

Managing Individual Workplace Grievances and Disciplinary Procedures

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Introduction

This paper examines ways of effectively managing individual workplace grievances and disciplinary procedures.

There are three principle areas that will be the focus of this page:

- dealing with conflict between co-workers;
- managing workplace complaints and investigation procedures; and
- implementing appropriate disciplinary procedures.

These issues on the whole tend to be aired in the course of unfair dismissal proceedings, when the substantive and procedural fairness of a dismissal is considered. However, good HR practices should ensure that the issues are well managed from the outset through established procedures, long before the issue of unfair dismissal arises.

We begin by identifying different types of complaints or grievances that may arise. We will also look at the investigative and disciplinary procedures that could be used in handling the issues. We have chosen a number of cases as a focus of the discussion, as they provide a good illustration of both the types of issues that may arise, and also how the issues should be dealt with. In many cases, courts and tribunals have expressed some concern with the investigation process, although this was not necessary fatal. Ultimately, it is a test of whether the outcome implemented, such as dismissal, could be said not to be harsh, unjust or unreasonable, taking both the substantive as well as the procedural issues into account.

There are different ways that conflict in the workplace may give rise to complaints or grievances. It may take the more obvious form of fighting for example, which we will look at shortly. The term “conflict” can also encapsulate discriminatory, harassing or bullying conduct. It also takes into account less specific forms of grievances such as personality clashes, disagreements and general disharmony in the workplace. This briefing will focus primarily on how to deal with such issues to ensure a procedural fair outcome. We will also mention briefly some other grievances that individual may have that are less likely to have disciplinary consequences. These might be grievances or complaints over leave, promotion, performances appraisal or other issues.

Although ultimately many of the issues of conflict, or other problems giving rise to grievances in the workplace, are seen as part of the unfair dismissal regime, you should also be looking to take pro-actively manage these issues as part of the general obligation to provide a health and safe work environment. The new occupational health and safety legislation in New South Wales imposes obligations with respect to risk management and consultation with employees. The proactive obligation to identify hazards in the workplace and respond appropriately, that underlies this new statutory scheme, can be relevant to this type of conduct.

The first step in the risk management approach requires employers to undertake a risk identification. Particular hazards are identified in the legislative scheme to which an employer should have regard, including the potential for workplace violence. However, other forms of conflict that fall short of “violence” are also clearly relevant. Once risk identification has been

undertaken, a risk assessment should evaluate the likelihood and severity of any consequence in the workplace, in order that steps can be taken to eliminate or control the risks. In applying this sort of approach, it is important that employers ascertain from current practices what is the risk of violent incidents or other forms of conflict in their workplace, evaluate the likelihood, identify the factors contributing to any risk, identify the necessary action to deal with it, and respond appropriately.

The other significant change brought about by new occupational health and safety legislation in New South Wales is the duty to consult with employees “*to enable employees to contribute to the making of decisions affecting their health, safety and welfare at work.*”¹ The Act sets out various mechanisms for consultation to be established, and the circumstances in which these should take place. Hence, issues such as workplace conflict should also be aired through relevant consultation procedures.

Conflict in the Workplace – Fighting

Direct conflict in the workplace in the form of altercations and physical violence in the workplace is not a new issue for employers. However, the general shift in HR practices to documenting and defining may issues, has caused many employers to develop specific “no-fighting policies”. Some of these have adopted a strict approach of summary dismissal in the event of fighting. Although there may be some limited circumstances where the hazardous nature of the enterprise warrants a strict approach, generally the question of whether this was fair in the circumstances will prevail.

A Full Bench of the Australian Industrial Relations Commission recently heard an appeal by Tenix Defence Systems Pty Ltd²(Tenix) over whether the termination of a Mr Fearnley’s employment was harsh, unjust and unreasonable. In the original proceedings Tenix submitted it had a valid reason for dismissing the Applicant based on his conduct because he has been involved in a fight and that Tenix had a clear policy that intimidating or assaulting employees was serious misconduct and could lead to summary dismissal. Tenix also submitted that the Applicant was notified of this reason for dismissal.

In its decision the Full Bench made some observations on the approach taken by the Industrial Tribunals when fighting or an assault has been established. The bench referred to the decision of Moore J in *AWU-FIME Amalgamated Union v Queensland Alumina Limited*³ in which he stated

“What emerges from these decisions is whether a dismissal or termination arising from a fight in the workplace is harsh, unjust or unreasonable will depend very much on the circumstances. However, generally the attitude of Industrial Tribunals tends to be that in the absence of extenuating circumstances, a dismissal for fighting will not be viewed as harsh, unjust or unreasonable. The extenuating circumstances may, and often do, concern the circumstances in which the fight occurred as well as other considerations such as the length of service of the employee, including their work record, and whether

¹ See s13 *Occupational Health & Safety Act 2000* (NSW).

² Print S 6238, 22 May 2000

³ (1995) 26 IR 385 at 393

he or she was in a supervisory position. As to the circumstances of the fight, relevant considerations include whether the dismissed employee was provoked and whether he or she was acting in self defence”

The Full Bench regarded the relevant authorities as supporting the view that in determining whether there is a valid reason for a termination of employment arising from a fight in the workplace the Commission should have regard to all of the circumstances in which the fight occurred including, but not limited:

- whether the terminated employee was provoked and whether he or she was acting in self defence;
- the employer’s need to establish and retain discipline amongst its employees; and
- the service and work record of the employee concerned.

The Full Bench considered Tenix’s policy on fighting. The policy set out that intimidating, or assaulting other employees, was an example of the type of actions that constitute serious misconduct and if proven, could result in instant dismissal. The Bench concluded that the policy, whilst relevant, was not determinative of the matter before the Commission. In this respect the Bench relied on the approach set out by the Federal Court in *Bostik (Australia) Pty Ltd v Geogevski* (No 1) in which it was stated:

“Employers can promulgate policies and give directions to employees as they see fit, but they cannot exclude the possibility that instant dismissal of an individual employee for non-compliance may, in the particular circumstances of an individual case, be harsh, unjust or unreasonable.”⁴

The Full Bench found that the original decision in Tenix should stand and that there was no valid reason for terminating the employment of Mr Fearnley. His Honour had concluded that the Applicant was not a willing participant in the actual fight and had been reacting to a real threat to his physical wellbeing. There had also been no history of aggression or violent attitude. It was also found that the manner in which the termination was affected was procedurally flawed. In this respect it was found at first instance that the Applicant was not truly given an opportunity to put whatever he wished in answer to the allegations made against him before the decision to terminate was made. It was apparent that at a “termination interview” where the Applicant indicated that he had only been acting in self-defence, his response was ignored. No attempt was made to reconsider the decision to terminate on the basis of the plea of self-defence. Nor was the Applicant shown a copy of a number of statements made in respect of the fighting incident.

In the case of *Burge v NSW BHP Steel Pty Ltd*⁵ a Full Bench of the NSW Industrial Relations Commission stated that:

“Our review of the evidence in the present case leads us to a similar conclusion as that in Bostik v Geogevski that is, the Respondent took the view that its policy against fighting in the workplace, without more and once it had been established the Appellant

⁴ (1992) 36 FCR at 29

⁵ 105 IR 325

was engaged in a fight, meant that dismissal should follow almost as a matter of course.”

The Full Bench took the view that it is not possible to use the investigation of the incident as “merely incidental to its application of the no-fighting policy”. Hence the Commission concluded the Appellant was wrongly dismissed by the Respondent and the action was harsh, unjust or unreasonable.

Conflict in the Workplace – Discrimination, Harassment and Bullying

Discrimination and harassment in the workplace particularly sexual harassment, have remained a significant compliance problem, despite the application of legislation covering these issues for many years. In addition, there are now moves to regulate inappropriate conduct in the workplace more generally, though efforts to identify such conduct as a form of bullying.

There are many reasons why employers should take any complaint of discrimination, harassment or bullying seriously. Such conduct is clearly unlawful under anti-discrimination legislation, and there are an increasing number of complaints made about such conduct. The number of complaints does not represent a full picture of the incidences of such conduct, as much conduct goes unreported. There is also increasing interest in the use of other legal avenues to cover these issues, such as occupational health and safety, the common law, and workers’ compensation. Bullying is now also been considered in terms of a number of different forms of legal regulation. Bullying and harassment also have significant consequences for individuals that are subject to the conduct, including financial, health and self-esteem problems in some circumstances. As far as an organisation is concerned, there are significant institutional costs in terms of the management down-time involved in managing such issues, cost to morale, turnover of good staff and associated legal costs. Increasingly, organisations are also concerned with the damage to corporate reputation that may result from adverse media exposure.

The general prohibition of direct discrimination is sufficiently broad to cover most types of adverse conduct of a discriminatory nature that an employee may have a complaint or grievance about. For example, if a woman is subject to adverse conduct in circumstances where she can show that a man in the same circumstances would not have been subject to that conduct, then direct discrimination on the basis of sex could be established. In some circumstances the treatment may amount to indirect discrimination. Both federal and state anti-discrimination legislation also contain a specific prohibition outlawing sexual harassment, which obviates the need to rely on the general prohibition of direct discrimination. The *Disability Discrimination Act* 1992 (Cth) contains a specific prohibition of harassment on the basis of disability in the contexts of employment, education and the provision of goods and services.

An example of a discrimination case pursued where there was evidence of continuing conflict and harassment in the workplace is the case of *Daniels v Hunter Water Board*⁶. An electrician was subject to adverse conduct in the workplace because he was thought to be gay. The conduct took the form of name calling, allocation of an unreasonable share of undesirable jobs, less access to overtime, and subjecting him to a range of practical jokes and prank calls. His perceived

⁶ (1994) EOC 92-626.

homosexuality was based on his trendy haircut, his interest in jazz ballet classes and modelling, and his earring. The conduct in question was persistent over a significant period of time so as to be seen as a campaign of harassment. The Tribunal found that he was subject to less favourable treatment on the grounds of his perceived homosexuality as he could establish that a person who was not thought to be homosexual would not have been treated in this way.

Investigating Discrimination and Harassment Complaints

In a number of recent cases the type of conduct that is alleged to constitute sexual harassment has overlapped with other areas of regulation such as the appropriate use of Internet and e-mail facilities in the workplace. There has been a range of cases where the conduct in question took the form of down-loading pornographic material, or sending sexually explicit e-mails.⁷ In these cases the conduct was found to constitute a breach of EEO and Harassment policies or other codes of conduct in the workplace so as to warrant termination of employment. However, these cases have highlighted deficiencies in investigation and disciplinary procedures.

In the case of *Burrows v Commissioner of Police*⁸ Mr Burrows was removed from the police service for allegedly receiving and disseminating offensive pornographic material on the Police Service electronic memo system. He brought proceeding seeking a review of the orders made by the Commissioner of Police pursuant to the *Police Service Act 1990*. In the Industrial Relations Commission proceedings it was found that Mr Burrows as a servicing Police Officer, used the Police Service memo system to receive and send what was highly offensive pornographic material and to engage in a written dialogue with another officer involving an extreme level of vulgarity in contraventions of instructions sent to all Police Officers relating to the proper use of the system. Hence in terms of a substantive reason there was clearly arguable grounds that he had engaged in some form of misconduct. The main emphasis in these proceedings was on the procedural unfairness, and whether this could make the dismissal harsh, unjust or unreasonable.

The Applicant in the proceedings alleged he had been punished twice for the same misconduct. The Applicant was initially suspended for one month, and after some passage of time a further penalty was imposed in the form of his removal from the service. The Commission found that the Applicant's state of mind at the time he was suspended included a lingering concern that his suspension might not be the end of the matter in terms of punishment and that he might receive a "slap over the wrist". But when he returned to duty he did so as an acting Sergeant and continued to perform his work without any further complaint. He was certainly entitled to believe that there was no prospect of him being removed from the service. The Commission stated:

"In May, he was informed that he had been recommended for removal. This was despite the fact that the Applicant had already been suspended for one month. The suspension, it may be inferred, was a punishment. There is no other plausible explanation for it, given the sequence of events. If the suspension had been for the purpose of enabling Internal Affairs to engage in further investigations into Mr

⁷ See *Toyota Motor Corporation v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union - Print T465*, 18 December 2000. *Markland v Colonial Services Pty Limited - PR903570*, 26 April 2001. Cf *Wilmott v Bank of Western Australia Limited*, WAIRC, 13 June 2001.

⁸ [2001] NSW Industrial Relations Commission 333 (14 December 2001)

Burrow's transgressions, it must be asked why wasn't Mr Burrows told this was the case? Moreover what was left to investigate given that the Applicant had admitted his involvement during the course of the interview with Internal Affairs Investigators on 15 December 1999? The original Commander, it appears, administered the punishment. Then, for some reason that was not explained there was a change in administrative process that took the matter out of the hands of the Regional Commander and enabled an Internal Affairs Investigator to recommend the removal of a Police Officer. Consequently, Mr Burrows received a further punishment and that was removal. It is difficult to escape the conclusion that Mr Burrows was punished twice for the same offence"

The Commission found that the suspension may possibly have been manifestly inadequate, but it was plainly unreasonable to leave him in a state of mind where he believed if he was to be punished further it would be a relatively minor punishment only to discover 5 months later he was facing removal from the service for the same admitted conduct that led to his suspension in the first place. In other words there was no new misconduct relied upon to support the removal. The Commission was left to speculate that concerns by the Police Commissioner, unfavourable media attention, scrutiny by the Ombudsman, and referral to the Police Minister had all had an impact on the further punishment administered. The Commission concluded that the process leading to Mr Burrows removal from the Police Service was flawed, and caused an injustice to the Applicant.

A further issue that was of considerable importance was the differential treatment of the Applicant compared to a large number of Police officers who had been detected receiving and/or disseminating pornographic material over the memo system. The fact that despite the large number of Police officers involved, only 3 had been removed, and that the Applicant's removal in these circumstances was procedural unfair. In total there were 471 officers of ranks up to and include Inspector who were detected as receiving or disseminating pornographic material over the memo system. The Commission concluded that if the Commissioner on the one hand removes the Applicant for particular misconduct, and on the other hand, does not remove others guilty of the same misconduct, then the Commissioner has acted unreasonably or unjustly. In order to justify the removal of the Applicant it would have to be demonstrated that the Applicant's conduct was such to exhibit a greater degree of culpability than other officers. The Commission referred to the "culture" in the Police Service of exchanging pornographic material over the memo system. However the existence of a particular culture does not diminish the inappropriateness of the Applicant's conduct. However, it is still a question of whether the Applicant was treated so differently that it amounted to an injustice, which was the ultimate finding of the Commission.

In the *Burrows* case the Tribunal stated:

"In weighing up the Applicant's interests and the public interests, the reception and transmission of highly offensive pornographic material over an internal electronic mail system by a Police Officer in breach of guidelines for the use of that system is completely unacceptable, despite the fact that the material was for private consumption. The suspension imposed on the Applicant of one month with pay was an inadequate response to such conduct. On the other hand, in all the circumstances, removal from the service was too harsh".

Another case example of this kind involved the manufacturer Phillip Morris, where an employee was dismissed because of misconduct that took the form of accessing inappropriate Internet sites. This was considered to be a form of misconduct, as well as a breach of the relevant EEO policies.

Cookies left on the hard drive of the computer could trace the inappropriate sites accessed. This linked a particular individual through his login ID. In the investigation process the Applicant denied that he had accessed the inappropriate sites. Further he stated that it was common for people to use other people's ID, and that generally there was very poor computer security. When the matter went before the Commission it was found that there was nothing to establish that he had accessed the inappropriate sites. The investigation process was flawed as it did not pursue the issue of who else may have had access to the computer once this issue was raised. Further it was found that it was not necessarily a breach of the company policy, as the policy did not on its own make access, rather than transmission a breach of the policy.

Complaints of Bullying in the workplace

Another increasingly common grievance is that a person is being "bullied" by a superior or co-worker. The exact parameters of what conduct is said to constitute "bullying" is still evolving. Conduct involving intimidation or threat could clearly be termed bullying. In other circumstances, it may be more difficult to draw the limit between bullying and other workplace interactions. Much non-violent conflict in the workplace is now being argued as a form of bullying. Employers will need to be aware that bullying may be an issue in the workplace, and respond appropriately to any complaints.

In terms of defining workplace bullying, it has been stated:

*"Workplace bullying is a term that covers a multitude of behaviours. Basically it is a broad description covering both overt harassment, such as verbal abuse, hostility, rages, tirades and covert harassment such as sabotage, isolation and undermining an individual's position. The common ground is that a person has been treated less favourably and has suffered an injury due to behaviour that is beyond normal disciplinary action or appropriate workplace interaction."*⁹

The Victorian WorkCover Authority has released an Issues Paper in March 2001 entitled "Code of Practice for Prevention of Workplace Bullying". In the Issues Paper they identify an increase in bullying behaviour, as well as a greater willingness amongst victims to report bullying and/or take legal action against it. They refer to a number of landmark cases where there has been substantial compensation to employees who suffered injury as a result of bullying. The position adopted in the Issues Paper is that occupational health and safety is the most appropriate framework for regulating occupational bullying, because of the essentially pro-active and preventative approach of the legislation.

The issues paper defines workplace bullying as:

"Aggressive behaviour that intimidates, humiliates and/or undermines a person or group. Bullying is not a one-off situation; it is behaviour that is repeated over time.

Examples of bullying at work include: yelling; screaming; abusive language; continually criticising someone; isolating or ignoring the worker; putting workers

⁹ "Bullying from Backyard to Boardroom", Second Edition, Federation Press, page 104.

under unnecessary pressure with over work and impossible deadlines; and sabotaging someone's work or their ability to do their job by not providing them with vital information and resources.”¹⁰

The issues paper states:

“Critical comments which are objective and indicate observable performance deficiencies do not constitute workplace bullying.”

The paper goes on to indicate that:

“By contrast, comments unrelated to actual performance that are used to embarrass or humiliate the employee may constitute bullying, especially when they occur in conjunction with other bullying behaviour.”

However, the paper also acknowledges that employers have fundamental legal rights in relation to their capacity to control and direct work done in their organisation.

The Queensland Government established a taskforce to examine the issues of workplace bullying, and to develop strategies to help prevent workplace bullying. In its Report the taskforce recommended increasing the powers of the Queensland Industrial Relations Commissions to provide an avenue for the disputes relating to workplace harassment to be mediated by the Commission. It also recommended a definition of “workplace harassment” that includes behaviour that is *“offensive, intimidating, humiliating threatening, and is unwelcome and unsolicited.”*

Legal Responses to Bullying

It is difficult to determine an appropriate legal response without a clear idea as to what actually constitutes “bullying”. However, assuming some form of bullying is established, there are a number of potential legal responses.

- Common law actions based on breach of contract or negligence
- Occupational health and safety liability

Breach of anti-discrimination legislation

- Termination based on constructive dismissal

¹⁰ See page 2.

- Criminal law
- Workers' compensation liability

To minimise liability arising in any of these circumstances it is necessary for an employer to have some mechanism in place to respond to allegations of bullying, and that there is a full and fair investigation of the allegations.

In the case of *Kelson v Forward*,¹¹ the Federal Court made it clear that to engage in appropriate management practices is not a form of workplace bullying. It is clearly important to ensure that managers and supervisors receive appropriate training and guidance to enable them to manage people under their authority in an effective manner.

A number of unfair dismissal applications have been based on bullying allegations. Employees have been able to claim constructive dismissal on the basis that the bullying conduct gave them no option but to leave. An example of bullying in the dismissal context is a case of *Dillon v Arnotts Biscuits Limited*¹² In that case the evidence, spelled out a history of persistent bullying, harassment, non-compliance with return to work rehabilitation directions by Mr Svigos (team leader) and the apathetic approach by Ms Briddock, who was employed by the company as an occupational health nurse and WorkCover claims administrator, to complaints made by the applicant about the non-compliance by the team leader (Mr Svigos) with her work rehabilitation programme and the attitude expressed by Mr Svigos to the applicant's work restrictions. The evidence of Mr Svigos showed that he believed that he was doing nothing wrong in bullying the applicant to the point of reducing her to tears, putting her to work at a work station by herself and facing a blank wall with her back to her fellow employees, and deciding to obey or disobey the applicant's return to work rehabilitation to suit himself. Mr Svigos, in the course of his evidence, admitted that he singled the applicant out for special treatment to "toughen her up" and felt that he had to "watch" her.

The Commission stated:

“Mr Svigos came across as egotistical, didactical and a bully and, in my opinion, as being a person not suitable to supervise. His treatment of the applicant was bullying, harassing and spiteful. The applicant did not receive the support she is entitled to as a human being by any level of management at the company. Although Mr Svigos was the main perpetrator of the wrongful actions against the applicant, I point out that, in my opinion, Mr Tarczynski, Mr McHutchison and, to a lesser extent, Ms Briddock, are just as guilty, as they, in varying degrees, while being aware of Mr Svigos' shortcomings, turned a blind eye to the harassment of the applicant, harassment which forced her resignation”.

There have been a number of cases where employees have recovered common law damages for conduct that amounted to bullying. In the case of *Arnold v Midwestern Radio Limited*, an employee brought an action in negligence where she was subject to aggressive, bullying, abusive,

¹¹ (1995) EOC 92-762.

¹² Industrial Relations Commission, 10 September 1998, 31680 of 1997.

derogatory and sarcastic conduct by her manager. As a result, she developed a serious psychological injury. The employer was found not to have provided a safe system of work for the employee, and it was found to be reasonably foreseeable that abusive conduct of the manager would result in such a condition in the employee. The employee was awarded a significant amount of damages in this common law action, however, that matter went on appeal, and was reversed by the Court of Appeal. Initially the Court had found on the basis of the medical evidence, that a psychiatric illness was reasonably foreseeable as a consequence of the manager's behaviour, and that the employer breached its duty to take reasonable care to avoid risk of injury to her, and to ensure that she had a safe system of work. On appeal,¹³ the Court of Appeal did not accept that the medical evidence relied upon by the plaintiff was sufficiently clear to establish that the *“abusive, threatening and unacceptable conduct of the manager caused the plaintiff to suffer a major depressive disorder.”*

In the case of *Blenner-Hassett v Murray Goulburn Co-Operative Pty Limited & Ors*,¹⁴ a case was brought based on negligence and under occupational health and safety legislation. The conduct in question involved a number of pranks of a sexual nature as part of an initiation routine. In that case the Judge stated:

“I am further satisfied that the company had no practices in place to ensure that the types of behaviour which occurred were either monitored or governed. I am satisfied the perpetrators were fully aware of the practices and never gave them a second thought. It was customary and part of initiation into a set of values which we might now regard as singularly abhorrent.”

¹³ *Midwest Radio v Arnold* (1999) EOC 92-970.

¹⁴ County Court Victoria, 10 March 1999. See also *Carlile v Council of the Shire of Kilkivan and Brietkreutz*, District Court, unreported 2/12/95 referred to in M Spry “Workplace Harassment” (1997) 10 AJLL 229.

Other types of individual grievances

Employees may also have grievances that do not necessarily involve disciplinary procedures or raise concerns about unfair dismissal. These could take the form of complaints regarding performance appraisals, remuneration and promotion. Or they may involve complaints about the application of company policies and procedures such as leave related policies, including return from maternity leave. Finally employees may have general complaints or grievances about relations with other people in the workplace. Without addressing the specifics of each of these issues there are some general points that should be kept in mind. First, it is important to ascertain what are your legal obligations, if any, in respect of the particular issue. For example, in the case of a grievance about leave entitlements, ascertain first off what your legal obligations are. Secondly, are there any relevant company policies and practices, and have these been followed. Thirdly, conduct a fair investigation into the issues to determine whether the particular individual been treated in a fair and impartial manner. Fourthly, take into account all matters that may be relevant, including the personal circumstances of the person making the complaint. Finally, make an assessment of whether there is any substance to the complaint, and report back to the person making the complaint.

There may also be other types of misconduct allegation in the workplace that an employer may be called upon to investigate, and where appropriate take disciplinary action. Without going into the details of all of these, this could include alleged breaches of privacy obligations, theft, claims of alcohol and substance abuse in the workplace, or other misconduct. Again, appropriate and fair investigative procedures should be applied, which we will return to.

Investigative procedures

A good guide as to whether an appropriate and fair investigative procedure has been established is to judge it by the legislative standards set for procedural fairness in the unfair dismissal context. Pursuant to the *Workplace Relations Act*, in determining whether a termination of employment is harsh, unjust or unreasonable, the Commission must have regard to the following factors:

- whether there was a valid reason for the termination related to capacity or conduct of the employee, or the operational requirements of the employer's business
- whether the employee was notified of that reason
- whether the employee was given an opportunity to respond to any reason relating to capacity or conduct
- where the termination related to unsatisfactory performance, whether the employee had been warned about that unsatisfactory performance before the termination
- whether there had been a full investigation, including obtaining information from obvious witnesses, in respect of any relevant incident

- any other matters the Commission considers relevant¹⁵

The basic principle is that it is harsh unjust and unreasonable for an employer to dismiss an employee summarily on the grounds of misconduct without taking reasonable steps to investigate those allegations and give the employee a fair chance to answer them. However, a lack of procedural fairness will not on its own make a dismissal unfair, without looking at the substance of the case. It is also possible to look at factors that come to light after a termination to justify a dismissal. However, all the case law emphasises that procedural factors will have a bearing on the overall assessment of whether a termination is fair. The question of a fair go all round in both a substantive and procedural sense will depend on a range of factors. This will vary according to the circumstances of an employee, their individual work history, length of service, alleged misconduct, performance issues, warnings, counselling and other factors.

It is not possible to provide an exhaustive checklist on what should be done in an investigation process. However, we can make general observations on how to go about it gained from experience and cases on this issue.

Investigate as soon as you hear of a problem

Frequently, we are told by employers that they have indirectly heard allegations of inappropriate conduct, but are waiting for someone to come forward to complain before they take any action. It is a mistake not to act promptly, this can exacerbate the liability of the employer, despite the unwillingness of a particular individual to make a complaint. For example, the basic principle under anti-discrimination law is that an employer, in order to avoid vicarious liability, has an obligation to take reasonable steps to prevent discrimination or harassment. This applies even where the employer has no knowledge of any problem. Should an issue of discrimination or harassment be raised, an employer must be able to show that pro-active steps were taken. This obligation to be pro-active about the issue applies regardless of what knowledge an employer might have of actual or potential complaints. Ultimately it is very difficult for an employer to rely on a defence that they took all reasonable steps to prevent or eliminate harassment or discrimination if they were aware of a potential problem, but took no action.

Any investigation must be timely

There has also been recent publicity about a number of workers in the Department of Community Service who had been stood down for more than 18 months on full pay while the Department investigated allegations of child abuse and Internet pornography. The delayed nature of the investigation has a significant impact on the procedural fairness aspect of any disciplinary action taken.

Following specified procedures

It is not advisable to set out in a company policy or procedures the precise manner in which an investigation will be undertaken. The difficulty with this approach is that in the event of a failure to abide by the precise terms of any investigation process set out in a policy or procedure manual, the employer may then be facing an argument of a lack of procedural fairness based on the specifics

¹⁵ s 170CG *Workplace Relations Act 1996*.

of this policy document. A general commitment in a company policy or procedure to conduct an investigation in a procedural fair manner should be sufficient. However, should you have such a policy or procedure, you should ensure that it is followed to the letter. A specified procedures will not in any event override the requirements of procedural fairness.

In the case of *Anderson v Grootte Eylandt Mining Company Pty Ltd*,¹⁶ Mr Anderson's employment was terminated due to a number of absences from work without leave, approval or explanation. On a number of occasions as part of an established agreement for taking disciplinary action, Mr Anderson was warned about his behaviour. A decision to terminate his employment was taken at a meeting on 11 April 2000, and a termination meeting was held on 12 April 2000. In terms of the procedures invoked, although he was told of the reason for his termination, he was not given an opportunity to explain his conduct as the decision to terminate had been taken prior to the meeting. The pivotal issue was failure to comply with the procedure in the agreement regarding union representation, particularly in the light of Mr Anderson's personal circumstances. The Commission found that observing the agreement would have created circumstances that would have avoided the need for termination. With the opportunity forgone, the penalty imposed was itself harsh.

“When the conduct of the supervisors, in not observing the disciplinary procedure, precludes the chance of being properly advised, the penalty is harsh. It is important to note that the failure to implement the agreed procedure had a significant impact on a finding that the termination was harsh, unjust or unreasonable.”

A further example of this is the case of *Murphy v David Jones Pty Ltd*,¹⁷ which involved allegations of race discrimination. It examined the investigation process instigated, which the Tribunal found to be inadequate and unfair. Despite the existence of a complaints procedure, and of harassment and discrimination officers, this was not followed. The Tribunal found that the personnel involved were too concerned with letting him know what his duties entailed, at the expense of investigating his complaint. The internal investigation concluded that the complaint had no merit, but this outcome was not reached in accordance with David Jones's own policy. The person who was the Harassment and Discrimination Officer appeared unaware of her responsibilities and did nothing to attempt to resolve the matter through conciliation, as the policy required.

Relying on an agreed investigation or grievance procedures that is flawed

Problems will also arise where an employer is not lacking a grievance procedures, but relies on one that is itself unfair. The case of *Lane v Commission of Corrective Services and Anor*¹⁸ involved allegations of sexual harassment involving prison officers. An investigation was conducted in which the Applicant confirms her allegations and the alleged perpetrator denied her allegations. A number of other officers were also interviewed. Finally a report was finalised, which found no evidence to support any of the applicant's complaints. The report was considered by a superior officer, who determined that there was no substance to the allegations made by the

¹⁶ (2000) 105 IR 5.

¹⁷ ADT 140 15/08/02

¹⁸ [2002] NSW ADT 139 14/08/02

Applicant. The Applicant then pursued a complaint with the Anti-Discrimination Board. The Tribunal examined the investigation process and found that the person making the complaint was not informed of the outcome of the investigation. The Tribunal commented that “it is incredible that such a system existed in a Government Department”. It was the clear policy at the time that applicants were not to be notified of the result of any investigation into their complaints. The Tribunal commented that whilst this in itself was not a breach of the Act, nor a form of victimisation, it was very poor administration. The applicant’s complaint was in fact dismissed in this case. But if it had not been dismissed, the Department may very well have been found to be vicarious liability on the basis that it had not taking all reasonable steps to prevent or eliminate discrimination and harassment with such an inadequate complaints handling mechanism.

Appoint an appropriate person to investigate

Generally an investigation is best conducted by a trained or experienced investigator, if possible, depending on the size of the organisation. It is also desirable to find someone outside the work area of both the complainant and alleged perpetrator. It is vital that the person is seen as independent and impartial.

Conduct Initial interview with Complainant

The first substantive step is to conduct an interview with the person making the complaint. This should be conducted in a private and confidential manner, with a support person if requested. The investigation process should be explained and it should be made clear that there will be no victimisation. Every effort should be made to obtain information from the complainant relevant to the complaint, and any supporting documentation.

Initial interview with the alleged perpetrator

The above procedure should be mirrored with the alleged perpetrator. Again, this should be private and confidential, and with a support person, if required. The investigation process should be explained. All allegations should be put in full, with time given for responding.

Important procedural factors at this point in time include:

- The employer must take reasonable steps to give the employee a fair chance of answering any allegations.
- The reason for any interview should be explained.
- The employee should be provided with material which forms the basis of the allegation against him or her.
- If the employee raises an issue that can be investigated or a witness who can be interviewed about a matter raised in his or her defence, then the employer should attend to it where it is practicable to do so.
- An opportunity should be provided for support person or union representation.
- Give the alleged perpetrator time to respond to allegations and produce other information.

Obtain any other relevant information

The investigation should then proceed to interviews with any witness and any other inquiries relevant to whether the conduct occurred. Particular attention should be paid to following up issues raised in response to allegations by the perpetrator.

Conciliation/ Mediation

Where appropriate conciliation or mediation can be used to attempt to resolve a dispute or conflict between particular individuals. However, even where a particular issue is resolved between two individual, it may be necessary to continue with the investigation process in order to determine what wider implications or outcomes there may be for the workplace as a whole.

Reach conclusion based on facts

It is important that once the investigation is undertaken, a firm conclusion is reached, one way or the other. A conclusion should be reached on the balance of probability. Particular care should be taken where serious allegation of misconduct are involved. In many circumstances it may only be the word of each party against the other.

Informing parties of conclusion

Both parties should then be contacted and individually informed of the outcome of investigation.

Report to management

A formal reporting mechanism enable the report to be brought to the attention of management should be implemented. This report may include recommended courses of action.

Implementation

The final formal step is implementing an appropriate outcome, including disciplinary action if required. This should be a management responsibility. This may vary from apologies, formal warning, counselling, undertaking that behaviour will cease, demotion, transfer or dismissal. We discuss issues of discipline in the latter section of the paper.

Record keeping

Any records of the investigation should be kept confidential. It is preferable not to retain these on personnel files but in a specially designated location.

Investigating Criminal Conduct

One of the most difficult issues in terms of investigating alleged misconduct on the part of employees is where criminal conduct is involved. Criminal conduct in the workplace is the type of misconduct that can provide clear grounds for termination of employment, provided an employer is careful with the investigation process. Quite often criminal proceedings do not go ahead, or an employer does not want to wait until a criminal court case is resolved before any

action is taken. In those circumstances an employer should ensure due regard is had to ensuring a fair investigation before relying on the criminal conduct to justify a dismissal.

In the case of *Liu v Star City Pty Limited*¹⁹ the Applicant was a part-time food and beverage server who was dismissed for stealing money at work. The allegation of misconduct was subject to criminal proceedings that were not proven. The Applicant contended that her termination by the Respondent was harsh, unjust or unreasonable and sought reinstatement. The Applicant claimed that she was late and picked up a bag of coins by mistake. The removal of the coins appeared on videotaped surveillance.

The Commission considered the investigative process and expressed concern that the Applicant was not advised of the purpose of the interview that was conducted and the name of the person who would conduct that interview. She presumed her interview was in relation to her application for another position in the organisation. The Commissioner considered it unfair to allow her to maintain a false impression of what was to occur. Another concern related to access to the video surveillance tapes. The Applicant was not shown the video at any point during the investigation or at the time of termination although the contents of it were in fact explained to her. Although the Commission did find there was some lack of procedural fairness in the investigative process, the Commission found on the balance of probability that the allegation of misconduct had been made out and that the Applicant did have an opportunity to explain her view of the events. Hence the termination was not harsh, unjust or unreasonable.

In a recent decision of the NSW Industrial Relations Commission of *Lawrence v Catholic Education Office, Sydney*²⁰ the case involved an unfair dismissal application where the employee had been convicted of a criminal offence. The issue in the case was whether the employer was entitled to rely on the conviction in itself as establishing misconduct so as to justify a termination of employment. The misconduct related to a charge of an indecent assault upon a former student of the school where the Applicant had been employed as a teacher. The allegations for misconduct came to the attention of the employer after the Applicant was charged by the Police. The employer waited until the criminal proceedings were completed and the Applicant was convicted and sentenced by the court. The employer then reviewed the transcript of proceedings and made the decision to terminate the employment of the Applicant. Justice Schmidt found that the material on which the conviction was based provided a sufficient basis for the employer conclusion that the misconduct had occurred. Although the judge did suggest that a prudent employer may well give the employee an opportunity to raise matters as to whether their employment should continue as the Respondent did here, which could be taken into account in any decision reached. However, procedural fairness did not require that an employer faced with circumstances where the employee had already been convicted of a serious offence of this nature must then also conduct its own separate investigation into the matters already dealt with in the criminal proceedings.

In the case of *Wang v Crestell Industries Pty Limited*, the Full Bench of the Industrial Relations Commission of NSW considered the appeal by 3 former employees who were dismissed by Crestell because it believed they were involved in the theft of property from its factory premises.

¹⁹ PR 903625, 24/4/01

²⁰ 6053 of 1998, 98/5/02, Schmidt J

A criminal charge of theft was laid by the Police against Mr Wang, but was eventually dismissed by a magistrate. The 3 Appellants were dismissed from their employment without an opportunity to defend themselves against the employer's action. The dismissal followed a Police raid on the home of Mr Wang where a large and valuable quantity of manchester products was found. In the *Wang* case, the employer had not communicated the dismissal to the employees as the company had relied on the Police who interviewed them to inform them of that position. The Commission found however that on the basis of the seriousness of the misconduct established, the lack of procedural fairness did not render the dismissal harsh, unjust or unreasonable. The Commission relied on the case of *Byrne v Australian Airlines Limited* which concerned the dismissal of airport baggage handlers for pilfering, and a subsequent claim that the dismissal was harsh, unjust or unreasonable. The employer's peremptory dismissal action without extending to the employee's considerations of procedural fairness did not, in all the circumstances result in the dismissal being harsh, unjust or unreasonable. An employee guilty of theft is not entitled to rely on procedural issues as a total defence to an unfair dismissal application. All the circumstances surrounding the dismissal should be considered and the evidence weighed and measured.

Disciplinary Procedures

Where an employee engages in some form of inappropriate conduct in the workplace, or is under performing in some way, an employer may wish to take some form of disciplinary action. This can present a number of difficulties. There are a vast number of potential disciplinary measures that could be implemented. In practice however, the main issue is usually trying to determine whether the circumstances justify a termination of employment. This is usually determined by whether there is a reason relating to conduct or capacity that satisfies the requirements of the statutory unfair dismissal regimes. In particular, the alleged misconduct must be of sufficient seriousness to warrant termination of employment. An employer must also be mindful of the manner in which the termination is undertaken to satisfy the procedural fairness requirements as outlined above.

The recent publicity surrounding the case of a postal worker who was disciplined for disobeying order to remove personal items from her desk illustrates the difficulties in this area. The failure to remove the personal items was said to constitute a breach of the company's policy. The media reports suggest that she was subject to disciplinary action in the form of the loss of two previous pay rises amount to \$3000, which was a form of demotion. There is an issue of whether she had disobeyed a lawful and reasonable direction, and then the appropriateness of the disciplinary consequences.

Some organisations have specific disciplinary procedures that specify degrees of misconduct and the consequences. These can cause difficulties if they are rigidly applied, or the "*crime does not fit the punishment*". In any event, a policy cannot be applied without regard to the particular circumstances of the case and must be done in accordance with procedural fairness.

Where the disciplinary action takes the form of a demotion particular issues arise. Demotion may be specified as an available disciplinary measure, for example in public sector employment. However, in certain circumstances a demotion may be considered to constitute a termination of employment, and therefore come with in unfair dismissal regimes. Changes last year to the federal unfair termination provisions attempt to exclude certain demotions from the regime. A demotion that does not significantly reduce remuneration or duties is not a termination for the purposes of the Act. However, if for disciplinary purposes the reduction in salary or duties is

“significant” then the termination provisions apply. This exclusion does not operate at the state level. Deductions from wages are also not permissible, except in very specific circumstances.

In some cases an individual may be suspended on full pay while an investigation is being conducted. There may be a specific power to suspend, particularly in public sector employment. Some cases have emphasised this option may create difficulties where there is a long passage of time before the investigation is completed.

As we saw in the *Burrows case*, any disciplinary measures should be implemented “once and for all”, to avoid a suggestion that the person has been punished twice for the same “offence”. However, if the person has in fact engaged in a further breach or some form of misconduct, then it is possible to implement further disciplinary measures. The *Burrows case* also highlights the need for consistency in approach, so that employees are treated in a like manner for similar misconduct. For example, in a recent case where an employee was dismissed for failing to conduct a required safety test, the Tribunal took into account both of the unconscionably long hours the employee had been working, and that his partner was only demoted.

The manner in which discipline is undertaken, apart from raising unfair dismissal issues, may also give rise to contractual claims that the employer has conducted itself in a manner likely to destroy the trust and confidence in the relationship. A good example of this is an English case where an employer repeatedly insisted that an employee undertake psychiatric tests, which were unwarranted in the circumstances.²¹ It has been argued that this implied term could be breached “*when supervisors or manager have made unjustified accusations against workers, engaged in harassment, refused to investigate reasonable grievances or failed to treat employees with a appropriate degree of dignity.*”²²

In a novel case argued before the NSW Court of Appeal recently, an former employee sought to recover damages for the alleged negligence of the employer in undertaking its disciplinary procedures. However the Court held that an employer does not owe an employee a duty of care to conduct its disciplinary proceedings in such a manner as to avoid psychiatric harm to an employee. In the case of *State of NSW v Paige*²³ a principal of Sydney High School received complaints from students regarding sexual misconduct of a teacher. The principal notified the NSW Department of Education of some complaints, but dealt with the complaints by a direct approach to the teacher and arranged to have him transferred from the school.

In 1995, the Director General of the Department issued a statement requesting a re-notification of sexual misconduct cases that had not been adequately investigated. The Respondent re-notified the complaints and notified some other complaints for the first time. The Respondent’s conduct was then investigated and he was charged with the breach of his duty for non-compliance with the departmental procedures in the way he had handled the complaints. In October 1997, the Respondent submitted, and subsequently withdrew, a notice of retirement. The Respondent was then found guilty of various charges and the Director-General purported to accept the original notice of retirement.

²¹ *Bliss v South East Thames Regional Health Authority* [1987] ICR 700.

²² Creighton & Stewart *Labour Law : An Introduction* (3rd Ed.) p 256.

²³ [2002] NSW CA 235 (19 July 2002)

The Respondent claimed psychiatric harm and loss of income. The issue arose whether there had been a breach of duty of care to the Respondent and also a question of whether there had been an effective termination of the Respondent's contract of employment. The NSW Super Court found that the Appellant did not owe a duty of care to conduct its disciplinary proceedings so as to avoid psychiatric harm to the Respondent. The court found that the imposition of such a duty would have an inhibiting affect on expeditious investigations. The Court found that there are arrangements in place for the handling of unfair dismissal claims that address procedural issues. This statutory scheme would be thwarted by the creation of a parallel remedy of unlimited scope, that could be sought at any time. Therefore the court thought it would be inappropriate to expand the duty of care and negligence to provide an alternative course of action for unfair dismissals. The Court found that matters concerning the creation and termination of a contract of employment should properly be left to the law of contract and the specific statutory schemes.

What should an Employer do where the conduct occurs outside the work context?

The fact that the conduct may have occurred outside of hours and may not be directly related to work, does not mean it can be ignored and not subject to some form of investigation.

A question that often arises with respect to vicarious liability, is what are the outer limits of an employer's vicarious liability, particularly where some form of social activity that may have an indirect relationship to the workplace takes place? Where such social activities such as Christmas parties,²⁴ work related conferences, and travel for work related purposes takes place, it is fairly clear that vicarious liability may be established. The question remains of what about conduct that might be more remotely connected to the workplace?

The issue of conduct that might occur outside the workplace, but has a consequence in the workplace, was considered by Justice Finn in the case of *McManus v Scott-Charlton*²⁵. In that case Justice Finn observed

*"I am mindful of the caution that should be exercised when any extension is made to the supervision allowed an employer over the private activities of an employee. It needs to be carefully contained and fully justified."*²⁶

His Honour concluded that it was lawful for an employer to give an employee directions to prevent a repetition of privately engaged sexual harassment of a co-employee where:

- "(1) The harassment can reasonably be said to be a consequence of the relationship of the parties as co-employees (ie it is employment related); and*
- (2) The harassment has had and continues to have substantial and adverse effects on workplace relations, workplace performance and/or the efficient,*

²⁴ *Thomas v Westpac Banking Corporation* (1995) EOC 92-742

²⁵ (1996) 140 ALR 625 at 636.

²⁶ (1996) 140 ALR 625 at 636

equitable and proper conduct of the employer's business because of the proximity of the harasser and the harassed person in the workplace."

In that case, the lawfulness of the direction by the employer not to engage in harassment outside work hours was dependent on the fact that the employee's out of work conduct had demonstrated a substantial and adverse affect on the employer's business

The general approach to out of hours conduct was outlined in *Rose v Telstra* in which Vice President Ross considered the issue of when "out of hours" conduct justifies a termination of employment, and limited it to the following circumstances:

1. The conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee or;
2. The conduct damages the employers interest, or;
3. The conduct is incompatible with the employees duty as an employee.

The case involved 2 Telstra employees who were involved in fighting after hours in a hotel room. The dismissal of one of the 2 employees for fighting was found to be harsh, unjust and unreasonable because of the limited impact on his employment, and a lack of a requisite connection to his employment. Neither of the employees were in their uniform at the time, nor were they "on-call". The incident also took place outside of working hours and therefore did not involve a public place. His Honour concluded that the conduct complained of must be of such a gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee. Absent these concerns, an employer had no right to control or regulate an employees out of hour conduct. Vice President Ross found that there was no evidence to indicate that Telstra's reputation had been tarnished by the incidents although there had been Local Court proceedings. Ross VP stated

"I do not doubt that the Applicant's behaviour on 14 November 1997 was foolish and an error of judgment. He made a mistake. But employers do not have an unfettered right to sit in judgment on the out of hours behaviour of their employees. An employee is entitled to a private life. The circumstances in which an employee may be validly terminated because of their conduct outside work are limited. The facts of this case do not fall within those limited circumstances."

A further example is a recent case from Tasmania²⁷, which involved the sexual activities of an off duty police officer in the lounge of a hotel. The Commission found that the behaviour, while foolish and demanding severe disciplinary action, did not constitute grounds for a valid reason to terminate his employment.

²⁷ Gunston v Commissioner of Police 27/6/20002.

Conclusion

Managing individual workplace grievances and disciplinary procedures requires careful attention on the part of the employer. The circumstances of each case must be considered, and any relevant factors taken into account. Ultimately, an employer should ensure that it acts promptly when grievances arise, investigate any complaint or grievance thoroughly and in a fair manner, and finally that it ensures any disciplinary action is consistent and justifiable.