



# The Right to be Heard by a Neutral and Impartial Third Party

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Participating in an internal appeal process or arbitration can often bring about major stress. Confrontational situations are known to be emotionally taxing, but become even more so when one's disagreement must be heard and decided upon by a third party. In addition to the frustration, anxiety, sadness, deception and range of other emotions normally experienced in such situations, the presenting of one's conflict before a panel or tribunal adds a new set of worries: procedural, financial and time-related ones. When involved in a case, one can only hope that both the decision-maker and the decision are fair.

This concept of fairness is inextricably linked to the principles of natural justice which are a) the right to be heard and b) the duty to impartiality and neutrality on the part of the decision-maker. Disregard for these principles invalidates the entire decision-making process.

## The Right to be Heard

A conflict is often the result of two different interpretations of one reality. A dispute begins with each party attempting to convince the other that his/her position is correct. When neither side succeeds, a common reaction is to find recourse in a neutral third party who will put an end to the dispute. From that point on, the focus is placed on the third party to listen, understand and decide in favour of one side or the other. For this reason, each party wants to be heard, and most importantly, to feel heard.

"To be heard" means that everything is managed in such a way that each party can adequately state his/her claim in regards to the source of conflict.

In particular, this includes:

- The right to be informed of and understand the facts and arguments over which the final decision will be rendered, in order to be adequately prepared;
- The right to be informed and be made aware of the proof the other party will use to convince the decision-maker of his/her position (documents, pictures, witnesses etc.) in order to be adequately prepared;
- The opportunity to present one's arguments and evidence in suitable conditions (in terms of time allotted, availability of participants, place and method of presentation - either in written form, in person, or in some other way deemed acceptable, etc.);
- The obligation to respect the applicable rules of evidence;
- The right to obtain information or guidelines within a reasonable timeframe, with respect to the specific circumstances of the case;
- The right to legal representation, if required;
- The right to express oneself in the language of choice, or to have the assistance of an interpreter;
- The right to respond to allegations made by the other party;
- The right to cross-examine the other party's witnesses, if necessary;
- The right to obtain a copy of a decision with reasons based upon arguments presented in the course of the process and rendered by individuals who have attended the proceedings.



These rules will be adapted according to the unique aspects of the subject and the case. However, it is preferable to have a well-structured decision making process in place in order to avoid omissions or the possibility of having a decision overturned due to a demonstrated lack of “right to be heard”. An internal appeal policy responding to the needs of the organization is often the best foundation on which to build the framework for an appropriate decision-making process. This, in turn, will ensure that all parties feel properly and completely heard.

### **The Impartiality and the Neutrality of the Decision-Maker**

This seemingly obvious rule of natural justice can at times be difficult to apply and interpret, especially in relation to sport organisations that often lack critical human and financial resources. Regardless, the absence of resources is never a valid excuse for partiality or bias on the part of the third party responsible for rendering a decision. Here again we must remember to put ourselves in the shoes of the individual who has much at stake and who hopes that in the case of a loss, there is at least good reasons for it.

Impartiality and neutrality refer to the degree of objectivity the decision maker brings to his/her current case and to his/her indifference in the outcome of the issue. To evaluate these principles, appearances count as much as reality, because not only must justice be done, but it must also appear to be done.

The extent to which this principle must be followed will vary according to the specifics of the type of process observed (internal appeal, arbitration, common law tribunal, etc.), the field concerned (amateur sport, international commerce, human rights, etc.), and the relevant case (potential outcomes, delays applicable, etc.). Although many of these factors will be decided on a case-by-case basis, the following is a list of some factors that may cast doubt on a decision-maker’s impartiality and independence:

- Being the subject of external or internal pressures that influence or risk influencing the decision-making process;
- Having rendered the decision being appealed;
- Having suggested to one of the parties that a complaint be brought forth;
- Showing hostility towards one of the parties;
- Having a financial interest in the case;
- Having personal or professional relationships with one of the parties or their close contacts;
- Being a family member of one of the parties;
- Having argued one side of the dispute in a similar case in the past;
- Having represented one of the parties in the past;
- Acting as a director on a board that is involved with one of the parties;
- Acting as a director on the board of a sport organization if one of the parties is a sport organization;
- Having acted as a lawyer or representative for a sport organization when one of the parties is a sport organization;
- Having acted as a representative for an athlete, coach or official within an organization when the file involves an athlete, a coach or an official.

In short, anything that could, in reality or in appearance, influence the decision- maker’s ability to listen, evaluate or analyse the case breaches the rule of impartiality and neutrality and may constitute a conflict of interest.



In order to overcome the problems that can create such a situation, the following three preventatives, and sometimes curative methods, can be used: refusing a file, disclosing potential sources of conflicts of interest, and recusing oneself from deciding a case.

### **Refusing a File**

Refusing a file is appropriate when the conflict of interest is clear and definite. Examples of such instances include a case in which a decision-maker is asked to hear the appeal of one of his/her previous decisions, or one in which a party to the dispute is a family member. In these cases, the principles of natural justice dictate that one must refuse to hear the matter.

### **Disclosing Conflicts of Interest**

When a conflict of interest is 'indirect' (ie. when it results from a distant relationship between the decision-maker and one of the parties), the rule obliges the decision-maker to disclose to all parties any interest or relationship that could affect his/her impartiality or neutrality, or that could create the appearance of partiality or bias.

In a questionable situation, the decision-maker must always disclose. Uncertainty gives rise to the appearance of partiality; therefore, if the decisionmaker is doubtful, he/she must assume that the other parties to the process are as well. Furthermore, the decision-maker cannot simply declare himself /herself impartial to remove all doubt. The appearance of partiality does not result from any deliberate action on the part of the decisionmaker (which would constitute a direct conflict of interest and an obligation to refuse the file) but from a subconscious predisposition due to relationships, experiences, and interests (moral, financial, psychological, etc.). This is the reason why the concept of conflict of interest is so difficult to define and apply: the decision-maker may not be aware of the conflict, but it nevertheless affects the way he/she broaches a question or causes him/her to prejudge a given situation.

Obviously, there is a need to have a competent and experienced decisionmaker who can protect the parties by offering a fair and equitable process. The duty to disclose brings us somewhat closer to the ideal. By disclosing potential or actual sources of conflict of interest, the decision-maker allows all parties to offer their opinions on the situation by either accepting the individual or, where appropriate, by suggesting that the decision-maker recuse himself/herself.

Finally, the duty to disclose applies throughout the process. A past or forgotten conflict is no more negligible than one that arises in the course of the process. Only when we put ourselves in the place of those who are being judged can we understand the importance of offering a process that is trustworthy from the parties' perspectives.

### **Recusing oneself**

As mentioned previously, disclosure can lead to the recusal of a decisionmaker. It can result from the request of one of the parties or it can be self-initiated when the decision-maker feels that he/she is no longer able to offer an impartial process, or even the appearance of one. When this happens, a new decisionmaker must be chosen and the process starts anew. In conclusion, it is essential to remember the importance of the rules of natural justice, without which decisions could easily be overturned on the basis of a flawed procedure. The application of these rules, however, should be carried out in consideration of all the circumstances surrounding a case: the facts, the risks and the alternatives must be balanced in order for the final outcome to be the best fit for the particular file. As a general statement for all cases, open and direct communication between the parties and the decision-maker will lead to far fewer disputes, misunderstandings and disappointments.