

Fact sheet: The Role of the Support Person in the Disciplinary Process

1. Background

Any disciplinary process undertaken by an employer should follow certain procedures to reduce the risks of an unfair dismissal claim. It also increases the chances of an unfair dismissal claim being successfully defended in the Fair Work Commission (FWC).

- In considering whether a dismissal was harsh, unjust or unreasonable, the Fair Work Commission will take into account a number of factors about the process, including whether or not the employee was allowed a support person and whether they had an opportunity to respond to concerns.
- **It is also good HR practice** to ensure that the process is fair for both the employer and the employee. Getting to the bottom of a problem usually requires more than one point of view so following a good process means that all perspectives are considered, resulting in a better outcome for all.

When bringing concerns to the attention of an employee, it is fair to present the concerns to the employee in writing prior to attending a meeting to discuss the concerns to allow the employee the opportunity to respond and put their side of the story.

As part of this process, employers need to ensure employees are given the opportunity to bring a support person along to the meeting and that the employer does not unreasonably refuse an employee to have a support person present.

It is important to note that while the employer does not need to **supply** the support person, they must allow one if asked.

2. FWA Criteria for Considering Harshness etc.

Section 387 of the Fair Work Act lists several criteria that must be satisfied when determining whether a dismissal is harsh, unjust or unreasonable. One of those is:

387 (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal.

The support person at a glance:

- Good HR practice;
- Requirement of the FWC as a criterion for considering fairness of dismissal;
- Employer must not refuse to allow an employee a support person;
- Support person should NOT advocate on the employee's behalf;
- Can be a lawyer or a union representative;
- Employee should be given notice in writing of discipline meeting with enough time to arrange a support person.

Resources:

- [Jobs Australia's Disciplinary Action and Termination of Employment Guide](#)
- **Relevant Cases**
 - [Teaching of English Inc v Debra de Laps \[2014\] FWCCFB 613](#)
 - [David Wates v Goodyear Australia Pty Ltd \[2016\] FWC 1991](#)

3. Employer obligation

An employer should consider encouraging the presence of a support person in relation to any formal disciplinary meetings or where an employee's employment may be at risk of termination.

However, while the employer is not obligated to **provide** the support person, employers must not unreasonably refuse an employee wishing to have a support person present.

Therefore, it is recommended that prior to the disciplinary meeting, the employee be notified by the employer that they may bring a support person to the meeting.

Make sure that notification for the meeting is in writing and that the employee has enough time to organise themselves and a support person and be flexible if the employee requests more time for this purpose.

Finally, ensure that prior to the meeting, the support person is aware of their role to support the employee, not represent them.

4. A support person should not be an advocate

There have been some decisions of FWC that clarify that the support person should not be an advocate for the employee. They are there to support the employee, not to intervene or advocate on the employee's behalf.

The full bench of FWC in 2014 made this quite clear in *Victorian Association for the Teaching of English Inc v Debra de Laps [2014] FWCCFB 613* by ruling that where an employee wants their support person to act as their advocate, the employer is not obligated to allow such a person to act as the support person.

More recently, it was noted by Commissioner Cambridge in *David Wates v Goodyear Australia Pty Ltd [2016] FWC 1991* that while "There was no contest that the applicant was offered the assistance of a support person ... rather than assisting in the process, the excessively interventionist approach adopted by the applicant's chosen support person, served only to confirm the extent to which the employment relationship had collapsed"

5. Who can be a support person?

A support person could be a friend, colleague or family member. They may also be a union representative or a lawyer. However, as explained above, they are only there to support the employee, perhaps help answering questions if the employee is from a non-English speaking background, but not to speak on the employee's behalf or to advocate for them.

More information

For more information on support persons and the discipline process, contact a Jobs Australia Workplace Relations Advisor on 1800 331 915.