



FACT SHEET

Support persons and disciplinary meetings - employers' top questions answered

One factor the Fair Work Commission takes into account when deciding if a dismissal was unfair is whether the employer unreasonably refused to allow the former employee to have a support person present to assist at any discussions relating to dismissal.¹

How this works in reality can be difficult for employers. Here are the top questions we deal with in relation to the participation of support persons in important (and often stressful) employment related discussions. This includes; do employers *have* to offer a support person; can employers refuse a particular support person; and how to manage an 'overly enthusiastic' or obstructive support person.

Do employers have an obligation to offer a support person to an employee?

There is no positive obligation under the *Fair Work Act 2009* on employers to offer an employee a support person during discussions, whether or not these concern, or might lead to, dismissal.² The obligation on employers is to not unreasonably *refuse* a request made by an employee, to be assisted by a support person at any discussions relating to dismissal.

If there is no positive obligation, should employers offer them to employees?

There are three reasons why an employer should offer a support person for disciplinary meetings even though it is not specifically required.

Firstly, it is generally seen as fair and best practice to provide employees with the opportunity to have external support in important employment-related discussions. These discussions can be very stressful for employees and a support person can actually be of assistance, particularly where an employee is, or may become, upset.

Secondly, in the unfair dismissal case of *Jimenez v Platypus Pty Limited*³, the employer was heavily criticised on this point even though the employee had not requested a support person. The circumstances were that the employee was not informed of the purpose of the meeting – set up by the employer to discuss allegations of serious misconduct – and in fact, was led to believe that the meeting was to give the employee good news.

The Commission held that as the employee was not aware of the reason for the meeting, he did not request a support person – when he might have done had he been able to properly appreciate the seriousness of the situation. By actually offering a support person, an employer avoids being questioned in relation to support persons in any unfair dismissal application.

Thirdly, offering a support person provides the employer with an opportunity to inform the employee who will be acceptable as a support person – allowing an employer to more cleanly refuse any unsuitable person

– which leads to the next question we are frequently asked.

Can an employer refuse a particular support person?

In short, the answer is yes. The recent unfair dismissal case of *Trembath v RACV Cape Schanck Resort*⁴ provides some guidance as to when it would be considered “reasonable” to do so.

In that case, Ms Trembath asked a co-worker to be her support person in a meeting to discuss allegations of serious misconduct against her. However, the employer refused to allow Ms Trembath's nominated support person to be involved in the meeting on the basis that the co-worker, having been involved in the factual circumstances, would themselves have an interest in the meeting, resulting in a conflict of interest.

Commissioner Wilson agreed that this was a “reasonable” refusal by the employer to allow the employee her preferred support person.

At the time of the refusal, the employer offered to either delay the meeting, or stated that Ms Trembath could involve a Mr Roche as her support person – Ms Trembath agreed to have Mr Roche. Interestingly, Commissioner Wilson expressed more serious concerns over the choice of Mr Roche as a support person, because Mr Roche was a representative of the employer’s management and, subsequently, significantly involved in the dismissal process. The Commissioner commented, *‘By no means could he be regarded as someone who would give Ms Trembath “support” in any of the capacities implied by that word; whether as an advisor, counsellor or representative’*.

While Commissioner Wilson did not make a finding that the employer unreasonably refused Ms Trembath a support person on this basis, two points can be taken from this case:

- It is not unreasonable to restrict co-workers from being support persons if they will or might have any involvement in the matter at hand (e.g. as a witness in an investigation or formal hearing of any kind). In that case, there is a risk that any evidence they might later give will be seen to have been compromised by things they have seen and heard in relevant meetings.
- It is rarely (if ever) a good idea to have management involved as a support person. This is because they are unlikely to actually provide the support an employee needs in these situations on account of a hopeless conflict between the role a support person is supposed to perform and their management role, as representative of the employer.

Regardless, in many situations it is best (and not unreasonable) not to have co-workers involved as support persons, simply from a workplace confidentiality point of view.

So how should employers manage an employee’s support person choice? Ideally, the employee should be informed of any parameters surrounding their choice of a support person upfront (for example, not someone who might be a witness, not a co-worker) to avoid any delays or controversy. The employee should also be requested to advise, in advance, who their support person will be so that any issues can be addressed prior to the meeting. If an inappropriate support person is presented, the employee should be given a reasonable opportunity to find an alternative.

How to manage an “overly enthusiastic” or obstructive support person

The Fair Work Commission cases do not provide a great deal of guidance on the role of a support person, other than to say that they are “not an advocate”.⁵ Generally, it is reasonable to expect a support person to:

- take notes;
- assist with clarifying the process, questions asked, or responses given; and
- quietly prompt or give advice to the employee, including requesting a break if needed;

but only to the extent that their input doesn’t overly disrupt the meeting.

As a first step to managing their presence, a support person should be acknowledged and they should be reminded that their role is as a support person, not as an advocate. It is also important to remind them of the need for confidentiality.

Some recommendations for managing an overly enthusiastic support person include:

- If at any point the support person appears to be advocating, or is becoming argumentative or

obstructive, they should be reminded that they are “here for support only, and not to be an advocate”. The employee and their support person could also be offered a short break (e.g. about 5-10 minutes) to confer.

- If the support person starts answering for the employee (beyond what is helpful/clarifying), another strategy might be to say, “I need [the employee] to answer this”.
- If they become too obstructive, the support person should be warned that if they continue to advocate, they will be asked to leave.
- As a last resort, if the behaviour continues, the support person should be asked to leave the meeting on the basis that they are being obstructive, and not carrying out the role of the support person. The meeting can then continue with the employee (perhaps after a short break to allow the employee to “regroup” if required). If the employee objects to continuing, it will depend on the circumstances as to how this should be handled – with a focus on what is fair and reasonable. Possibilities include giving the employee an opportunity to locate an alternative support person; pressing on with the meeting regardless (without a support person); or, giving the employee the option to respond to allegations in writing.

Unless a support person is being obstructive or difficult, it is generally advisable to allow some leeway on “advocating” during disciplinary meetings. It will often be easier to communicate with a reasonable advocate than with a difficult employee. In the vast majority of situations, having a support person involved does not present any additional issues for the employer to manage and, as noted above, can actually assist.

1. Section 387(d) *Fair Work Act 2009*.
 2. See the Explanatory Memorandum to the *Fair Work Act 2009*, paragraph 1542.
 3. [2016] FWC 5141.
 4. [2017] FWC 4727.
 5. *Victorian Association for the Teaching of English Inc v de Laps* [2014] FWCFB 613.

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