Useful Cases for Investigators to Achieve Practical Justice

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AAWI Conference

The Relevance of Case law

• Lessons can be learned from what courts and tribunals have said about workplace investigations –
  o What has been done well and been “fair”
  o What has not been reasonable or good practice or has been “unfair”
  o Where have things gone seriously wrong
• As an investigator, I endeavour to adopt the policy of doing no harm – not making what is already a bad situation, any worse …
Can your report be relied on?

- These lessons help investigators be aware of flaws in an investigation process which may result in their report not withstanding scrutiny. A report used as the foundation for a disciplinary process or termination of employment may be relied on in a legal proceeding such as an unfair dismissal, discrimination or adverse action complaint.
- Your investigation process and findings may be subject to independent review.

What sort of guidance?

- If your report is tendered at a legal proceeding, what should it contain in order to withstand scrutiny?
- What considerations should you have taken into account in reaching your findings?
- Have you made your judgements on the basis of the appropriate standard of proof?
- Have you taken into account the policies and procedures pursuant to which the employer has engaged you and made sure your process complies?
- Have you exercised procedural fairness and made sure natural justice has been applied?
Natural Justice and Procedural Fairness

What is Natural Justice?

- The WorkLogic book on Effective Workplace Investigations describes the two rules of natural justice as follows:
- The Hearing Rule requires the decision-maker to give an opportunity to the person who may be adversely affected by the decision to be heard in respect of matters relevant to the decision
- The No Bias Rule requires that the decision-maker shall not be a judge in his own cause; that the decision-maker is free from bias
What is Procedural Fairness?

• Procedural fairness in the workplace context requires something in addition to natural justice, namely that the person under a performance or disciplinary process be made aware of the potential consequences of that process, that the process take place within a reasonable timeframe, that the person have a support person of their choice if they wish to do so, that confidentiality is maintained so far as is possible, that there is sufficient evidence on which to base any decision including that all relevant persons are interviewed and that the decision maker complies with their own policies and procedures which might govern the performance or disciplinary process.

What is the source?

• In Victoria the Court of Appeal in Intico (Vic) Pty Ltd & Ors v Walmsley (2004) held that the employer was not bound to act reasonably or to give reasons or to accord the employee an opportunity to be heard – the question was whether the employer had a contractual right to dismiss the employee
• However, in most workplace investigations, there are policies, industrial agreements, or codes of conduct which set out the right to procedural fairness and natural justice
• Statutory provisions, including the Fair Work Act 2009, may also require it eg unfair dismissal considerations (s387), Public Administration Act 2004 values and principles
Lohse v Arthur (No 3) [2009] FCA 1118

- [41] In most cases the critical question is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?...
- [42] The expression ‘procedural fairness’ more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. …
- [43] Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice…

Gera v Commonwealth Bank of Australia Ltd [2010] FMCA 205

- 68. The first principle is that the decision-maker must act without bias or prejudging the issue. Mr Gera alleges that Mr Carroll was biased, seemingly on the basis that Mr Carroll was a senior Bank employee.
- 69. Bias connotes a predisposition towards or prejudice against one party’s case or evidence for reasons unconnected with the merits.
- 70. To prove actual bias on the part of the decision-maker, or here the investigator, requires evidence of a state of mind such that the decision-maker or the investigator is so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. The test for apprehended bias is whether a fair-minded lay observer might reasonably apprehend that the decision-maker or the investigator might not bring an impartial mind to the resolution of the question to be decided.
Standard of Proof

The Briginshaw Standard

- The standard of proof applied is on the balance of probabilities as discussed by Dixon J in Briginshaw v Briginshaw (1938)
- “...it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences".
Dixon J further stated

• “….. the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact ….. it should so find”.

Gera v Commonwealth Bank Case

• [82] …A standard of satisfaction is not specified by reason of the fact that the required investigation is one which … is not required to be a judicial or police style examination of the issues. An employer must be reasonably satisfied that the conduct occurred, and that the conduct constituted misconduct (or serious misconduct as the case may be), having regard to the information obtained during the investigation, the nature of the case, and the particular facts in issue, including their inherent gravity or unlikelihood. Concepts relevant to standard of proof in a civil proceeding in a federal court are not appropriate concepts for use in the determination of the Bank’s satisfaction in a disciplinary investigation
Decisions I have found useful

Principles

• Keep an open mind at all times – do not decide what your findings will be until all the evidence and information has been collected, considered and analysed
• Do not make assumptions or put words in the mouths of witnesses
• If you find out some additional relevant information in the course of the investigation, consider carefully whether it needs to be put to the respondent for a response if there is any risk you might be even subconsciously influenced by knowing it – or ensure that you do not take it into account eg past similar allegations or allegations by another person
The Court found that Mr Lohse was not afforded procedural fairness in the investigation into alleged misconduct towards a female employee.

A decision-maker will be biased if he or she does not approach the decision-making task entrusted to him or her with an open mind which is open to persuasion one way or the other. If a decision-maker has pre-judged a case so as to be unable or unwilling to decide it impartially, that decision-maker’s determination will be affected by actual bias …

Lohse v Arthur Case

[47] As procedural fairness is directed to the obligation to give a person such as Mr Lohse a fair go, it is necessary to begin by looking at what procedural fairness required the relevant decision-maker to do in the course of conducting the process of determining whether Mr Lohse had breached the code of conduct. Because principles of procedural fairness …are to be applied to the processes by which a decision will be reached. If adverse information that was credible, relevant and significant to the determination to be made by the decision-maker was placed before the decision-maker it would be unfair to deny a person such as Mr Lohse an opportunity to deal with it where there was a real risk of prejudice, albeit subconscious, arising from the decision-maker’s possession of the relevant information.
Decision in *Lohse v Arthur*

- The court found that the investigator had failed to comply with relevant procedures in failing to provide the details of the suspected breaches to Mr Lohse (as soon as they were made – there was an 11 week delay)
- Mr Lohse was not given the opportunity to make an oral statement as required in the company procedures
- The investigator made some comments indicating pre-judgement when interviewing witnesses (appearing to agree with comments they made) and he put words in their mouths (assigning a characterisation to a meeting that was not what they had said) – giving the impression that he was biased

Principles

- Ensure there is a valid reason to investigate – and that the investigation will not be causing harm
- Be aware of situations where the behaviour under investigation relates to the respondent exercising a workplace right eg *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd* (No 3) [2013] FCA 525 (the investigation was adverse action against a HSR who had raised a safety issue)
- *Doyle v Dept of Justice* [2008] AIRC 350 (Ms Doyle was harmed by the investigation of a complaint she had not made, and to rub salt in the wound, she was found to have acted vexatiously)
Principle

- Maintain your independence and do not allow any party, including the party paying for your services, to influence or change the outcome of your investigation
- Visy Packaging case - The interference with the independence of the investigation particularly by the General Manager HR Operations, Mr Harmer, cast doubt on the independence and impartiality of the investigation
- Hansen v Mt Martha Community Centre Inc [2015] FCA 1099 - The Executive Summary of the Report was altered to emphasise management’s concern about allegations of “physical violence” and their importance as “a safety issue”, but there was little in the body of the report that actually supported this change

Principles

- Take a practical and common sense approach to the investigation – be careful and thorough but remember that an investigation is not held to the same meticulous standard as the examination of evidence in a Court or Tribunal
- Don’t expect perfect behaviour by employees
- Take into account all relevant considerations and do not take into account irrelevant matters
Gera v Commonwealth Bank Case

• 37. To “investigate” is to “examine, inquire into, study carefully; make official inquiry into.”

• 38. Mr Gera complains that there was not a proper investigation, and sought to minutely examine every variable and nuance of the investigation. However, in conducting an investigation, an employer is obliged to act in a practical manner, and not to embark on a judicial hearing or police style examination of the circumstances.

• [76] In determining whether relevant considerations have not been taken into account or irrelevant matters have been considered it needs to be borne in mind that the decision-maker only fails on this account if it fails to consider a relevant consideration or considers an irrelevant matter where it is something that is bound to be taken into account in making the decision. ... Insignificant matters may not materially affect the decision and therefore failure to take them into account may not warrant the Court reaching a view that the Bank could not have been satisfied, as required here, because it did not take those matters into account. ....
Principles

• Ensure there are sufficient particulars about the allegation to allow the respondent a fair chance to defend themselves
• Don’t investigate something you are not qualified to measure – such as how well a person is performing in their job – it is an investigation into a personal grievance not a forum for criticising how another employee works
• Ensure the allegations are by the person who is making the complaint and they are not purporting to complain on behalf of others


• [163] The Commission is concerned, however, that the allegations were not in all instances sufficiently identifiable by reason of the absence of any identifiable event or particularised conduct to which the Applicant was capable of responding. In most instances, this arose from the allegation being too generalised or lacking any chronological structure. …
• [166] It is to be reasonably expected that if an allegation is made of an employee and the employee is asked for a response, for the response to have a meaningful function - beyond mere proceduralism - then the allegation must have some measure of specificity about it.
Principle

• Be careful assigning labels to behaviour – or making assumptions about characterising behaviour - such as “bullying” or “sexual harassment” or “discrimination”
• Make sure you ground your analysis of the behaviour in the definitions contained in the company policies

Wendy Bann Case

• [105] The Commission is conscious that allegations of bullying (and loosely allied accusations of victimisation, harassment, abuse, intimidation and so forth) are difficult to make out for reason they are perceived impacts by individuals of another individual’s conduct. The Commission is therefore sensitive to the subtlety of the evidentiary task that is before it in recognising … evidence of bullying that has probative value.
• [114] The Commission is also of the view that not all personal misconduct that gives rise to difficulties and tensions and stress in workplace relations by necessity constitutes bullying or harassment (etc). This is so although it may be tempting for those who give evidence in the contemporary environment to reach for such characterisations in an effort to validate the underlying grievance.
Principle

- Be conscious of the difference between bullying or other inappropriate behaviours and the exercise of the employer’s right to issue lawful and reasonable directions
- Reasonable management action – reasonable actions done in a reasonable manner

Wendy Bann Case and WorkSafe Guide on Workplace Bullying

- [115] The Commission must also be careful to distinguish the impact of conduct which is bullying behaviour from the impact of conduct which results from the performance of genuine management responsibilities.
- This guide is not intended to cover dissatisfaction or grievances with organisational and management practices or poor management practices on their own, as they are not workplace bullying. At times people may feel that their working life is unpleasant and that they are being inappropriately treated, but feeling upset or undervalued at work does not mean an individual is being bullied at work (page 1)
What Does a Good Investigation Look Like? – **Gera v Cwth Bank Case**

64. **When what was done by Mr Carroll is analysed it is evident that:**
   a. he interviewed relevant persons involved, sometimes more than once;
   b. he took or was provided with written statements and documents which he subsequently collated and considered;
   c. he has given Mr Gera an opportunity to respond to the Bank’s allegations (including meeting Mr Gera on four occasions), which opportunity Mr Gera has taken including taking the right not to answer certain questions);
   d. he has considered Mr Gera’s responses;
   e. he has considered all materials (including Mr Gera’s responses) in preparing (his) Report;.....

65. **Mr Carroll has, in the Court’s view, investigated the allegations**