

LEGAL REPRESENTATION IN DISCIPLINARY HEARINGS

Much has been said of late about a new decision of the Supreme Court of Appeals dealing with the question whether employees are entitled to legal representation in disciplinary hearings. Misleading reports have surfaced in newspapers about the implications of the decision and some consultants are even advising employers that employees now have the right to legal representation in disciplinary hearings.

The decision does not create new law and merely confirms what has been known all along, i.e. that employees are entitled to a fair hearing before a decision is made to terminate their services. There is no right to legal representation at such hearings (the court confirmed this). However, in certain situations the absence of legal representation may put the employee at such a disadvantage, that he or she would not be able to state his/her case in a proper manner unless legal representation is allowed.

Further, the chairperson always retains a discretion to allow or deny legal representation, even if the employer's disciplinary procedure states otherwise. This is because the employer's rules cannot trump the employee's right to a fair hearing. Therefore, one cannot merely argue that the employer's policy is not to allow legal representation and then exclude it on that basis alone. All such requests must be considered by the chairperson and he or she must exercise a discretion whether or not to allow it. The following factors should be considered: the nature of the charges brought (e.g. if they are of a criminal nature); the factual or legal complexity of the case (e.g. if the case raises questions of legal interpretation or involves complex forensic reports); potential seriousness of the consequences of the outcome for the employee (e.g. if it may lead to the employee being excluded from his or her profession); and the prejudice that the employer might suffer if it is allowed (e.g. lengthy delays or having to employ its own lawyers to match the employee's; or problems of consistency in the future).

There is no right or wrong answer here. Legal representation remains the exception and not the rule. What the chairperson must do is consider the request in the light of the factors mentioned and then make a decision. Nobody can interfere with that decision, provided it shows that the chairperson has applied his or her mind in a rational and unbiased manner.

The case does not address the question of allowing trade union representation – under the LRA that remains something about which the employer and the union must agree.