



# Fact Sheet

## EMPLOYMENT LAW

### Support Persons

It is not uncommon for employees to assert a right to bring a support person to a meeting. Some employers are unsure whether to agree to this request or not. Particularly when they know the support person is a lawyer or, worse, a well-known agitator who will disturb or take control of the meeting.

A recent decision<sup>1</sup> of the Fair Work Commission (**Commission**) has provided some welcome clarification in this area.

#### Is an employee entitled to bring a support person?

The position in respect of meetings which may result in the termination of employment is relatively clear. In determining whether the dismissal of an employee was harsh, unjust or unreasonable (in other words whether an employee has been unfairly dismissed), the *Fair Work Act 2009* (Cth) requires that the Commission must, amongst other things, take into account whether the employee has been allowed to have a support person present to assist in any discussions relating to the dismissal.

This requirement means that, as a general rule, if an employee seeks to bring a support person to a disciplinary meeting then that request should be accommodated.

While the legislation does not specifically require an employer to advise an employee that he or she is entitled to bring a support person to a meeting, a prudent employer will generally take this step to avoid any controversy about the issue.

As to meetings with employees about any other issue (e.g. grievance hearings), it is advisable for an employer to adopt the same approach as above.

#### What is the role of a support person?

A support person's primary role is to provide 'support' to the employee. This support can be in the nature of emotional support, guidance as to the manner in which the employee conducts themselves during the process or to prompt the worker as to any information he or she has overlooked providing.

As a general rule, a support person is not entitled to advocate on behalf

of the employee. Nor may the support person answer questions directed to the employee by the employer. The Commission recently ruled on this issue.

Despite the Commission's recent decision on this issue, employers should adopt a common sense approach. If a support person is engaging in a small amount of 'advocacy' then the employer would be wise to consider whether that conduct is compromising the meeting, disturbing it or affecting the employer's rights. If it is not, then some tolerance may need to be exhibited.

#### Can you refuse to have a particular support person attend?

An employer is within its rights to refuse an individual the right to attend a meeting as a support person but it should only be a right exercised in exceptional circumstances. Such circumstances might include where the person has a history of violence.

Where an employee wishes to bring a lawyer as a support person, the employer should carefully consider the consequences of granting this

1. *Victorian Association for the Teach of English Inc (VATE) v Debra de Laps* [2014] FWCFB 613

request. Factors such as any past dealings with the particular lawyer and the complexity of the matters in issue should be considered.

The consequences of refusing an employee an opportunity to bring a support person of his or her choice could, if the decision is found by the Commission to have been unreasonable, result in a fair dismissal becoming an unfair dismissal.

### Planning so that things don't go wrong

If you require an employee to participate in your disciplinary process and it is possible that the outcome of the process could lead to termination of employment, prior to taking action, you should:

- *ensure the employee is aware they are entitled to have a support person present during the process and communicate this to them clearly either in person or preferably in writing;*
- *ask the employee to provide you with the name of the support person prior to the meeting so that they can be accommodated during the process;*
- *inform the support person of their role in the process at the commencement of the meeting (or prior to the meeting if you hold concerns about their involvement);*

- *allow the support person to provide assistance during the meeting, whilst ensuring they are not speaking or advocating on the employee's behalf; and*
- *allow the support person and the employee sufficient opportunities to consult with each other privately as required.*

In all other meetings, you should consider observing the same process.

If you form the view that a support person is advocating or attempting to answer questions on behalf of the employee and that is disturbing the meeting or impeding your rights as the employer, you should politely but firmly remind them that his or her role is to offer support and not to speak on the employee's behalf. If the support person continues to behave in a manner which you consider falls outside the scope of his or her role, you should adjourn the meeting and seek urgent legal advice.



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