RECOMMENDATION

REPRESENTATION IN DISCIPLINARY AND GRIEVANCE HEARINGS

Presented to the Social Security Minister on 7 March 2012

PURPOSE OF RECOMMENDATION

Consultation was undertaken to seek views from interested parties about a proposal to amend the 'Disciplinary and Grievance Procedures' Code of Practice (the 'Code'). The Social Security Minister had proposed that the Code could be amended to outline circumstances in which it would be reasonable for an employer to permit employees to be represented by representatives, other than work colleagues or trade union employees and officials, in formal disciplinary and grievance hearings. The Forum has considered the responses received to the consultation and presents its recommendation to the Social Security Minister.

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SECTION 1 - BACKGROUND

Employment Law rights

Part 7A of the Employment (Jersey) Law 2003, as amended, (the 'Employment Law') gives an employee the right to be represented in disciplinary hearings where that hearing could result in some formal action being taken against the employee and in grievance hearings. An employee has the right to take one of the following types of a representative to such a hearing –

1. A fellow employee who is employed by the same employer, or
2. An employee or an official of a trade union that is registered under the Employment Relations (Jersey) Law, 2007.

The Employment Law does not prevent an employee from requesting a different type of representative, such as a lawyer, a friend, a family member or a politician. This would be a matter for the employer to consider and determine.

Article 78A of the Employment Law limits the role of the representative during the hearing, as follows:

"(3) The employer must permit the employee's representative –
- (a) to address the hearing so as to put the employee's case, to sum up that case and to respond on the employee's behalf to any view expressed at the hearing; and
- (b) to confer with the employee during the hearing.

(4) However, paragraph (3) does not require the employer to permit the employee's representative –
- (a) to answer questions on behalf of the employee;
- (b) to address the hearing if, at the hearing, the employee indicates that he or she does not wish the representative to do so; or
- (c) to use the powers conferred by that paragraph in a way that prevents the employer from explaining his or her case or prevents any other person at the hearing from making a contribution to it."

Code of Practice

Currently, there is a 'Disciplinary and Grievance Procedures' Code of Practice (the 'Code') which was approved under Article 2A of the Employment Law.

Although the Code does not give employees further legal rights, where any provision of the Code is relevant to tribunal proceedings, the tribunal must take that provision into account.

The Code states that an employee may choose to be represented by an official from any trade union, regardless of whether the union is recognised by the employer, but where a trade union is recognised in a workplace, it is good practice for the employee to ask an official from that union to represent them. An employee does not have to be a member of a trade union in order to request representation by that union.

The Code also states that *"some employers may extend the right* [to be represented] *further via employees' contracts or company procedures, giving employees a contractual right to be represented by someone who may or may not be an employee of the same organisation, e.g. a partner, spouse, friend or legal representative. Whatever decision is taken by the employer in this respect, it is advised that the procedure should specifically address this issue to prevent disagreement and/or confusion from arising."*

The Employment Law requires that, prior to approving a code of practice, the Minister must publish a notice in the Jersey Gazette inviting representations on the code within a minimum 28 day period and must consult the Jersey Advisory and Conciliation Service, the Employment Forum and such persons as the Minister considers will be affected, or representatives of such persons.

SECTION 2 - OTHER JURISDICTIONS

UK and Isle of Man

Rights in Jersey are akin to those of employees in the UK and Isle of Man, giving a limited statutory right to be accompanied by a colleague or a trade union representative in disciplinary and grievance hearings. There is no statutory right in either of these jurisdictions to be accompanied by a legal representative.

It is understood that the introduction of a defined statutory right to accompaniment in the UK was designed to ensure consistency in existing practice, afford individual employees increased protection and to facilitate the resolution of workplace disputes. It was believed that if employees were accompanied, the likelihood of extreme sanctions such as dismissal and resultant claims to Employment Tribunals would be reduced. Research in the UK has suggested that union involvement tends to make dismissal and the use of disciplinary sanctions less likely.

UK and Isle of Man legislation provides the right to be 'accompanied' rather than 'represented'. However, the laws are identical in describing the role of the representative/companion at the hearing, as described on page 2, regardless of the terminology used.

The Code was based upon the ACAS 'Disciplinary and Grievance Procedures' Code of Practice. The current ACAS Code of Practice, effective from April 2009, sets out how the statutory right applies in practice, but does not outline any circumstances in which an employer should consider permitting a companion other than a fellow worker, a trade union representative, or an official employed by a trade union.

Guernsey

Guernsey's October 2004 Code of Practice, "Disciplinary Practice and Procedures in Employment", is issued under the Employment Protection (Guernsey) Law, 1998. The code states that disciplinary procedures should be drawn up and should give individuals the right to be accompanied by a trade union representative or by a fellow employee of their choice. The provisions of the code are admissible in evidence and may be taken into account by a Tribunal, as they are in Jersey.

The Commerce and Employment Department's Advisory Booklet on 'Discipline at Work' goes on to advise that an employee should be advised of *"what is being alleged and advise them that they can choose to be accompanied at the hearing by a colleague or a trade union/staff association representative. If there are likely to be language difficulties, consider the presence of an interpreter."*

SECTION 3 - POLITICAL DEVELOPMENTS

On 7 June 2011, the former Deputy of St. Martin, Deputy Frederick Hill, lodged the Proposition 'Disciplinary and Grievance Hearings: Right to a friend', (P.112/2011) which was debated by the States on 1 November 2011.

The first part of the Proposition asked the States to decide that the Social Security Minister should be requested to bring an amendment to the Employment Law to give employees a right to be represented by any person they choose in disciplinary and grievance hearings. This could include legal representatives, friends, family members and politicians.

When the Proposition was lodged, a number of interested parties wrote to the Social Security Minister, the Chief Minister and Deputy Hill strongly opposing the Proposition, including on the following grounds;

- Stakeholders must be consulted prior to any changes being made.

- To extend employee rights in the manner proposed would be a significant departure from other jurisdictions.

- There are potentially significant financial and resource implications for the private sector and the public sector in relation to legal representation.

- Appropriate representatives for disciplinary and grievance hearings have knowledge of the workplace and an interest in maintaining good employment relations. Other representatives, such as family members, might personalise the issue and may therefore be inappropriate.

- Commercially or personally sensitive data might be discussed in the hearing and therefore confidentiality becomes a concern.

The States voted against Deputy Hill's Proposition which means that the Social Security Minister is not required to amend the Employment Law to extend the types of representatives that may be chosen by employees in formal disciplinary and grievance hearings. The Minister had however committed that consultation would be undertaken to review this aspect of the Code.

Reference to Forum

In July 2011, the Social Security Minister, Deputy Hill, the States Employment Board and a number of interested parties met to discuss the Proposition. The outcome of that meeting was agreement that:

1) A more acceptable solution than legislative provision might be to amend the Code so that it outlines circumstances in which an employer should consider permitting different types of representatives, and

2) The Employment Forum should be directed to consult on such an amendment.

The resulting formal reference to the Forum stated the Minister's request *"that the Employment Forum consults on an amendment to the Code, to include what circumstances employers should be advised to consider permitting employees to be represented in formal disciplinary and grievance hearings by other types of representatives"* and the Minister suggested circumstances that might be consulted upon, including;

- Where an employee may be prevented from following their profession as a result of any disciplinary action taken, and
- Where the employee requires specific types of support, such as a mental health advocate.

SECTION 4 – CONSULTATION METHOD AND OUTCOMES

Consultation method

The Forum consulted during the period 30 November 2011 to 19 January 2012. A consultation paper including background information and a survey were circulated to those on the Forum's consultation database (approximately 250 in total, including a wide cross section of respondents), to individuals and organisations who had expressed an interest in Deputy's Hill Proposition, and to interested parties such as organisations that work with vulnerable people. The survey was also available to complete online.

As directed, the Forum asked whether the Code should be amended to describe circumstances in which an employer should consider permitting employees to be represented in formal disciplinary and grievance hearings by representatives, other than a work colleague or a trade union representative.

As required by the Minister, the Forum suggested some specific circumstances, listed below, and asked if respondents felt that these situations should be included in the code, and if so, what types of representatives might be permitted in such a situation.

1(a) - Where the employee is a vulnerable person
1(b) - Where the employee is under age 18
1(c) - Where the employee is the sole employee of the business
1(d) - Where an employee may be prevented from following his or her profession
1(e) - Where the employee is appealing against a dismissal decision
1(f) - Where related criminal charges are in progress against the employee

Respondents were also asked if there are any other circumstances in which the Code should specify that other types of representatives might be permitted.

The Forum received 71 responses from a wide range of respondents, as listed in the table below;

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Employer	22
Employee	18
Trade union	2
Employers' association	3
Other	21
Not specified	5
Total	**71**

Consultation outcomes

A large number of responses were received to this consultation and many of the respondents appear to support additional provision being made in the Code, in appropriate circumstances. The Forum's process of reaching a recommendation includes a full consideration of the reasons people gave for their responses, as well as the practical application. The overall impact of the consultation responses was as follows:

1. The definitions of any particular circumstances in which an employer should consider permitting other types of representatives should be narrow and specific, both to prevent misuse and to avoid difficulties in determining whether those circumstances apply to any particular employee. However, it was recognised by respondents that the Code cannot address all potential circumstances in which a different type of representative may be appropriate and that there is likely to be difficulty in defining some of the specific circumstances, leading to potential confusion and delays in arranging hearings.

2. The danger of prescribing specific and narrow circumstances in which an employer should consider permitting other representatives is that this potentially excludes other circumstances in which it might also be appropriate for an employer to consider permitting a different type of representative, and employees may ultimately be worse off. By listing specific circumstances, it could be inferred that other circumstances do not have to be taken into account.

3. Although there was support for employers to permit other types of representatives in certain circumstances, it was not clear who those representatives might be. Many of the respondents who supported additional provisions expected some limitation on the types of representatives, or did not agree that friends, family members or lawyers should be permitted. Some respondents suggested JACS officers, particularly to represent a sole employee of the business. David Witherington, Director of JACS, has commented, *"Given our over-arching role as an impartial adviser it would be*

contrary to all we did. It would, in my opinion: a) Alienate many employers, particularly smaller employers, who would be less likely to seek JACS advice in the future because we were "on the side of employees", and b) It would be difficult, if not impossible, for JACS to be considered an impartial conciliator if we were to offer conciliation to an employer (in a Tribunal claim) having previously represented the employee."

4. There were concerns that the Code should be as simple as possible and focus on the key issues, allowing employers to apply their own discretion within the existing legislation and guidance, noting that no such additional provisions are made in the UK. Some respondents noted that businesses in Jersey (particularly smaller business) are already finding it difficult to cope with the legislation in relation to disciplinary procedures. There was a concern that by imposing too many obligations on employers and additional 'red tape', the effectiveness of businesses will be hampered at a time when many are already struggling.

5. There were responses about sensitivity and confidentiality of workplace information and employers' duties regarding data protection. This is cited as one of the main reasons why allowing other types of representatives is likely to be seen as a risk and problematic for employers. A representative who is not a trade union official or a workplace colleague does not have a duty of confidentiality and there is no means for an employer to take any action for a breach. Any change to the Code must allow the employer to consider whether it is reasonable to permit other representatives from outside the workplace, which will depend upon the nature of the case.

In some cases, respondents did not appear to be fully aware of the current legal provisions, the existing provisions of the Code, or the purpose of the consultation. This was demonstrated is a number of ways including,

- Some respondents agreed that further provision should be made in the Code whilst appearing to support only work colleagues and trade union officials as representatives. This right is already provided via the Employment Law.

- A number of respondents advocated a wider right to representation that would permit employees to be represented by any person they choose. The States of Jersey decided on 1 November 2011 that the Employment Law should not be amended to extend the types of representatives permitted in disciplinary and grievance hearings under the Employment Law and the remit of this consultation is to review the Code, which cannot supersede statutory rights, or overturn that decision.

- A number of respondents suggested that employers should consider permitting translators or interpreters as representatives. However an employee would generally not be expected to have a translator as a representative. Paragraph 49 of the Code states, *“Where English is not the employee’s first language there may also be a need for translation facilities.”* (Forum’s emphasis).

Whilst the Forum was directed by the former Social Security Minister to consult on an amendment to the Code, to include what circumstances employers should be advised to consider permitting employees to be represented by other types of representatives, the Forum has not pre-supposed that any change to the Code is, or is not, required.

Having analysed all of the responses, the Forum recognises that some additional provision in the Code is supported by the responses and it would appear that many employers already make such allowances in practice. However, it is clear that detailed situational provisions in the Code are unlikely to be workable in practice. The Forum concluded unanimously that a wider generic provision can be made in the Code that allows individual circumstances to be considered, including the particular circumstances that were detailed in the consultation, but without being overly prescriptive.

SECTION 5 - RECOMMENDATION

Having considered and debated all of the responses, the Forum unanimously recommends that the Code should be amended as described in points 1 and 2 below:

1. Paragraph 45 of the Code currently states; *“Some employers may extend the right further via employees’ contracts or company procedures, giving employees a contractual right to be represented by someone who may or may not be an employee of the same organisation, e.g. a partner, spouse, friend or legal representative. Whatever decision is taken by the employer in this respect, it is advised that the procedure should specifically address this issue to prevent disagreement and/or confusion from arising.”*

   If an employer unfairly excludes a representative where there are special circumstances, there is a possibility that any resulting dismissal may be considered to be unfair. However, the Code does not require an employer to have considered, as part of a fair process, a request for another type of representative beyond employees’ statutory and contractual rights.

The Forum recommends that paragraph 45 should be preceded by the sentence; *"To ensure a fair process, an employer should give consideration to reasonable requests for other types of representatives in circumstances that are appropriate for both parties."*

The provisions of the Code are admissible in evidence and may be taken into account in determining any questions arising in proceedings before the Employment Tribunal or a court., The recommended change to the Code would mean that, in determining whether a process has been fair or otherwise, the Employment Tribunal or a court may take into account whether an employer has given consideration to such a request and whether that request was reasonable and appropriate for both parties.

The Forum considers that this could encompass the consideration of any of the scenarios described in the consultation paper. Such a provision more adequately enables individual circumstances to be considered by both parties, rather than being limited to particular groups of employees or narrow situations, to the exclusion of other appropriate circumstances.

2. Paragraph 50 of the Code currently states; *"Before the hearing, the employee should inform the employer of the identity of their chosen representative."*

   The Forum recommends that this paragraph should be amended, so that *"Before the hearing, both parties should be informed of the identity and role of each person who will attend the hearing."*

   The purpose, as with point 1, is to assist in ensuring a fair process and clarity for both parties.

SECTION 6 - SUMMARY OF CONSULTATION RESPONSES

Respondents were asked if the Code should be amended to describe circumstances in which an employer should consider permitting employees to be represented in formal disciplinary and grievance hearings by representatives, other than a work colleague or a trade union representative.

The following specific circumstances were described and respondents were asked if these situations should be included in the code, and if so, what types of representatives might be permitted in such a situation.

1(a) - Where the employee is a vulnerable person

1(b) - Where the employee is under age 18
1(c) - Where the employee is the sole employee of the business
1(d) - Where an employee may be prevented from following his or her profession
1(e) - Where the employee is appealing against a dismissal decision
1(f) - Where related criminal charges are in progress against the employee

A summary of the responses received and a selection of comments that are illustrative of the range of views expressed are provided in respect of each consultation question. Please note that all comments quoted are quoted verbatim.

QUESTION 1(a) - Where the employee is a vulnerable person

Responses

Fifty-three respondents agreed that the code should make additional provision where an employee is vulnerable. This included 14 employees, 16 employers, 2 trade unions, two employers' associations and 15 'other' respondents (which includes law firms, independent consultants, advisory bodies and other interested parties).

Seventeen respondents did not agree, including 4 employees, 1 employers' association and 6 employers and 6 'other' respondents.

Defining a vulnerable person

The Forum's survey described a vulnerable person as *"someone who is or may be in need of support by reason of mental or other disability, age or illness and who is, or maybe unable to protect him or herself against significant harm.*"

A number of respondents commented on the difficulty of defining vulnerable;

"Vulnerable" is a very broad and unspecific term, even with the additional explanation set out above in the consultation question. Many, if not most, employees who attend a disciplinary or grievance hearing will find the process very stressful. A proportion will have a psychological or psychiatric condition related in some way to the disciplinary or grievance issues to be discussed at the hearing. (Those dealing with the hearing are also likely to find it very stressful.) The idea that, of itself, a degree of stress or illness on the part of the employee concerned should put an obligation on an employer to allow someone other than a TU representative or colleague to attend at the hearing is problematic." (Employer's association)

“The term vulnerable is too broad and employers may be put at extra cost and management time establishing how vulnerable an employee is.” (Chartered Institute of Personnel and Development, Jersey, ‘CIPD’)

“We also have concerns in respect of who would make the ultimate decision as to whether or not an individual is 'vulnerable' for the purposes of the right to representation; some employers may have different views to others. The term vulnerable would, in our view, need to be defined fairly narrowly in order to ensure that those who truly need to benefit from an extension of the right, do so. A wide definition is likely to lead to almost all employees potentially being considered vulnerable.” (Law firm)

“ELA (JB) considers that it could be difficult to define a 'vulnerable person' sufficiently narrowly. All employees are likely to find such a process stressful and may consult their doctor about stress/depression.” (Employment Lawyers’ Association (Jersey Branch), ‘ELA (JB)’)

Other comments in opposition to additional provisions in the code for vulnerable employees included;

Under the Employment Law all employees, including vulnerable employees, can have a colleague or trade union representative, and the Employment Law does not prevent an employer from extending this in appropriate circumstances (which is expressly recognised at paragraph 45 of the Code). Indeed, paragraph 49 of the Code states that: "The employer should ensure that, where necessary, arrangements are made to cater for any disability the employee or their representative may have". In our opinion there is sufficient protection within the Employment Law and Code” (ELA (JB))

“The idea that, of itself, a degree of stress or illness on the part of the employee concerned should put an obligation on an employer to allow someone other than a TU representative or colleague to attend at the hearing is problematic. We don't agree that any amendment is required to the Code in this regard.” (Employers’ Association)

“The current provision already permits the person to be accompanied by a work colleague or official of a trade union. Appropriate representatives for disciplinary and grievance hearings have knowledge of the workplace and an interest in maintaining good employment relations. Other representatives, such as family members, might personalise the issue and may therefore be inappropriate” (Channel Islands' Co-operative Society)

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"We do not believe that any statue or code of practice should be amended to give further rights to "vulnerable people" , this can be included into individuals terms and conditions should an employer be of the view that their own employee is classed as vulnerable." (CIPD)

An employer stated that this is "Superfluous. Current law demands fairness in "all the circumstances" so vulnerable adults are already protected as a reasonable employer will take extra steps to ensure a vulnerable person's hearing is fair." (Employer)

Comments in support of additional provisions in the code for vulnerable employees, and suggested types of representatives that might be permitted, included;

"We would welcome a representative such as a Mental Health Worker or a Support Worker, or a family member to accompany any employee who might be deemed as vulnerable." (John Lewis Partnership)

"To enable the disciplinary process to be fair - a colleague or care worker etc. would be suitable as representation, but family members or relations would be too closely personally related for the process not to become personal and therefore wouldn't be suitable representative persons." (Employer)

"They could be able to be represented by a key worker or helper but only if one has been assigned through official means (i.e. HSS, Social Security or ESC. They should not be represented by a 'friend' (who could potentially act in a legal capacity)." (Employer)

"The representative in this situation could be a recognised therapist from Health, workplace mentor or family member in the case of learning disabilities. We would not wish to be prescriptive as each case would be looked at on its own merits. We already do this in such situations as it is recognised as good practice" (Stephanie Holloway on behalf of Human Resources, Chief Minister's Department, States of Jersey)

"Fellow worker, union or staff association representative would be appropriate but not external "friends" or "family". A medical practitioner might also be appropriate in certain cases." (Employee)

"JACS officers regularly see individuals who are severely distressed due to alleged bullying or harassment in the workplace. Often in such circumstances the employee is receiving support from a mental health counsellor from organisations such as Mind Jersey. Disciplinary or grievance hearings can be extremely stressful for such

employees and their mental state is frequently so poor that they are unable to adequately represent themselves. While a trade union representative may have experience of dealing with vulnerable individuals, in our view in such circumstances the employer should consider allowing the professional counsellor to act as the employee's representative." (JACS)

"If such a person is not a union member, and a union rep or workplace colleague cannot be persuaded to assist, then one of a parent, guardian or health care professional should be permitted to represent them." (Civil Service Alan Treanor on behalf of Civil Service Staffside).

"Genuine vulnerable employees should be able to gain access and be represented through the professiional support services and advice and guidance provided by agencies such as the Jersey Employment Trust or JEND - Jersey Employers Network on Disability." (Jersey Hospitality Association)

"Additional emotional support would need to be provided for those in this situation especially if they have been bullied or harassed. It is therefore important to give the individual the right to be accompanied by a friend or family member or alternatively a representative from a supporting agency/charity." (Jersey Community Relations Trust)

QUESTION 1(b) - Where the employee is under age 18

Responses

Forty-nine respondents agreed that the code should make further provision in respect of employees under age 18, including 15 employers, 14 employees, 2 unions, 2 employers' associations and 6 'other' respondents.

Twenty-one respondents did not agree, including, 4 employees, 7 employers, 1 employer association and 8 'other' respondents.

Comments opposing any special provision in the code for employees under age 18 included;

"If an employee is not old enough to communicate with their employer then they are not old enough to be at work. The employment law protects all individuals from compulsory school leaving age, any younger should and could be at the discretion of the employer." (CIPD)

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"If someone is over 16 and is old enough to earn a wage then they are old enough to attend a disciplinary or grievance hearing with a TU rep or colleague. There shouldn't be an expectation that special rules should apply." (Employers' association)

Any amendments to the code "should apply to all employees, and not be confined to specific categories of employee, which could be seen as discriminatory, and give issues of eligibility in borderline cases." (Employee)
"The employee has the ability to choose from the entire workforce which will, in most cases, include someone who can be classed as an adult responsible enough to provide suitable representation. Where this is not possible, a trade union official would be suitable representation." (Employment Law Consultancy)

"Instead, this could be done by amending the Code to encourage businesses to consult with the employee in respect of whether they would like to be accompanied by his/her parent or legal guardian." (Law firm)

Comments in support of special provision in the code for employees under age 18 included;

"Employees under 18 are generally less worldly wise when it comes to employment matters and having someone with them, preferably older, can bring a more equitable stance to the proceedings." ('Other')

"Where such a person is not a union member, and a union rep or workplace colleague cannot be persuaded to assist, representation permitted by a parent, guardian or appropriate adult. The latter could be chosen from persons on the police appropriate adult scheme or similar." (Alan Treanor on behalf of Civil Service Staffside)

"Young employees can be naïve and vulnerable when facing an employer in a disciplinary or grievance hearing." (JACS)

Suggested types of representatives that might be permitted where the employee is under age 18 included;

A parent, legal guardian, god-parent, other close friend or relative who is over the age of 18, careers teacher, workplace mentor (if a work placement), or an appropriate adult chosen from persons on the police appropriate adult scheme.

"A colleague or friend / nominated perosn not related would be suitable as representation, but family members or relations would be too closely personally related for the process not to become personal" (Employer)

"If some form of extended representation is considered appropriate, we consider that it should be limited to the individual's parent or legal guardian. That said, we do have concerns about the impact of such a person at a disciplinary meeting. Not only is the dynamic of the meeting likely to change but also, there are likely to be instances where a parent and/or legal guardian may obstruct the progress of the meeting because they are so closely linked to the individual concerned. The employer must be able to conduct its processes without obstruction." (Law firm)

"In relation to employees under 16 it would be appropriate for the Code to invite employers to consider allowing an employee to request a parent or guardian to attend with them, in place of a TU rep or colleague." (Employers' association)

QUESTION 1(c) - Where the employee is the sole employee of the business

Responses

41 respondents agreed that the code should make further provision where the employee is the sole employee of the business, including 11 employers, 12 employees, 1 employers' association, 1 trade union and 12 'other' respondents.

27 respondents did not agree, including, 10 employers, 5 employees, 1 employers' association, 1 trade union and 7 'other' respondents.

Comments opposing special provision in the code for sole employees included;

"We do not consider that sole employees should have significantly more rights than other employees." (Law firm)

"Each employee already has the right to have trade union representation, even though the company may not even recognise the union. Why should someone be of more of an advantage just because they are the only employee, also why should the smaller employers have an additional burden than that of larger employers." (CIPD)

"The current option to use a trade union official already provides a solution in this circumstance." (Employment Law Consultancy)

"Firstly, employees can call upon a trade union representative anyway. Secondly the code should not be so specific. If we keep including all potential outcomes of every business in the Island it would not end up as a code. Thirdly this is onerous on small businesses. Why should small employers have to take extra steps for sole employees, steps that larger employers do not have to take?" (Employer)

Comments in support of special provision in the code for sole employees included;

"ELA (JB) believes that an amendment to the Code may be warranted in this scenario, given that it is not possible for such an employee to have a colleague present. However, we are aware that there are difficulties in identifying a suitable alternative." (ELA (JB))

"There is a normally a right within any fair and balanced disciplianry process to be accompanied by a work colleague of your choice. In this situation the employee is arguablyy significantly disadvantaged." ('Other')

Suggested types of representative that might be permitted where the employee is the sole employee of the business included;

"Due to the lack of other employees being available, they should be entitled any person they trust." (Employee)

"An appropriate representative from a similar work environment." (Employers' Association)

"To ensure fairness we believe that sole employees in this situation should be permitted the right of representation by a "friend", although that "friend" should not act in a legal capacity if he or she is a lawyer." (JACS)

"If it was considered appropriate to amend the Code to address this scenario, we do have significant concerns as to whom the representative should be. We do not consider that it would be appropriate to extend the right generally so that the employee can bring whoever they want. The Code should restrict the employee to bringing a certain representative." (Law firm)

"The employer must have discretion to limit the category of person who can attend. An employer should not be expected to consider allowing an employee a right to bring a lawyer, anyone whose professional or commercial interests might conflict with those of the company (e.g. someone working for a competitor) or a politician." (Employers' Association)

"ELA (JB) would invite the Forum to consider whether a member of JACS might be an appropriate representative in such situations, given JACS' expertise and in order to maintain confidentiality. We do not feel that a friend, family member or legal representative would be appropriate. The scenario set out in (c) is likely to be rare. Accordingly, if JACS' remit were to be extended in this regard it should not place undue burden upon its resources. However, JACS would need to be consulted

about whether it feels that such a role is appropriate given considerations re impartiality if an unfair dismissal claim was brought subsequently." (ELA (JB))

QUESTION 1(d) - Where an employee may be prevented from following his or her profession as a result of any disciplinary action taken where employment is subject to approval by an authority and there is the potential for that authority to be influenced by the outcome of the disciplinary proceedings.

The Forum explained that this might apply where, for example, a doctor or teacher is disciplined for actions of gross misconduct against a patient or pupil and the outcome of that disciplinary hearing could influence the relevant authority in deciding whether the employee can continue in his or her profession.

Responses

Thirty-six respondents agreed that the code should make further provision where an employee may be prevented from following his or her profession, including 10 employers, 14 employees, 1 trade union and 11 'other' respondents.

Twenty-six respondents did not agree, including, 11 employers, 4 employees, 3 employers' association, 1 trade union and 7 'other' respondents.

Comments in support of provision being made in the code for situations where an employee may be prevented from following his or her profession, and suggested types of representatives that might be permitted, included;

"Where allegations against an individual are so grave as to have the potential to influence a relevant authority in deciding whether the employee can continue in his or her profession, JACS believes that an employee could not be fairly expected to represent him/herself, neither would the right to be accompanied by a trade union official or work colleague be sufficient. In such circumstances JACS already advises employers to give serious consideration to allowing representation by a third party which could be a lawyer." (JACS)

"We would therefore welcome additional representation for the employee in the form of a colleague from the same profession who might not necessarily work within the same organisation, or indeed a family member or close friend. If however, they did request representation in the form of a legally qualified professional, we feel that we could allow this although we too would wish to have our legal representative present." (John Lewis Partnership)

"In such serious cases, when the potential loss of livelihood is at stake, the employee facing possible disciplinary action should not be restricted in their choice of possible representative." (Guy Le Maistre)

"Where the outcome could destroy a career then representation of any kind should be permitted" (Employer)

"We already make allowances where right to profession is an issue, specifically with regard to doctors and teachers as it is included in their terms and conditions of employment. Where a disciplinary outcome could be dismissal and affect an individual's right to practice we would again consider each case on its own merits. In general terms where professional bodies have the right to terminate a person's right to practice we would encourage internal employment processes to be considered as part of their deliberations and therefore exhausted prior to their hearing. In those circumstances we would endeavour to ensure a national representative is invited to the SoJ disciplinary hearing, although it would be up to the indiviual if they did not wish this to happen." (Stephanie Holloway on behalf of Human Resources, Chief Minister's Department, States of Jersey)

Comments opposing provision being made in the code for situations where an employee may be prevented from following his or her profession included;

"Such a provision is usually the result from Union/Employers negotiations and this is the most practical way to arrive at this right. It would be difficult (to say the least) to legislate which professionals should have this right in law and which should not; so this scenario should be avoided." (Alan Treanor on behalf of Civil Service Staffside)

"ELA (JB) is mindful of the fact that this has been the subject of UK case law (and that there may be further developments in the future). ELA (JB) is also mindful of the fact that under UK law there is no statutory right dealing expressly with this situation, and neither does the ACAS Code of Practice 1 make reference to this scenario. The consensus of members is that no amendment to the Code is required as this is a scenario which should be dealt with appropriately on a case by case basis. However, it may be appropriate to simply amend the Code to signpost to both parties that they may wish to take legal advice or advice from JACS in such a situation." (ELA (JB))

"Each such profession has access to a well established union or staff side representative body which would be appropriate for admission internally. It is extremely unusual for any similar profession to not have access." (Employer)

"No amendment to the Code is required. Employers should be entitled to consider this on a case by case basis." (Employers' Association)

QUESTION 1(e) - Where the employee is appealing against a dismissal decision

Thirty-five respondents agreed that the code should make further provision where an employee is appealing against a dismissal decision, including 9 employers, 15 employees, 1 employers' association, 1 trade union and 9 'other' respondents.

Twenty-nine respondents did not agree, including 13 employers, 3 employees, 2 employers' associations, 1 trade union and 10 'other' respondents.

Comments opposing special provision being made in the code where an employee is appealing against a dismissal decision included;

"ELA (JB) considers that there is adequate provision in the Employment Law and the Code as it currently stands. The definition of 'disciplinary hearing' at Article 78A(7)(c) includes "the confirmation of a warning administered under paragraph (a) or the confirmation of any other disciplinary action taken under paragraph (b)." Paragraphs 39, 45 and 49 of the Code are also relevant." (ELA (JB))

"The appeal is still part of the disciplinary process, and as we do not believe that any situation should give rise for more rights in relation to representation, the appeal should be no different. Should someone different become involved at this late stage, it could give rise to delays and more cost and time of employers spent, to ensure that they do not fall foul by being unreasonable to any requests received by their past employees representatives. Should an ex-employee feel aggrieved, then they have the right to bring a claim from Unfair Dismissal The current rights under the employment law/code of conduct is sufficient." (CIPD)

"JACS believes that current provisions are adequate for disciplinary hearings or appeals against dismissal (in this belief we appear to be of the same view as other employment advisers in comparable jurisdictions and the UK). If an employee could be represented in such a hearing by a representative other than a work colleague or trade union representative this could open the door to a legal representative. It is our view that modern employment practice should be to encourage settlement of issues in a non legal framework whenever possible." (JACS)

Comments in support of special provision in the code where an employee is appealing against a dismissal decision, and suggested types of representative that might be permitted, included;

"In this situation the employee should be entitled to have someone with them to help outline their case for appeal. However I would personally like to see this restricted to a work colleague, friend or family member and not be open to legal representation as

this just elevates the whole case to one that has the potential to get out of control." (Other)

"RCN activist are trained to deal with all senarios and would be appropriate to support individuals at all stages of the D&G process." (Kenny McNeil, Chairman Royal College of Nursing (Jersey Branch))

"In addition to the existing permitted representative types of work colleague and trade union official/representative for the case of an appeal against a dismissal decision, the employee should be given the opportunity to be represented by another independent person, including friends and politicians but not legal representatives or family members. In this way, independent representation would be assured for all employees at some part of the disciplinary process, without involving either party in escalation to the legal level or unduly risking the issue becoming personalised." (Employee)

QUESTION 1(f) - Where related criminal charges are in progress against the employee

Twenty-eight respondents agreed that the code should make further provision where related criminal charges are in progress against the employee, including 7 employers, 11 employees, 1 employers' association, 1 trade union and 8 'other' respondents.

Thirty-three respondents did not agree, including, 14 employers, 7 employees, 1 employers' association, 1 trade union and 10 'other' respondents.

Comments in support of special provision in the code where related criminal charges are in progress against the employee, and suggested types of representative that might be permitted, included;

The employee facing possible disciplinary action should not be restricted in their choice of possible representative. However, the potential consequences of the outcome of criminal charges should not necessarily be a matter which should concern the employer or members of the panel deciding on the outcome of the hearing - although the employee may ultimately face automatic dismissal if they are subsequently found guilty of criminal charges." (Other, Guy Le Maistre)

"We have access to legal advice and representaton if appropriate. In this senario if there were criminal proceedings going on it is likely they would have been allocated a Lawyer to manage there case." (Kenny McNeil, Chairman Royal College of Nursing (Jersey Branch))

Comments opposing special provision in the code where related criminal charges are in progress against the employee included;

"We believe that each process should be dealt with seperately. Our Disciplinary process is sufficient in ensuring that there is no need for additional representation, and therefore would not need to align with any criminal proceedings. We would therefore welcome a companion into the meeting, as our current policy dictates, in the form of a Trade Union Rep or a fellow employee." (John Lewis Partnership)

"Criminal charges are quite separate from and not dependant upon employment decisions. We understand that the Police already have their own extensive codes and obligations designed to protect accused civil rights." (Employer)

"We do not believe that any extension to UK employment law or codes of practice has been made to deal with this situation. Accordingly, we do not consider that any such extension is required here. The employee is perfectly entitled to receive legal advice outside of the internal process and, on the basis of that advice, can make an informed decision as to any responses and or statements that he/she would want to make during an internal process. The Code could be amended to state that as a matter of good employment practice, the employer may wish to remind an employee that he/she can take legal advice prior to an internal hearing should the employee wish to do so." (Law firm)

"If the employee is dismissed (without the right to representation by a representative other than a work colleague or trade union representative) he/she has the right to make a claim of unfair dismissal to the Employment Tribunal – where the right to legal representation and to cross-examine witnesses is allowed – thereby conforming to Article 6 of the ECHR. Whatever subsequent action is taken in the criminal courts is, in our opinion, a separate matter." (JACS)

QUESTION 2 - Any other circumstances

Respondents were asked if there are any other circumstances in which it would be appropriate for an employer to consider permitting other types of representatives in disciplinary and grievance hearings.

Some respondents re-affirmed their view that the present situation is adequate, including:

"There has been no evidence presented that indicates the current arrangement is too restrictive. Ultimately, all employees have recourse to the Employment Tribunal

where they may be represented by a lawyer.” (Channel Islands' Co-operative Society)

“The current rights under the employment law/code of conduct are sufficient. We do not see any reason to change the statue or any code of conduct as everyone should be given the same rights, and discretion should be left up to the employer if they would like to offer above than what is required.” (CIPD)

JACS noted one other circumstance in which it considered that it would be appropriate for an employer to consider permitting other types of representatives in disciplinary and grievance hearings included;

“On occasions JACS has noted that an employer may use a legal adviser to present the employer's case at a disciplinary hearing, particularly when the employer him/herself has been involved in the investigation of the alleged disciplinary offence, or at a grievance hearing where the employer is the subject of the employee’s grievance. In these circumstances, in the interests of fairness, we believe the employer should advise the employee of that intention and offer the employee the facility of representation by his or her own legal adviser.” (JACS)

QUESTION 3 – Any other comments

Relating to role of representative –

“I think the code should allow entitled any person the individual trust to attend the hearings but there would to be guidance notes for the employee's representative to clarify what is their role and how they are expected to perform it to ensure that all parties are clear on the proceedings.” (Employee)

“I would hope that the type of support received by the "representative" is appropriate support wtih an understanding of the reason for the disciplinary/grievance/dismissal. however, this may have an impact upon the HR and management on the panel who are not from a legal background - this would need training/understanding from both to argue against a legal rep.” (Employer)

Interpreters -

A number of respondents suggested that an employee should be permitted to be represented by an interpreter or translator.

“The Code should state that an interpreter is permissible in cases where there are language difficulties.” (Alan Treanor on behalf of Civil Service Staffside)

The JHA had noted that “Translators may also be relevant.”

Supporting a wider right to representation –

A number of comments were received supporting a wider right to representation that is currently provided in the Employment Law.

“All circumstances where it suits the employee. Surely the purpose would be to avoid dismissal and the subsequent appeals , tribunals etc. A well defended case within a disciplinary hearing could well save a great deal of pain and tribunal time later on.” (Jon Scott)

“Representation should not be restricted. An employee should be able to be represented by whoever is best suited to accompanying them and putting their case and that could include a parent, carer, qualified medical professional or a suitably experienced friend or other relative.” (Guy Le Maistre)

“I feel that all people should be able to have a friend with them in this potenially stressful situation.” (Kristina Moore, Deputy for St Peter)

Relating to business -

“Everything needs to be kept as simple as possible, with fewer, and not many, exceptions. Defining exceptions is of particular importance.” (Herald Trust Ltd.)

“Almost all the businesses in the island employee less than 10 employees and they are already finding it difficult to cope with the legislation in relation to disciplinary procedures. To make it more problematic by introducing the right to have anyone attend a disciplinary hearing would be counterproductive. Currently if the employer is happy with the employee’s request to have someone else they will usually allow it anyway, and if they were unhappy and there was a legal requirement, they would simply say no and take the fallout from it. Not having the absolute legal right could result in an employee actually keeping their job.” (Independent Consultant)

“Imposing too many obligations on employers, whether through legislation or even in guidance, can hamper the effectiveness of businesses at a time when many are struggling to break even. The States of Jersey should not intervene excessively in internal business management: employers must be allowed to apply their own discretion wherever possible, within the parameters of existing legislation, customary law and guidance.” (Employers’ Association)

RECOMMENDATION

REPRESENTATION IN DISCIPLINARY AND GRIEVANCE HEARINGS

"The Code could not possibly address all potential circumstances in which an alternative representative may be appropriate and it will be difficult to define certain situations. This is likely to cause confusion and difficulties going forward." (Law firm)

"The smaller employers on the Island already struggle with the current regime, to increase the burden is not going to make the process any fairer, in fact it may have the opposite effect, as employers have to do more to establish when and where they should be offering more rights to employees." (CIPD)

"To include in the Code of Practice situations where representation to a further extent than currently provided should be considered may place an employer in a situation where they feel that to deny such representation would be disadvantageous to any defence of claim at tribunal. That is almost akin to making a legislative amendment which has already been considered unnecessary by the States." (Employment Law Consultancy)

"The Code needs to focus on the key issues and should be a straight forward document. The difficulty with amending the Code in the way suggested, is that these issues are very complex. There are good business reasons and practical reasons why a company may not want someone from outside the business or an employee's family member to act as representative in a meeting like this. These may include confidentiality issues and the emotional upheaval that may arise from having a family member (for example) attend such a hearing, which could be very disruptive. In any case, if an employee wants and an employer permits a representative from outside of the business to attend, there can be no expectation that the employer will make any kind of financial contribution towards this: any cost will have to be borne by the employee." (Employers' Association)

"Internal matters are for internal processes; managers (and trade unions/staff side groups) should resolve and that the place for lawyers/advocates is in external tribunals and court cases." (Employer)

"A disciplinary or grievance process is an internal process which is private as between employer and employee. In many instances, such procedures can be concerned with commercially sensitive or otherwise confidential matters and/or personal/sensitive personal data. Extending the right to representation to others outside of the business could cause significant issues for an employer. We would strongly recommend that if the right to representation is extended beyond its current scope, there should be some guidance in the Code in respect of the responsibility of that person to maintain confidentiality in respect of the process and matters discussed therein." (Law firm)