Fearless or Fraught?
The Investigator’s Approach
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Fearless?
The Intrepid Investigator?
A Superhero, ready to fly boldly into any situation?
Willing to take any risk?
Heedless of possible dangers?
Fraught?

The cautious creeper?
Always afraid of getting into trouble?
Hoping the truth with emerge without anyone getting upset?

What a workplace investigator is

- Someone with no special powers
- An ordinary person with a specific job to do
- Doing a job that no-one else can do, or is willing to do
What a workplace investigator is not

- A court of law
- A royal commission or commission of inquiry
- A police officer
- Hercule Poirot or Miss Marple (although some advertise that their investigators are licensed)

What a workplace investigator is not

- The investigator cannot conduct an adversarial trial or a commission of inquiry:
  - no power to summon witnesses
  - no power to administer oaths or affirmations
  - no facility for cross-examination
- No power even to question anyone, except by management instruction to employees
What a workplace investigator is not

- Some providers advertise that they apply principles of “procedural fairness” or “natural justice” (sometimes both)
- Putting one side’s allegations to the other side – practical consequences
- Putting anybody’s allegations to third parties (witnesses, other employees, managers, etc) – possible liability for defamation
- Sometimes slander actionable without proof of special damage (eg allegation of commission of a criminal offence)

What to fear: liability for defamation

- No absolute privilege in respect of:
  - any communications in the investigation process
  - anything said in investigator’s report
- Defence of qualified privilege is available – duty to communicate
- Qualified privilege lost if malice
- Malice is:
  - ulterior purpose
  - absence of belief in truth of allegation
  - indifference as to truth (recklessness)
  - intention to harm
What to be fearless about: Independence and Integrity

- Politician’s mantra: Don’t appoint a royal commission unless you know what it is going to report
- Insurance investigators: another time, another place
- Common for workplace investigators to advertise, using words like “objective”, “impartial”, “independence” and “integrity”
- Also common to promise to work closely with management: “working to achieve the most desirable outcome”; “constant communication throughout the investigation to update you and refine the direction of the investigation as required”; “an investigator who will work with you as closely as you want in addressing the investigative outcomes”

What to be fearless about: independence and integrity

- You start badly: you are hired and paid by management
- If you have to rely on management to order people to talk to you, you will go backwards
- If you are seen to be communicating with management as you go, that will reinforce the perception that you are management’s agent
- You need a convincing assertion of independence
What to be fearless about: independence and integrity

- Ask for all documents, not just the ones whoever hired you chose to give you
- Look for contemporaneous, or as near as possible recording of events
- Focus on what is not recorded, as well as what is
- Beware of the WYSIATI (what you see is all there is) fallacy – what should be there, but isn’t, is often the key
- Look for what has happened on other occasions
- Interview widely – even if there are no eyewitnesses, there could be people to whom things have been said at or near the time

What to be fearless about: independence and integrity

- There is still a presumption that, if there is a conflict between senior and junior, junior will be sacked
- Management looks after its own
- Harvey Weinstein is an exception, not a change of presumption: he was sheltered for years
- Only by calling out bad management when you see it will you do practical justice
Objective and impartial fact-finding

- Memory is unreliable
- Unreliability does not seem to be related to lapse of time or “importance” of the occasion
- “Recollection” is invariably reconstruction
- Reconstruction involves:
  - supplying the unremembered details as they should be
  - casting ourselves in the best possible light
  - becoming stronger with repeated renditions

Objective and impartial fact-finding

- The fact-finder is confronted with different reconstructed accounts of the same event
- The task is **not** to choose between those accounts
- The task is to produce the fact-finder’s own reconstructed account:
  - based on the evidence
  - in accordance with the probabilities
- The fact-finder must avoid using his or her imagination to create a reconstructed account
- There is no mould into which cases can be expected to fit
Objective and impartial fact-finding

We can’t tell who is telling the truth and who is lying: experienced judges, legal commentators and psychologists all agree. So-called clues to falsehood are not real: based on pseudo-science and folklore.

Attempts to assess credit from demeanour may result in serious injustice: cultural issues are involved. Lying about one thing does not mean lying about everything.

The cautious but determined investigator

- Be clear about your role and its limitations
- Don’t risk your own or anyone else’s liability for defamation
- Assert your independence
- Report bad management when you see it
- Find the facts objectively and in accordance with the probabilities: don’t label anyone a liar
- Maintain your professional integrity: no client is worth sacrificing it