



“Latest developments in workplace investigations”

Latest developments in workplace investigation

1. Take home lessons from 'flawed investigation' cases
2. Natural Justice:
 - The 'hearing rule'
 - The 'no bias rule'
3. The **seven golden rules** of Procedural Fairness
4. 'Aftercare issues' – ensuring your investigation is not wasted



1. GUIDANCE FROM CASE LAW

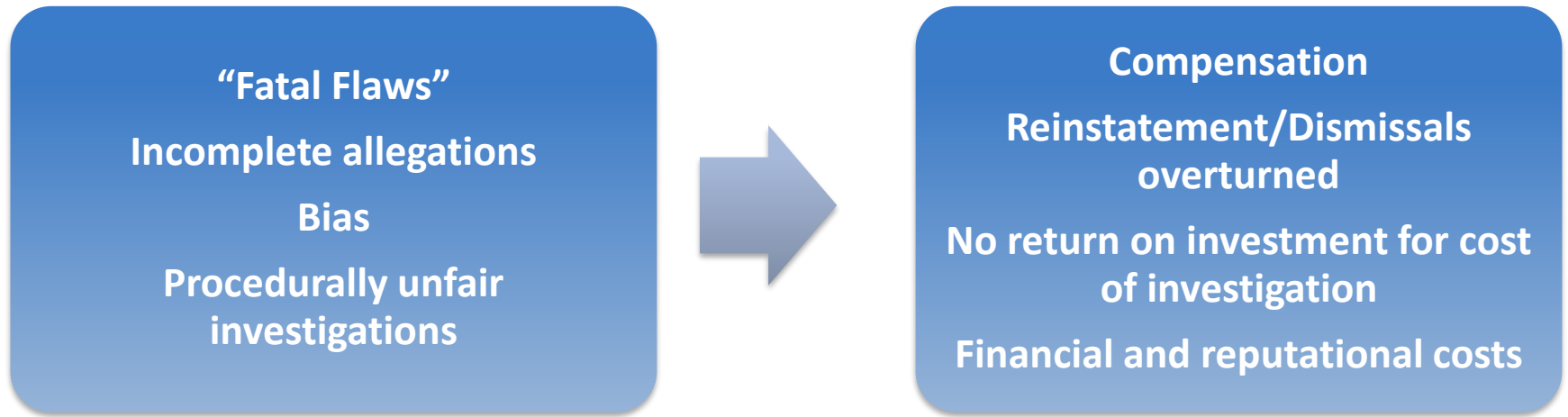
Investigators do not need legal experience but remember:



- Cases increasingly demonstrate what NOT to do
- It is useful to be aware of the reasons why some steps in investigations are NOT discretionary
- Being informed about what courts find to be "fatal flaws" and their impact assists us to make the right decisions about the investigation process



**FATAL FLAWS →
PROCEDURAL UNFAIRNESS →
POOR OUTCOMES**



Investigation does not need to be “perfect”, or at the same standard as a police investigation**Rogers v Millennium Inorganic Chemicals Limited & Anor [2009]**
FMCA 1

2. WHAT IS NATURAL JUSTICE?

Contains two rules:

- 1. The hearing rule** - requires the decision-maker to give an opportunity to respond to the allegations and evidence; and
- 2. The no bias rule** – the decision maker shall be free from bias.



3. PROCEDURALLY FAIR INVESTIGATIONS

- **Procedural fairness** is much broader than the two **'natural justice'** rules, which make up only the first two rules
- Sometimes it involves a delicate balancing of competing interests
- Let's look at **seven golden rules** that you must adhere to in order to conduct a procedurally fair investigation



PROCEDURALLY FAIR INVESTIGATIONS

The seven **golden** rules of procedural fairness:

1. The hearing rule (first principle of natural justice)
2. The no bias rule (second principle of natural justice)
3. Maintain confidentiality
4. Communicate the process, and offer a support person, to all participants
5. Consider all the evidence, including responses to contradictory evidence
6. Investigate diligently but promptly...
7. Make findings on the available evidence on the balance of probabilities.



RULE #1

The 'hearing' rule (first rule of 'natural justice')

You must provide to the respondent:

- Notice of possible disciplinary outcomes
- Details of all allegations
- Evidence to be relied upon



Details of allegations:

- Include only facts and alleged behaviour (not impact)
- Who? What? Where? When?
- Chronological order
- One numbered paragraph per behaviour
- Include dates or duration



RULE #1

The 'hearing' rule (first rule of 'natural justice')

Allegations too vague

Bann v Sunshine Coast Newspaper Company Pty Ltd [2003] AIRC 915

- *“You do not assist staff member with their work. They get more help from their colleagues.”*
- *“Staff members report that if they come to you with a problem you often end up antagonising the customer, however, if there is a problem with one of your customers you are always quick to make the customers happy.”*



RULE #1

The 'hearing' rule (first rule of 'natural justice')

Failure to provide adequate opportunity to respond:

***McCauley v Club Resort Holdings (No 2) [2013] QCAT
243***

- Failure to ask the respondent to respond to the allegations in full, accepting witness statement instead
- The complainant was also not interviewed, or the witness.



RULE #1

The 'hearing' rule



Failure to provide opportunity to respond (cont.)

Vernham v Jayco Corporation Pty Ltd [2015] FWC 8185

Thomas Vernham had been a driver for Jayco, for 15 years, but had not attended work since August 2014. In November 2014, he sent an email to his workers' compensation caseworker, "*I mean what is the worst that could happen, I go 'postal' due to psycho social stress and start taking those people that have hurt me!*"

In January 2015, someone anonymously alerted Jayco to the email, alleging he was suicidal and had made threats to "kill" other people. Based on this information, in February 2015, Jayco summarily dismissed Mr Vernham for misconduct.



RULE #1

The 'hearing' rule (first rule of 'natural justice') Failure to provide opportunity to respond (cont.)

Vernham v Jayco Corporation Pty Ltd [2015] FWC 8185

Commissioner Anna Lee Cribb of the FWC agreed with Mr Vernham that he had been unfairly dismissed. Her reasons included the following:

- Jayco did not give Mr Vernham the chance to respond to the allegations, or the evidence relied upon
- In fact, his mental illness or distress should have been considered by Jayco in relation to the emails (as mitigating factors), as they were aware of this at the time of the emails
- Jayco made no effort to investigate the allegations made by the anonymous caller, or to critically and independently examine and consider the evidence



RULE #1

The 'hearing' rule (first rule of 'natural justice') Failure to provide opportunity to respond (cont.)

Peter Mulhall v Direct Freight (Qld) Pty Ltd T/A Direct Freight Express [2016] FWC 58

An employer accused a truck driver of stealing a laptop based on "flimsy" CCTV evidence which was never shown to him, and sacked him.

Commissioner Simpson found:

- There was "no clear or cogent evidence" to prove that Mr Mulhall stole the missing box: the CCTV footage was inconclusive,
- Mr Mulhall was denied procedural fairness when his employer failed to show him the footage it relied on in making its decision to dismiss him,
- The dismissal was therefore unjust and unreasonable and Mr Mulhall was awarded damages of \$25,468.



RULE #2

The 'no bias' rule (second rule of 'natural justice')

The investigator must be impartial:

- Investigator should not be a friend of a party, have prior involvement or personal interest in the matter or be a witness
- Avoid actual and **perceived** bias
- Increasing scrutiny of past involvement by Courts
- Doesn't mean internal investigators are not appropriate



RULE #2

The 'no bias' rule (second rule of 'natural justice')

- ***Lohse v Arthur (No 3) [2009] FCA 1118*** – “Yes, I can understand that” demonstrated bias
- ***Poniatowska v Hickinbotham [2009] FCA 680*** – complaint led to formal warning and termination rather than independent investigation



RULE #2

The 'no bias' rule (second rule of 'natural justice')

Francis v Patrick Stevedores Holdings Pty Ltd [2014] FWV 7775

The HR Manager's investigation, leading to dismissal of an employee for assault, was both biased and unfair, because:

- The investigator was biased against the respondent, exaggerating inconsistencies in her evidence;
- Evidence of only one witness was relied upon to corroborate the complaint; other evidence (that did not corroborate it) was ignored;
- The investigator did not investigate counter-allegations by the respondent, in the nature of extenuating or provoking circumstances.



RULE #2

The 'no bias' rule'



Keiko Adachi v Qantas Airways Limited [2014] FWC 518 (10 February 2014) (FWC)

- The Qantas manager who dismissed the employee carried out the investigation in good faith, however his investigation *'reached conclusions that were not available to him upon the evidence'*.
- Specifically, the existing relationship between the investigator and a witness led the investigator to accept that witness' evidence despite 12 other cabin crew members failing to corroborate the allegation.



RULE #2

The 'no bias' rule

Romero v Farstad Shipping [2013] FWC



Bias towards the respondent Captain led to the following flaws:

- The Captain was interviewed first!
- Particulars of Ms Romero's allegations were not sought or provided to the Captain prior to his interview, so he had no chance to adequately respond to them, and her complaints were largely not investigated. Instead, he brought counter-allegations, questioning Ms Romero's competence and mental state
- The interview with Ms Romero was then undertaken with a bias against her, the questions focussing on the Captain's counter-claims, and not with her original allegations (*cont...*)



RULE #2

The 'no bias' rule (second rule of 'natural justice')

Romero v Farstad Shipping [2013] FWC (cont.)

- Ms Romero was not provided with advance notice of the counter-allegations against her (natural justice); instead, she was ambushed during her interview,
- The counter-claims should have been kept separate from the investigation (and dealt with under the relevant Enterprise Agreement), instead of being 'rolled up' in the one investigation and, in fact, becoming the major focus of the investigation.



The 'no bias' rule (second rule of 'natural justice')

Martin v Padua College [2014] VCAT 1652

Pearson v Martin [2015] VSC 696

Background A teacher, Mr Martin, was dismissed from his job at Padua College, a Catholic school, on the basis of an investigation report that found he had 'groomed' a student while she had been at school.

Decision VCAT Senior Member Megay: the investigator had been swayed by irrelevant later evidence (the commencement of a lawful sexual relationship between the teacher and the 18 year old former student):

"...the report had worked backwards from the sexual relationship and viewed all the retrospective evidence through the lens of grooming..."



RULE #3



3. Maintain confidentiality

- Limiting information about the complaint to as few people as possible in order to investigate
- Conduct interviews individually, in a private and discreet location
- No discussion with other staff BUT they can speak to HR and their support person
- Evidence may be put to others for response and will be read by those who receive the report



RULE #4



4. Communicate the process and offer a support person to all participants

- Clearly explain the investigation process. Provide a written guide
- Offer participants a support person of their choice
- Participants must maintain confidentiality and not victimise any participant

TIP: Manage pre-investigation communication.



RULE #4



4. Communicate the process and offer a support person to all participants

Victorian Association for the Teaching of English Inc. v Debra De Laps [2014] FWCFB 613

- A support person is necessary but an advocate is not. There is no obligation to allow an employee an advocate, as distinct from a support person, to a disciplinary meeting.



RULE #4



4. Communicate the process and offer a support person to all participants

Gary Bermingham v Kings Transport & Logistics [2010] FWA 1116

- Mr B was responsible for the day to day management of a transport and delivery contract between Kings Transport and major furniture retailer. Dismissed on the grounds that he stole money from his employer by ‘skimming’ funds from transactions with clients
- Not given allegations, no support person, inaccurate allegations, witnesses were fellow respondents.



RULE #5



5. Consider responses to contradictory evidence

- Before making findings of fact, do provide an opportunity to those against whom you make a finding to respond to the evidence against them that contradicts their evidence. Consider any response before making your findings of fact
- What is it?/when to put it to parties?/how?/why?



RULE #5

5. Consider all of the evidence, including responses to contradictory evidence

***Rizwan Ahmad Khokhar v Bytecraft Systems [2010]
FWA 3913***

Investigator had preconceived ideas, leading to failure to take into account the respondent's response to contradictory evidence. *Don't have a closed mind !*



RULE #6

6. Investigate diligently but promptly

- Be conscientious and rigorous
- Document every conversation
- Be able to explain in your report your methodology and why and how you collected and relied on the evidence



RULE #6

6. Investigate diligently but promptly

Roger Garrett v Shamrock Holdings [2009] AIRC 832

Investigator aware that the respondent was drunk during first interview. The respondent was told that he would have a further discussion when sober (which never took place)

Sheng He v Peacock Bros Pty Ltd, Wilson Lac v Peacock Bros Pty Ltd [2013] FWC 7541

Failure to provide a meaningful opportunity for employees to respond to allegations and contradictory evidence

- Failure to investigate employee's allegations against their supervisor or seek independent witnesses
- Failure to offer opportunity for employees to have a support person present or provide them with language assistance



RULE #6

6. Investigate diligently but promptly

- Do not contribute to any delay
- Actively manage delaying tactics



RULE #6

6. Investigate diligently but promptly

- ***Gilmour v Commissioner of Police [2009] NSWIR Comm 51***
18 month investigation was unreasonable delay
- ***Nikolich v Goldman Sachs J B Were Services Pty Ltd [2007] FCAFC 120***
Unreasonable delays in responding to complaint
- ***Dr Falk v ACT Health [2007] AIRC 613 –***
Allegations reinvestigated

The AIRC described the investigation of the complaints as
“meandering chaos”



RULE #7



7. Make findings on the available evidence collected after applying the balance of probabilities

- Review all the evidence and decide where the weight of the evidence lies
- Let the evidence speak rather than any preconceived ideas about the parties or what the organisation or others believe
- ASK: Are your findings of fact defensible?



RULE #7

7. Make findings on the available evidence ... (cont.)



Oui v Townsville Aboriginal & Torres Strait Islander Corporation Health Services [2012] FWA 2713

- The investigation report did not state who was interviewed and what evidence supported the findings



4. PROTECT YOUR RIGHTS: AFTERCARE

“It’s not over yet...!”

Even if your investigation is sound, you need to ensure that you consider the following ‘aftercare’ issues...



#1 - Don't lose the right to dismiss an employee

'Condoning' inappropriate behaviour:

While an employer may have otherwise valid grounds for dismissing an employee, *if management was aware of, but failed to act to stop, inappropriate conduct over a significant period*, the employee may lose the right to dismiss the employee for that conduct:

***Cannan and Fuller. v Nyrstar Hobart Pty Ltd [2014]
FWC 5072***

Johnpulle v Toll Holdings Ltd [2016] FWC 1507

#1 - Don't lose the right to dismiss an employee

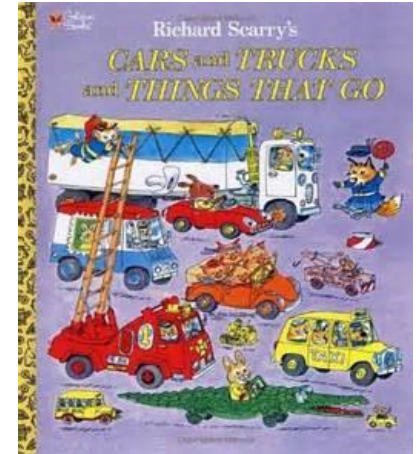
Failure to consistently enforce policies:

Boal v BHP Coal Pty Ltd [2014] FWC 9331

Faulkner v BHP Coal Pty Ltd [2014] FWC 9330

Commissioner Spencer:

Even if an employer has a valid reason to dismiss an employee for breach of an internal policy (e.g. for breach of its Workplace Behaviour Policy) the dismissal may be considered harsh, unjust or unfair (under s.394 of the FWA) if the employer has not done enough to protect its right to rely on that policy.



#1 - Don't lose the right to dismiss an employee

Failure to consistently enforce policies (cont.):

Boal v BHP Coal Pty Ltd [2014] FWC 9331

Faulkner v BHP Coal Pty Ltd [2014] FWC 9330

In both cases BHP Coal was not able to rely on its mobile phone Policy in dismissing the employees, because a “*strong and clear implementation and application of the procedure (including training of staff) was wanting*”:

- There was no clear evidence that the employees dismissed (or other employees) had attended a training session introducing the new Policy;
- There was no evidence that it was made clear to the employees that there was a ‘zero tolerance’ attitude to breaches (or been implemented);
- Different outcomes for different employees breaching the Policy (lack of fairness or accountability in its application).

#2 - Don't lose the right to dismiss an employee

Prior to dismissing an employee, you must put all relevant evidence (that is relied upon in dismissing them) to the employee for a response:

Boal v BHP Coal Pty Ltd [2014] FWC 9331

Faulkner v BHP Coal Pty Ltd [2014] FWC 9330

Remmert v Broken Hill Operations [2016] FWC 6036

#2 - Don't lose Legal Professional Privilege

Bartolo v Doutta Galla Aged Services Ltd [2014]

FCCA 1517 :

- An employer who would otherwise be entitled to rely on LPP in not disclosing an Investigation Report, may by their actions waive that right.
- A waiver of privilege can arise from the disclosure of, or reliance on, advice received in a Report.
- This decision suggests that it may not be wise to ask lawyers to conduct both an investigation and to also provide legal advice as this may lead to disclosure of the legal advice and the lawyer being called to give evidence.

QUESTIONS?





Thank you

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Please do email me at jclark@worklogic.com.au, if you would like to receive a complimentary copy of Worklogic's 364 page book, "Effective Workplace Investigations: A practical guide for Australian HR Practitioners"

