Do you have to offer employees a support person at disciplinary meetings? What is the support person's role? Can you refuse to allow a requested support person to attend meetings? *Lander & Rogers senior associate Amanda Harvey answers these questions and more*.

Q: Can the employer request that only one person speak rather than allow both employee and support person to speak?

A: That's correct. The support person is not supposed to be an advocate for the employee. There may be circumstances where a union representative might attend, or even a lawyer, but the employer is well within its rights to make sure that that person is there in a support capacity only.

They could potentially go on a break and suggest to the employee what responses might be given, but the support person is not an advocate.

Q: Do you have to offer a support person when giving a warning, not just a final termination?

A: The procedural fairness requirement set out in s387 of the Fair Work Act. in terms of a support person is specifically in relation to meetings that might result in dismissal. Therfore it's where the opportunity is given to the employee to respond to whether their employment will be terminated is where there must be the opportunity for a support person to be given.

But what is interesting is that Fair Work Australia is allowed to consider any other factors it considers relevant. Therefore in the advice that I've provided to various clients, I don't see any harm in allowing a support person to be present in any meeting that is related to performance management, provided they're only there in a support capacity. That would only be considered of benefit when the Tribunal is assessing whether procedural fairness has been allowed, because what other conclusion can there be, than the employee was absolutely allowed a support person on every occasion that one was requested?

It would be a managerial decision to allow a support person in any other meetings, but I don't think it would be a problem.

Q: Can you refuse that an employee's colleague be a support person?

A: I can think of a few examples where such a refusal would be appropriate. There are occasions where the colleagues would be involved in the event that has occurred. So for example they may have been a witness in relation to an allegation that has been made and provided a statement for an investigation. You can't then allow that support person to be involved in open discussions with that employee in a performance meeting, because of the potential for the contamination of evidence in the future if there are any proceedings.

Another would be potentially not refusing them to have a colleague as a support person but recommending to them that they select somebody somewhat removed from the specific work area, because you don't want to draw attention to the fact that you are having a performance meeting that the employee and the support person are attending.

Other than that, I don't think you can reasonably refuse a colleague being a support person. Often an employee is going to try to have somebody with them who they are comfortable with and that will support them, and that will often be a colleague or a friend.

Q: Should the employer advise of or insist the employee have this support person? Is it still procedurally fair if we just don't mention it and only address it if approached by the employee?

A: You need to be seen to be giving the employee an opportunity to have a support person. My recommendation would always be that the employer or the manager actually says to the employee in a letter arranging the meeting, or in any conversation that you have to arrange the meeting, that they are welcome to bring a support person along.

If you are avoiding saying that to the employee, it's going to come up eventually in allegations by the employee that they didn't even know, for example, that they could have a support person present, and the employer failed to meet that criteria in s387 of the Fair Work Act.

Q: What does the legislation require of employers in terms of providing to employees any notes taken during formal disciplinary meetings?

A: There's no actual requirement but in our view, the more notes the better. If you have written notes, they can be used subsequently - particularly handwritten notes that are taken contemporaneously (*i.e. real time)* in the meeting. It's very, very difficult for an employee to deny that notes of the meeting are accurate if the employee was right there and saw you writing them at the time.

My preference is always that they be taken, because you don't know when you are going to need to use them. You don't know at that time whether the employee is going to make a claim of unfair dismissal.

Q: Regarding getting a response from the employee [to allegations of poor performance or misconduct], what do you do if the employee declines to respond? Is it sufficient to note that "X declined to respond" on your record of the meeting?

A: Yes it is. It actually would also be appropriate for the employee to sign a simple sentence to that effect. They may refuse to do so but the manager should just write underneath, "Employee refused to sign this acknowledgement" and then date it. That of course is an extremely "lawyerly" approach, but that would be ideal, in my view.