

DISCIPLINARY INVESTIGATIONS: THE NEED TO BE BOTH EFFECTIVE AND FAIR –

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PART 1: WORKPLACE INVESTIGATIONS

In the past 20 years, Australia has seen a remarkable growth in the proliferation and use of professional investigators in respect of workplace issues.

The growth appears to have come from a number of stimuli, including but not limited to:

- The breadth of incidents that now fall within the ambit of “anti-discrimination” laws;
- Increasing complexity of unfair dismissal laws;
- The increased use of “factual investigations” by Workers’ Compensation Insurers to defeat inappropriate claims by claimant employees;
- The introduction of the “General Protections” jurisdiction in 2010;
- The introduction of Australia wide Anti-Bullying laws in 2014;
- The Harvey Weinstein Effect and the growth of the “MeToo” Movement and sexual harassment claims;
- Increasing complexity with respect to in-house fraud and then need to examine the on-line actions of one or more employees;
- An increase in senior management remuneration resulting in more employees being able to self-fund litigation against their former employer.

While this paper will focus on disciplinary investigations, and the need for them to be both effective and fair, it must be remembered that most comments made will also apply to other subject matters of workplace investigations, such as investigations dealing with harassment, bullying¹ or discrimination as well as investigations arising from complaints under Whistleblower Policies and, in some jurisdictions, legislation.

PART 2: WHAT IS MEANT BY A “DISCIPLINARY” INVESTIGATION?

Most Australian jurisdictions deal with two types of termination of employment, as follows:

- Summary dismissal for misconduct; and
- Termination on notice with payment in lieu for poor performance after several formal written warnings.

¹ See for example, *Bowker and Ors v DP World Melbourne Limited* [2015] FWC 7312

The former is often described as “summary dismissal” resulting from the breach of a key provision of the Contract of Employment and is often taken after a formal internal or external investigation process.

The latter is often described as “termination of employment” after a protracted counselling process involving several written warnings. Investigations in this context are less usual.

In Australia, both types of termination require both procedural fairness and substantive fairness.

Procedural fairness generally means that the employee:

- (a) Is told of the allegations;
- (b) Is given an opportunity to respond;
- (c) Has the advantage of the employer assessing those responses; and
- (d) Is permitted to address the employer on penalty and being told of the penalty within a responsible time.

Substantive fairness generally means that the penalty imposed in the employee “*must fit the crime*”.

This paper will regard “disciplinary” action as summary dismissal for misconduct. The employee the subject of any Investigation and any subsequent disciplinary process will be referred to as “the accused”.

Disciplinary investigations are like cooking a cake. Miss an ingredient and the end result may be less than optimal.

PART 3: WHAT IS REQUIRED FOR A DISCIPLINARY INVESTIGATION TO BE “FAIR”?

It is important to note that a “Disciplinary Investigation” is often the pre-cursor to the commencement of a procedurally and substantive process that may lead to the summary dismissal of an employee.

Where there are serious allegations against an employee, the Investigation may take some time. However, it must be commenced expeditiously. For example, in *Ms RT v The School*² the allegation was that a primary school teacher had been taping three 5 year old students to their classroom chairs, creating a “*seatbelt*” to secure the children to their chairs until they finished their work. Once the employer became aware of the allegations against the teacher it allowed her to continue teaching for a further two weeks before it suspended her and commenced a formal investigation into her conduct. When she was subsequently dismissed, the teacher commenced unfair dismissal proceedings on the grounds of harshness due to the delay between the incidents occurring and the school taking action³. She succeeded. The

² [2015] FWC 2927

³ This is effectively the doctrine of “*laches*” which means “*use it or lose it*”.

Commission said, “*in simple terms, if her behaviour was that significant, the school acted inappropriately by allowing her to continue to teach before it even commenced its investigation.*”

The Investigation may be negatively impacted by the continuing presence of the accused, the complainant and perhaps other employees, in the workplace. Therefore a “fair” Investigation will invariably commence with notice to impacted employees that an Investigation has commenced and identifying what are the various the matters under investigation.

That notice may include being advised of being on paid suspension while the Investigation is undertaken and while the employer considers its Findings and Recommendations⁴. It may be that an invitation is made as to whom the party wishes to be interviewed as part of the Investigation process. Directions should also be given to keep complainants and accused apart. Those directions should be enforced by the threat of further disciplinary action occurring in the event of a breach.

The following further matters must also be taken into account for the Investigation to be regarded as “fair” not only by the parties, but witnesses and the courts:

- 1 Who is the Investigator and how was the selection made? As most employers do not have senior managers with sufficient time available to conduct Investigations, nor the skills to do so, most employers will retain an external Investigator. In smaller companies, this also avoids the procedural problem of the Investigator becoming the instigator of a disciplinary process (see (25) below for further comments).
- 2 The appointment of an external Investigator will also remove issues of bias or unfair treatment as a senior manager may be known to some or all of the parties under investigation. The Investigator must also bring an open mind to the Investigation. For example, in *Batchem v Water Corporation*⁵ the Applicant was dismissed by the Water Corporation, on 30 December 2015, for misconduct in relation to a data manipulation breach and a working hours breach. These matters were investigated and the Applicant’s employment was ended based on the Investigation’s Findings. The Applicant challenged the termination and in particular, the Investigation. The Commission noted:

[76] *However, there are two aspects of the process which are of concern and which have resulted in a flawed process. The first aspect concerns that the fact that Ms Domurad, who was the decision maker, had an informal discussion about the working hours issue with Mr Cooper but did not have a corresponding conversation with Mr Batchem. Ms Domurad’s actions in firstly, having a conversation with Mr Cooper in the first place, and then not having a similar conversation with Mr Batchem, would seem to be contrary to the principles of*

⁴ An unpaid suspension is not recommended as it may imply that the employer had already come to a decision with respect to the employee’s guilt.

⁵ [2016] FWCSum 9088 (21 December 2016)

natural justice. These actions would also suggest a bias by the decision maker, Ms Domurad, against Mr Batchem.

[77] *Further, assumptions seem to have been made about the allegations based on preconceived views about Mr Batchem and his attitude and behaviour in the workplace. This was apparent in the evidence of Mr Ross, Ms Domurad and Mr Derwort. These preconceptions would also appear to be contrary to the principles of natural justice.*

- 3 The use of a third party to hire the Investigator in order to increase the perception of Investigator Independence. In this regard, in some jurisdictions, the use of solicitors may be useful in order to provide legal professional privilege over the Investigation Report. In turn, this may give some witnesses a higher level of comfort when during interviews with the Investigator.
- 4 The Terms of Reference of the Investigation should be determined and provided to the Investigator in writing.
- 5 The Terms of Reference of the Investigation should be provided to the accused, the complainant and the witnesses.
- 6 All allegations made about the accused need to be frames in an open manner and advised so that they can prepare their responses. In *Jimenez v Accent Group T/A Platypus Shoes (Australia) Pty Ltd*⁶, the Applicant challenged his summary dismissal for serious misconduct from his role as store manager. During the unfair dismissal proceedings, the Commission accepted that the employee's failure to record a sale of shoes to the employee's friend and place the cash immediately into the till amounted to serious misconduct, justifying dismissal on notice (not summary dismissal). The Commission found:

[78] *... The procedural errors made by the employer have rendered what would have otherwise been an entirely fair dismissal with notice, to be an unreasonable and unjust summary dismissal.*

Relevantly, the Commission stated: "*The concept of the need to provide an opportunity to respond to potential reasons for dismissal ... is fundamentally predicated upon the decision-maker approaching the issues under consideration with an open mind such that the opportunity represented some practical and realistic potential to persuade the decision-maker to a particular view.*"

The mistake made by the employer was to mischaracterise the serious misconduct by describing it as theft. In circumstances where the sale was subsequently recorded and

⁶ [2016] FWC 5141 (5 August 2016)

the cash returned to the till, the elements required to establish the criminal conduct of larceny could not be found. The investigation was tainted by this mischaracterisation.

- 7 The Investigator should be provided with the Terms of Reference and all supporting materials at least one week before the Investigator commences interviews. This will enable the Investigator to consider what questions should be asked of whom, in what order and to what end.
- 8 The Investigator needs to assess what standard of proof is required in relation to the allegations. The “*standard of proof*” is the evidence required to decide the likely truth or otherwise of allegations. The civil standard of proof is “on the balance of probabilities”. The criminal onus of proof is “beyond reasonable doubt”.

In Australia, *Briginshaw v Briginshaw*⁷ is regarded as the authority for the proposition that if a Finding in an Investigation is made on the balance of probabilities, is likely to produce grave consequences, the evidence should be of high probative value. This places a duty upon Investigator not just weigh the evidence but to test it. *Briginshaw* supports a conclusion that sufficient evidence has been provided if “*the affirmative of an allegation is made out to the reasonable satisfaction of the*” tribunal / Investigator.

- 9 A decision needs to be made as to where interviews are to be conducted. Some employers require all interviews to occur at the workplace but this may intimidate some witnesses and therefore a secure, confidential, neutral place should be determined. The interview must be conducted in a reasonable manner. In *Deng v Westpac Banking Corporation*⁸ the accused was interviewed for five hours without a break and refreshments, the FWC noting that “*The process followed by the respondent resembles that of a Star Chamber*”.
- 10 It is generally prudent for the Investigator to first interview the complainant to ensure that there a no further matters in issue that need to be put to the accused. The complaint may want a support person present. If there are new issues that have come to light, then the original letter to the accused advising of the commencement of the Investigation and identifying what are the various the matters under investigation will have to be expanded upon as the accused is entitled to know what matters are under investigation. In extreme cases, the Terms of Reference may also have to be amended. This should be executed by providing an Amended Terms of Reference, not withdrawing the original Brief and providing a new one.

⁷ (1930) 60 CLR 336

⁸ [2018] FWC 7334 (30 November 2018)

- 11 By this point the Investigator will need to make a decision as to whether to interview all other witnesses and then the accused, or whether the interview the accused before the other witnesses.
- 12 In most cases, the accused is interviewed last. In this instance, the Investigator will need time to collate the material from the complainant and the witnesses and formulate each allegation that needs to be put to the accused. This may not be practical in cases where the accused makes counter allegations. In this instance, all complaints / counter-complainants should be interviewed and then re-interviewed once all witness statements have been obtained and all allegations / counter-allegations are framed.
- 13 All witnesses should be interviewed face to face as this will allow the Investigator to confirm they are not being coached and will allow the Investigator to assess them as witnesses. However, in some instances telephone or FaceTime interviews may be required and if so, the Report should note this variation in procedure.
- 14 All witnesses are entitled to have a support person present. That person cannot take part in the interview nor suggest answers. Support persons should not be other witnesses and should generally not be the same for each witness, although this is difficult to achieve if a Union is supplying the support person.
- 15 The witnesses and support persons should sign Confidentiality Agreements.
- 16 The witnesses should be asked open questions, not ones that determine the answers.
- 17 In some jurisdictions, it is unlawful for interviews to be taped or recorded without the consent of the parties. Accordingly, the Investigator should seek permission to record the Interview and should note that consent is not given to it being recorded if he/she decided to take handwritten notes. See *Krav Manager Defence Institute v Markovitch*⁹, which opens the issue of illegal records and whether the FWC is bound by the rules of evidence.
- 18 All witnesses should be provided with a draft Statement of the Interview and asked to verify and sign it. Any changes should be undertaken in “track changes” and noted and discussed in the Report if they substantially alter the evidence.
- 19 When interviewing the accused there should also be a support person present. That person must be chosen by the accused. In *KB v The Agency*¹⁰ the FWC noted:

⁹ [2019] FWC FB 263 (17 January 2019)

¹⁰ [2018] FWC 6937 (23 November 2018)

[66] *The proposition that, in the absence of a request from the employee concerned, that their manager could be a support person of the nature envisaged by the Fair Work Act is as unworthy as it lacks credibility."*

An employer who does not offer an employee the opportunity of having their own support person in attendance at discussions relating to the employee's dismissal would serve their cause better by simply saying the offer was never made rather than looking somewhat silly by suggesting that the person's manager – a person superior to them and with altogether different interests to those of the employee being subjected to the disciplinary action – was the support person for the employee in the manner envisaged by s.387(d). Patently they were not. A support person does more than offer pseudo-supportive comments of "there, there" in the face of negative commentary, or to offer tissues when bad news is communicated. They may suggest things to say to the applicant, or even to advocate when the employee is unable to. DC was not KB's support person. She was KB's manager.

- 20 The accused should have each allegation put to them and asked whether they admit or deny the allegations and what other comments / explanations they may wish to give.
- 21 If the accused provides new information, the Investigator may have to re-interview some witnesses. The re-interviews should be conducted in the same manner as the first interviews.
- 22 The Investigation Report needs to be written and submitted within a reasonable time of the completion of interviews.
- 23 The Investigator will need to ensure that all papers and materials used in the Investigation and which influence the Findings are collected and referenced. Specimens and three dimensional exhibits should be kept in a safe place but also referenced by photographs or reports as to contents or structure. For example if the allegation was that the employee breached the Contract of Employment by being drunk at work, then the materials collected at the time of the analysis must be preserved.
- 24 If the Investigation Report makes adverse Findings against the accused, the accused needs to be informed of them within a reasonable time and have a reasonable time to respond. At the same time the employer will need to advise the accused that he / she is now the subject of a Disciplinary Process as noted in Part 2 (a) above. In *Deng v Westpac Banking Corporation*¹¹ the accused was given a six page series of allegations and only 24 hours to respond. It was not enough.
- 25 This is where it is important for the Investigator not to be the person who commences the Disciplinary Process. The analogy that best describes this circumstance is that the Coroner cannot be the Prosecutor.

¹¹ [2018] FWC 7334 (30 November 2018)

PART 4: WHAT IS REQUIRED FOR A DISCIPLINARY INVESTIGATION TO BE “EFFECTIVE”?

An “effective” Disciplinary Investigation is not necessarily one that results in the summary dismissal of the accused.

Rather it is one that objectively documents the facts, deals with each allegation, makes Findings on each allegation and then makes Recommendations. In this regard the structure of the Investigation Report is critical. We recommend the following structure:

- 1 Introduction and the skills, qualifications and expertise of the Investigator and confirmation of there being no conflicts of interests or pecuniary interests.
- 2 Terms of Reference.
- 3 Details of the Allegations under Investigation.
- 4 Which level of onus of proof has been used and why.
- 5 List of witnesses.
- 6 Methodology.
- 7 Witnesses Statements.
- 8 Observations. This is where the onus of proof is assessed and the evidence weighed and tested. The reasons for the Investigator’s Findings are expressed.
- 9 The Findings in respect of each allegation.
- 10 The Recommendations.
- 11 Documents considered and/or inspected.

PART 5: OPERATIONAL ISSUES

The following represent some of the operation issues facing Investigators:

- 1 The accused provides a medical certificate that indicates he/she is unfit for interview;
- 2 The accused fails to appear for interview;
- 3 The accused re-writes the interview notes;
- 4 The accused will only respond to written questions;
- 5 Two witnesses make contrary statements – can a decision be made by the Interviewer as to who to believe?

- 6 The accused wants a list of witnesses. Should they be provided?
- 7 The accused breaches confidentiality and starts gathering his / her own witness statements.

PART 6: SHORT CASE STUDY

Chen is an IT Manager employed by a multinational employer. He is accused by a subordinate employee, under a WhistleBlower Policy, of trading in company secrets and other valuable confidential information.

The Investigator is Chen's manager's manager (ie manager twice removed). He is under pressure from Head Office in the USA to finalise the Investigation and "*make heads roll*".

It is the Investigator's first investigation.

After examining data records and speaking with several witnesses, without taking formal notes, he comes to a Finding that Chen is "*on the balance of probability, guilty of all of the allegations made by the company, which I've investigated*".

Chen was on annual leave when some of the allegations occurred, a matter not addressed by the Investigator.

Coincidentally, when the Investigation occurs, Chen is again away on annual leave and was not interviewed. The Investigator thought that was OK as the WhistleBlower Policy forbids the release of the complainant.

The Investigator writes to Chen and terminates the employment.