciplinary process



Lyons v. Longford Westmeath ETB (May 2017)

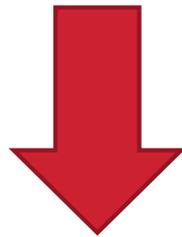
- Lyons accused of bullying by a colleague
- Challenged refusal to allow cross examination during investigation
- ETB argued against fair procedures at investigation stage



- **High Court** : ETB should have allowed full fair procedures (including right to cross examine and legal representation) where *“complaint is made which could result in an individual’s dismissal or where it impinges on the individual’s right to a good name”*

Impact of Lyons

- Heralded as “*new dawn*” for employees (and their lawyers)



WHY?

- Suggestion that fair procedures kick-in at investigation stage
- Strong basis for an employee to demand legal representation even when contrary to Company policy
- Clarification that right to cross-examine does form part of fair procedures in a disciplinary

But...

- *E.G. v Society of Actuaries in Ireland* (May 2017)
- *N.M. v Limerick and Clare ETB* (June 2017)

E.G. v Society of Actuaries in Ireland (May 2017)

- Member of Society accused of financial impropriety
- Investigation committee set up to determine if evidence of misconduct, followed by referral to Society disciplinary tribunal
- EG challenged on basis that denied right to cross examine



- **High Court:** If investigation is a preliminary step for information gathering, fair procedures (e.g. right to cross examine) do not apply in full. However, if adverse finding or sanction possible, fair procedures do apply to the investigation.

N.M. v Limerick and Clare ETB (June 2017)

- School principal accused of sexual harassment
- Application to restrain process from proceeding
- Challenged on basis of denial of opportunity to cross examine witnesses during investigation



- **High Court:** Refused order to prevent process proceeding as no final or binding decision was being made at the investigation stage. Must distinguish between an information gathering and a fact-finding investigation

Advice to employers

- Confirmed right to cross examine and legal representation (less so) at decision making stage
- Resist request for fair procedures at investigation stage on foot of Lyons
- Clearly flag investigation as fact gathering, not fact-finding
 - Fact gathering: final factual conclusion has not yet been reached as to what actually happened
 - Fact-finding: the decision has already been made as to what happened

Advice to employers

- To resist cross examination or legal representation, limit scope of potential sanction if not a serious matter
- Hold off on revising disciplinary procedures for now to build in cross-examination or legal representation – wait and see
- Allow it if required, but no need to publicise it internally

Practical Tips - Stage 1: Receipt of Complaint

- Talk to the actual complainant
- Ask employee what they want done:
 - Advise that employer can't act on anonymous complaints
 - Explain procedures and options but manage expectations
- Objective – clear outline of complaint and clarity on what procedure being used
- Record the complaint in writing

Practical Tips - Stage 2: Investigation of Complaint

- Appoint investigator and HR contact person
- Investigation process:
 - Clarify complaint being investigated and extent of investigator's authority – fact finding v fact gathering
 - Process for gathering evidence – consider types of evidence
 - Interview witnesses
 - Confirm content of witnesses statements
 - Exchange witness statements for comment
- Suspend employee pending outcome of investigation?

Practical Tips - Stage 2: Concluding Investigation

- Role of investigator is only to assess whether there may be a disciplinary case to answer – it is **not** to build a case to prosecute the employee (or Company)
- Prepare Investigator's report and conclusions:
 - Provide logic and reasoning for conclusion
 - Make it clear that any binding determinations of fact will only be made after disciplinary hearing
- Conclusion – withdraw complaint or move to disciplinary hearing

Practical Tips - Stage 3: Invite to Disciplinary Hearing

- Invite to the hearing:
 - Clear specific allegations
 - Provide all supporting evidence, even if repeated
 - Sufficient advance notice
 - Notify of dismissal as a potential sanction (but only if it is a realistic outcome)
 - Notify of right to representation, not just a witness

Stage 3: Disciplinary Hearing

- At the disciplinary hearing:
 - Explain chair's function
 - To consider the allegations and determine if substantiated
 - Decide on appropriate sanction if substantiated
 - Allow opportunity to respond to allegations
 - Allow opportunity to cross examine witnesses if dismissal is a potential outcome
 - Issue decision at least one day after the hearing
 - Decision must be based on allegations put to employee
 - Sanction must be proportionate – consider alternatives

Practical Tips - Stage 4: Appeal of Disciplinary Outcome

- Require written grounds of appeal
- Advise appeal on these grounds only
- Not a full rehearing of the facts and/or allegations
- No new evidence or allegations by employer
- Sanction cannot be increased
- Written conclusion on the grounds of appeal – uphold or set aside decision and sanction
- Fair process is a strong defence to any claim

Questions?

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