Bartier Perry LAWYERS
EMPOWERING INSIGHT

NSW Government CONNECT

ISSUE 3
NOVEMBER 2018

Inside this issue

WELCOME

2018 has seen many developments. Sexual harassment and office relationships continue to receive significant media attention. There is more focus on out-of-hours conduct, particularly on social media. A national inquiry into sexual harassment has now begun. We are also seeing developments in the area of domestic violence. There is an ongoing debate about whether the industrial relations system is broken.

In NSW, we have seen the Industrial Relations Commission lose some members. As a result, complying with directions in proceedings before the Commission has become more important in managing workload. We discuss these developments in *'Compliance with IRC directions: not "mere guidelines"'*. New members have since been appointed.

Bullying complaints continue to be made by employees, particularly when being managed for poor performance. We discuss this in *'When the "bullied" is the bully: continuing with legitimate performance management'*. Then the Fair Work Commission recently asserted it has jurisdiction over State employees in respect of alleged bullying. We look at this in *'Pursuing avenues to redress bullying: do NSW public sector employees have access to the Federal Fair Work jurisdiction?'*.

There is no doubt that aggrieved employees are looking for more options to challenge decisions. We talk about one of those options in *'Freedom from victimisation: the sleeping giant in NSW?'*. It has also been our experience that aggrieved employees are pursuing other avenues to access investigation records. We explore this in *'Dealing with disclosure demands for workplace investigation records: balancing fair process and the need to safeguard non-disclosure interests'*.

Finally, in *'What the Wattie'*, the Court of Appeal has reminded us that the Commission has broad discretion when considering whether a dismissal is harsh.

I hope you enjoy our articles, and I welcome any feedback and suggestions for future topics. We look forward to continuing to work with you.

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BENEFICIAL CONSTRUCTION OF INDUSTRIAL INSTRUMENTS: DON'T GET DISTRACTED

Often an employee or union will rely on *"the beneficial construction principle"* to justify a broad or *"fair"* interpretation of an award or enterprise agreement. The argument has never really impressed us.

The beneficial construction argument relies on the notion that *"awards should receive a generous construction"* (*see George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503-504). It is said *"narrow or pedantic approaches to the interpretation of an award are misplaced"* (*Kucks v CSR Limited* (1996) 66 IR 182).

So, when ambiguity exists, the argument is that an interpretation that favours a more generous entitlement to employees should be preferred to one that does not.

Not an impressive principle

Yes, an industrial instrument is drafted to provide entitlements. But equally, many provisions place limits on when entitlements apply. Such limitations cannot be ignored or given reduced effect on the basis of *"the beneficial construction principle"*. Such an approach would ignore the intention of the drafters to limit an entitlement.

Sometimes an industrial instrument also represents a compromise between the competing interests of a union, employees and an employer, so it does not necessarily have a beneficial purpose which must always favour employees: *Kennedy v Australian Fisheries Management Authority* (2009) 182 FCR 411 at [44] – [46]. In fact, some provisions impose obligations on the beneficiaries.

The proper interpretation of a disputed provision *"must be restrained within the confines of the actual language employed and what is fairly open on the words used"* (*Khoury v Government Information Office (NSW)* (1984) 165 CLR 622 at 638). Further, a court or tribunal *"is not at liberty to give it a construction that is unreasonable or unnatural"* (*IW v City of Perth* (1997) 191 CLR 1 at 11).

Finally, *"a court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award"*: *Kucks v CSR Limited* (1996) 66 IR 182 at 184.

The construction of an industrial instrument *"begins with a consideration of the ordinary meaning of its words"*: *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813. Attention must at all times be given to the meaning and effect as it appears from the plain and ordinary meaning of the words used (see *Zoological Parks Board of New South Wales and Australian Workers' Union, New South Wales* (2004) 135 IR 56 at [43]).

However, while interpretation of a disputed provision turns on the ordinary meaning of its language, the language must also be understood in the light of its industrial context and purpose (see *Amcor Limited v Construction, Forestry, Mining and Energy Union and Others* [2005] HCA 10). The content and purpose may not always be purely beneficial.

Conclusion

Don't get distracted by *"the beneficial construction principle"*. Understand the purpose of the provision, read the provision – the words used and the context – and give the words their plain and ordinary meaning as understood in light of that context and purpose. If you do that you will be giving the disputed provision its proper meaning – whether it is beneficial or not.

> "So, when ambiguity exists, the argument is that an interpretation that favours a more generous entitlement to employees should be preferred to one that does not."

COMPLIANCE WITH DIRECTIONS:
NOT "MERE GUIDELINES"

The resources of the NSW Industrial Relations Commission are stretched. Litigants are all seeking its precious time to have claims heard as soon as possible. Therefore, directions for the preparation of a matter should be taken seriously.

In a number of recent decisions, the Commission has emphasised this point. The lesson for applicants and their solicitors is that *"the discretion to dismiss proceedings for want of due dispatch is a discretion not to be exercised lightly"* is no safeguard against non-compliance with directions.

Directions are made for *"the just quick and cheap resolution of the real issues in the proceedings"*: s 56 of the *Uniform Civil Procedure Act 2005*. All parties must work to achieve this objective or risk the consequences.

"I eventually complied"

In *Mark Woodman v South Eastern Sydney Area Health Service* [2018] NSWIRComm 1025, we successfully acted for the Local Health District in having an unfair dismissal application dismissed for want of due dispatch. Chief Commissioner Kite SC dismissed the application despite the Applicant eventually filing and serving all his evidence and submissions in support of his claim.

The Commission's Practice Note 17A provides that the 'usual directions' *"**must** be complied with"* (original emphasis) unless an application to vary is made before the time for compliance. The 'usual directions' warn of serious consequences for non-compliance.

Mr Woodman had to file and serve his evidence and submissions by 18 December 2017. He did not comply or seek a variation promptly. An extension was granted to 15 January 2018 with the warning *"there will be no further variations"*. Mr Woodman again failed to comply or seek a variation in a timely manner.

The matter was relisted before Commissioner Newall. Just before the directions hearing, Mr Woodman served his evidence (but not his submissions). Existing hearing dates were vacated and new dates set. Mr Woodman was given to 12 February 2018 to file his submissions. Commissioner Newall made it clear *"further non-compliance will not be accepted"*.

Mr Woodman did not comply. The hearing dates were again vacated. Mr Woodman was asked to show cause why his application should not be dismissed.

Mr Woodman then belatedly filed his submissions. Mr Woodman argued his solicitor was at fault, but as he had now complied, it would be unfair and prejudicial to deny him the opportunity to have his case heard.

In his decision, the Chief Commissioner poignantly stated:

> 26. *Most telling in my view is the respondent's submission that the warnings issued by the Commission, clear and direct as they were, are assumed to be seriously advanced. They were. The terms of paragraph 11 of Practice Note 17A are clear. The warning and reminder of the Registrar on 22 December were clear. There is no doubt the applicant failed to comply with the directions made after each of those events. Moreover, the warning delivered on 31 January was expressly directed to the parties in this matter in circumstances of unexplained non-compliance by the applicant. Again the applicant was in default without prior notice, explanation or application for variation.*
>
> 27. *Parties cannot expect to be able to treat the directions of the Commission, with its limited resources, as mere guidelines. Directions are made for a reason. They are to facilitate, in the terms of s 56 of the Uniform Civil Procedure Act 2005 (NSW), "the just quick and cheap resolution of the real issues in the proceedings". The applicant, through his solicitors, has wantonly failed to treat the directions with the seriousness they deserve.*

Non-compliance impacts on respondent employers, other litigants and the Commission. Case preparation is impaired, hearing dates become unavailable to other parties, and the Commission's business is disrupted and its resources stretched.

In this case, Mr Woodman's continuous defaults meant eight hearing days were vacated. *"The application of the Civil Procedure Act … require(s) … the application be dismissed"*, the Chief Commissioner concluded.

“Non-compliance impacts on respondent employers, other litigants and the Commission.”

"My dad has been sick"

In another case conducted by our office, *Burns v NBMLHD* [2018] NSWIRComm 1020, the Commission dismissed the application for non-compliance.

On two occasions Mr Burns claimed his father's illness prevented him from filing evidence. However, the Commission was not satisfied that his excuse, which included the rather alarming claim that his dad was being *"brought back to life in hospital as we speak"*, was sufficient for a prolonged failure to comply with directions.

Commissioner Murphy concluded, *"In this case the only reason that has been proffered by the applicant for his failure to twice comply with directions made by the Commission was that there had been some health issues relating to his parents. That reason, in my judgement, is insufficient to excuse the applicant's failure on two occasions to comply with the Commission's directions"*.

"I just can't get myself organised"

In *Rous v Department of Education and Communities* [2018] NSWIRComm 1017, the Chief Commissioner dismissed various claims for want of dispatch.

Ms Rous would not comply despite the Commission's numerous explanations of its obligation to hear and determine proceedings, and of parties' obligations to assist in that.

Ms Rous refused to take steps to advance her proceedings. Even when the respondent had the matter relisted to consider varying the directions, Ms Rous refused to appear.

No sign was given by Ms Rous that she would be in a position to advance her claims in the foreseeable future. She remained determined to not prosecute her claims without legal assistance and legal assistance was not forthcoming.

The Commissioner repeated, as it did in *Kabir* (discussed below), *"I do not regard the absence of representation as providing an immunity from a party's obligations"* to comply and prosecute their claim.

Conclusion

Commissioner Newall in *Kabir v Department of Family and Community Services* [2016] NSWIRC 1009 said at [13], with our emphasis:

> ***It is not open to parties to luxuriate in the conduct of proceedings in a time and manner which suits them****, but does not conform to the Commission's statutory obligations to deal with matters quickly, or indeed conform to directions made by the Commission. If matters are not promptly to be prosecuted, there must be cogent and compelling reasons for that failure presented to the Commission if the tools provided by the UCPR, which must be read in the light of the provisions of the Civil Procedure Act itself, are not to be used to ensure that parties who do conduct themselves with due dispatch are not penalised by parties who do not.*

Be warned.

WHEN THE "BULLIED" IS THE BULLY:
CONTINUING WITH LEGITIMATE PERFORMANCE MANAGEMENT

It could be said, perhaps not sceptically, bullying allegations are in vogue in Australian workplaces. In the past year, the Fair Work Commission has received, on average, two applications for stop-bullying orders every day. While some NSW Government employees are not subject to the Fair Work Commission's anti-bullying jurisdiction, these numbers reflect a wider trend faced by employers in both the private and public sectors.

While workplace bullying is undoubtedly a problem, in our experience bullying allegations are often made by employees attempting to avoid legitimate performance management action.

The scenario goes a little like this: An employee is not performing. The employee's manager discusses their concerns and begins an improvement process. The employee then informs HR that they have been bullied by this manager. Placed in a predicament, HR and senior management suspend management action and launch an investigation into the allegations. In the meantime, the manager is left with a sullied name and the underperforming employee remains in the workplace, seemingly untouchable.

Why do employers place the performance process on hold? Perhaps they fear that any action taken against the employee will be construed as being in response to bullying allegations (and therefore unlawful). Perhaps it is to establish whether performance is actually impacted by bullying. It is also legitimate to take bullying complaints seriously.

Our advice to employers: assess the complaint, stay strong, and continue with your legitimate and genuine actions to achieve an improvement in performance. This advice is borne out by recent anti-bullying decisions of the Fair Work Commission.

Salama v Sydney Trains & Ors [2018] FWC 1845

Earlier this year, we acted for Sydney Trains when an employee, Mr Salama, alleged bullying by several managers and by the business as a whole. The employee lodged the anti-bullying application with the Commission after receiving several warnings by those managers, and after being placed on a formal performance improvement plan.

Having satisfied itself that the bullying allegations were without merit, and determined not to be bullied by the alleged "bullied", Sydney Trains pressed on with its legitimate performance management process. Ultimately, Mr Salama, was dismissed.

Before dismissing Mr Salama, Sydney Trains sought an order for the anti-bullying proceedings to be dismissed on the basis that they were an abuse of process and the proceedings had been commenced vexatiously to gain a collateral advantage against, and/or to harass or embarrass, the managers. After Mr Salama had been dismissed, the strike out application was amended to add an additional ground that there was no risk of ongoing bullying because his employment had been terminated.

Deputy President Sams dismissed the anti-bullying application on the ground that the Fair Work Commission lacked jurisdiction. The Commission's jurisdiction to make orders is based on a continuing risk – and no risk now existed given the employment was at an end.

While DP Sams did not find that the anti-bullying application was vexatious or without reasonable cause, he did express a pertinent view at [48]:

> *It should not be lost sight of that named individuals in Anti-Bullying applications are respondents to serious and public legal proceedings in which they are – for better or worse – labelled as alleged bullies. It usually becomes well known in the workplace that these persons are facing legal action to have them confirmed as bullies in the workplace. The epithet may stick, even if there is no substance to the allegations – as the saying goes 'if you throw enough mud at the wall, some of it will stick'. The vast majority of alleged bullies in proceedings of this kind are mid-level supervisors [sic], managers or team leaders who are doing no more than carrying out their supervisory duties. Usually, this is reasonable management action carried out in a reasonable manner. Invariably however, a resultant Anti-Bullying application is directly associated with an applicant's adverse performance issue or a warning given for poor performance or behaviour. On many occasions, I have observed named respondents, who are themselves seriously and adversely impacted by being named as alleged bullies, sometimes displaying high levels of stress, anxiety and distress, even psychological damage.*

It is refreshing to hear a senior member of the Commission express in a published decision what we have experienced for several years now. That is:

- often many allegations of bullying are merely attempts to avoid performance management; and
- managers are human beings, and such allegations can cause stress (and are not "just part of the job" for managers).

There needs to be some foundation to allegations of bullying, other than mere discontent over being performance managed.

> "In our experience bullying allegations are often made by employees attempting to avoid legitimate performance management action"

Miroslav Blagojevic v AGL Macquarie Pty Ltd; Mitchell Seears [2018] FWC 2906

In another recent decision (upheld on appeal), Commissioner Saunders dismissed a bullying application by an employee who was convinced that a performance improvement plan against him was bullying.

The Commission reiterated that in such cases, it is not for the Commission to decide whether the employee's performance warrants such a plan. The Commission will only intervene if the plan *"lacked any evident and intelligible justification"*, or if its introduction and implementation are not carried out in a reasonable way.

The Commission respects management's right to address underperformance. Bullying complaints are not about micro-managing every decision of a manager or employer. The concept of reasonableness provides employers with flexibility in decision-making. Complaints do not succeed based on an employee's perception of events.

Lesson

Allegations of bullying are not to be feared. They should not have you take a hands-off approach to managing employees and nor should you stop a reasonable and legitimate performance management process simply because bullying has been alleged.

However, bullying allegations should be treated seriously. Assess complaints from all angles to see if they have substance. Some will warrant investigation and some will not.

PURSUING AVENUES TO REDRESS BULLYING:
DO NSW PUBLIC SECTOR EMPLOYEES HAVE ACCESS TO THE FEDERAL *FAIR WORK* JURISDICTION?

In a recent decision of *Roads and Maritime Services v Leeman* [2018] FWCFB 5772, which dismissed an appeal against the earlier decision of *Victoria Leeman* [2018] FWC 3584, the Full Bench of the Fair Work Commission held that an employee of the Government of NSW has access to the Federal anti-bullying jurisdiction. What the...?

The Federal anti-bullying jurisdiction

As you may know, a worker who reasonably believes they have been bullied may apply to the Fair Work Commission for an anti-bullying order: s 789FC of the *Fair Work Act 2009*.

The Fair Work Act says a worker is bullied at work if *"the worker is at work in a constitutionally-covered business"*: s 789FD(1). A *"constitutionally-covered business"* includes a *"constitutional corporation"*: s 789FD(3). A *"constitutional corporation"* includes a trading corporation formed within the limits of the Commonwealth: s 12 of the Fair Work Act and paragraph 51(xx) of the Constitution.

The case

Ms Leeman worked at Roads and Maritime Services (RMS). Ms Leeman brought an application to the Commission seeking an order to stop alleged bullying. RMS filed a jurisdiction objection asserting Ms Leeman was never *"at work in"* RMS and RMS was not a *"constitutionally-covered business"*.

In summary, the Fair Work Commission found, and the Full Bench upheld:

- Ms Leeman could not be employed by RMS (see s 47A of the *Constitution Act 1902* (NSW));
- Ms Leeman was rather employed by the Government of NSW (see ss 68B and 68C the *Transport Administration Act 1988*);
- Ms Leeman did not have to be an employee of RMS, just *"at work in"* RMS, to be within jurisdiction;
- Ms Leeman was deployed to work with RMS in the Transport Service of NSW;

- As such, Ms Leeman was *"at work in"* RMS – as she turned up to RMS premises each day, took instructions from persons on behalf of RMS and exercised functions for RMS;
- RMS was a corporation under its specific legislation (see s 46 of the *Transport Administration Act 1988*);
- RMS had trading activities generating revenue of $173 million, or 2.67% of its revenue, which *"could not be described as trivial, insignificant, marginal, minor or incidental"*; and
- As such, RMS was a trading corporation and therefore a constitutionally-covered business.

Implications

The immediate and concerning implication of the decision in *RMS v Leeman* is that some employees, who may have otherwise been considered outside the Federal system, may pursue redress from the Commission for anti-bullying orders.

> "A worker who reasonably believes they have been bullied may apply to the Fair Work Commission for an anti-bullying order."

FREEDOM FROM VICTIMISATION:
THE SLEEPING GIANT IN NSW?

Employers and state-based organisations in the Federal IR system know how easy it is for staff to complain about employment decisions using the general protections or adverse action provisions of the *Fair Work Act 2009*. About 5,000 such claims were made to the Fair Work Commission in 2017/18. Often an employee will assert they were subject to action because they had a protected attribute or made some complaint or inquiry in relation to their employment.

Perhaps unknown, but becoming more common, is the similar (but different) provisions in the *Industrial Relations Act 1996* (NSW) known as the freedom from victimisation provisions. State based employees, and their advisors, are seeing these provisions to be of comparable utility.

A recent decision of the NSW Industrial Relations Commission in *Janssen v South Western Sydney Local Health District* [2018] NSWIRComm 1022 has important lessons for NSW State-based employers in relation to:

- the narrowness of the victimisation provisions; and
- decision-making, particularly when a senior employee bases a decision on advice and information provided by others.

The freedom from victimisation provisions

Excluding some 'whistle-blower' like provisions, s 210 of the IR Act relevantly provides a shopping list of protected attributes:

> *(1) An employer or industrial organisation must not victimise an employee or prospective employee because the person:*
>
> *(a) is or was a member or an official of an industrial organisation of employees or otherwise an elected representative of employees, or*
>
> *(b) does not belong to an industrial organisation of employees, or holds a certificate of conscientious objection to becoming a member of such an industrial organisation, or*
>
> *(c) refuses to engage in industrial action, or*
>
> *(d) exercises functions conferred under this Act, or*
>
> *(e) claims a benefit to which the person is entitled under the industrial relations legislation or an industrial instrument, or*
>
> *(f) informs any person of an alleged breach by an employer of the industrial relations legislation or of an industrial instrument, or*
>
> *(g) participates, or proposes to participate, in proceedings relating to an industrial matter, or*
>
> *(h) engages in, or proposes to engage in, any public or political activity (unless it interferes with the performance of the employee's duties), or*
>
> ...
>
> *(j) makes a complaint about a workplace matter that the person considers is not safe or a risk to health, or exercises functions under Part 5 (Consultation, representation and participation) of the Work Health and Safety Act 2011*

In our experience, this last paragraph (j) is the one to which State employees will often resort.

Victimisation will take the form of detrimental action. Detrimental action can include bullying behaviour, not promoting an employee, suspension or termination. In *Janssen*, the Commission found that suspension (even on full pay) for eight months *"without more, constitutes detrimental action"*.

As with the Federal system, once the employee has proved they have taken a protected action and suffered some detriment, it is for the employer to then prove that a *"substantial and operative cause of the detrimental action"* was not prohibited under s 210.

So if an employee makes a complaint and is dismissed the next day, that does not necessarily mean they have been victimised. It's all about the connecting link between the action of the employee, the detrimental action, and the employer's reasoning. Coincidence does not equal causation!

> "Detrimental action can include bullying behaviour, not promoting an employee, suspension or termination"

Suspended because I complained – no you weren't

Dr Janssen was a psychiatrist at South Western Sydney Local Health District. Dr Janssen had made complaints to the LHD alleging that certain conduct of his colleagues created risks to employees and patients. It was accepted these complaints fell within s 210(1)(j) of the IR Act.

In August 2017, Dr Janssen was suspended on full pay during an investigation. Ms Larkin, the Chief Executive of the LHD, made the decision to suspend Dr Janssen based on recommendations from the relevant manager, Dr Oliver. Dr Oliver made his recommendation based on a risk assessment prepared by another employee.

Ms Larkin was aware of the complaints made by Dr Janssen. But was the suspension because Dr Janssen made those complaints?

Dr Janssen argued, among other things:

- Ms Larkin and Dr Oliver did not make their own enquiries in relation to the matters raised in the risk assessment because they had already decided to suspend him as retribution for making the complaints;
- Ms Larkin made the suspension decision within one day of receiving Dr Oliver's recommendations, so the decision must have been pre-determined.

So surely the LHD had victimised Dr Janssen?

While Dr Oliver did not critically assess the risk assessment, and this *"may not constitute 'best practice'"*, Commissioner Seymour said the deficiency *"does not establish that a substantial and operative reason for the recommendation was retaliation"*.

The Commission noted that Ms Larkin considered the risk assessment and not matters more broadly. But just because she did not take a more holistic view *"does not establish that Ms Larkin's motive was not managing risks she believed existed, but retaliating against Dr Janssen"*.

The Commission also recognised some deficiencies in the LHD's handling of the matter. However, they were not relevant. *"The Commission in this matter is not undertaking a broad-ranging assessment of SWSLHD's actions and processes. Establishing liability of SWSLHD within the victimisation provisions of the Act is restricted to a narrow consideration of whether a substantial and operative reason was Dr Janssen's complaints"*, Commissioner Seymour said.

The allegation by Dr Janssen did not make sense. *"[I]n considering the motivation of Ms Larkin to suspend Dr Janssen to 'rid herself' of a troublesome employee, the fact of suspending Dr Janssen would not, in itself, preclude him from making complaints about matters relating to his employment with SWSLHD. As he remained an employee of SWSLHD for all purposes, he was entitled to make complaints irrespective of being on suspension and did in fact continue to make complaints during his suspension. If Ms Larkin's motive was to rid herself of a complaining employee, suspension was not an effective means of doing so"*, it was observed.

Some tips

Victimisation claims concern the real reason for the decision. If certain information is not available to or known by the decision maker, a decision cannot be influenced by it. This will make a victimisation claim easier to defend.

Ms Larkin had information before her relating directly to risk; namely a recommendation and risk assessment. *"I do not consider that to be unusual in the circumstances"*, Commissioner Seymour found. The decision was based on risk, and risk only.

The take home message

A large part of the LHD successfully defeating the claim in this matter was because:

- all ***relevant*** information relating to risk was put to the decision maker; and
- the decision was based on that information ***only***.

DEALING WITH DISCLOSURE DEMANDS FOR WORKPLACE INVESTIGATION RECORDS: BALANCING FAIR PROCESS AND THE NEED TO SAFEGUARD NON-DISCLOSURE INTERESTS

Workplace investigations are, unfortunately, a part of modern day life. Unions and plaintiff lawyers also know that no investigation is perfect.[1] They are quick to demand copies of investigation records to try and find procedural imperfections, or to take issue with conclusions, or to frustrate, delay or influence the final decision.

When faced with demands to produce investigation records, there is a tension between balancing procedural fairness expectations with safeguarding confidentiality, privacy, privilege and other non-disclosure interests.

Procedural fairness

Employees and their union or legal representatives often claim a 'right' to have a full copy of an investigation report, or even all investigation records. This right is often asserted to exist in the interests of ensuring natural justice or procedural fairness. Yet it is doubtful that such a right exists in all cases.

At common law there is no duty to afford natural justice in employment.[2] Procedural fairness is also not implied in the contract of employment.[3] The existence of a statutory unfair dismissal regime also does not imply an obligation to hand over investigation records.

1 Although the law does not demand perfection – as was said in *Dent v Hallibuton Australia Pty Ltd* [2014] FWC 5692 at [49], *"[The] investigation does not need to be without flaw."*

2 *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Anor* [2007] NSWSC 104 at [143].

3 *Jones v Queensland Tertiary Admissions Centre Ltd* [2009] FCA 1382 at [43]; *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578.

Nevertheless, many government employers import into policy, procedural fairness expectations. There is also in government employment (but not in non-government employment) a presumption that procedural fairness must be observed in exercising statutory power that could affect the rights, interests or legitimate expectations of individuals in a direct or immediate way.[4] If an investigation fails to follow a statutory scheme, the subsequent decision will almost certainly be set aside on review or appeal.

Not disclosing all investigation records does not equal denial of procedural fairness

Departure from policy investigation guidelines will generally not result in a subsequent decision being set aside as unlawful[5], unless such an approach actually results in failure to afford procedural fairness.[6]

The High Court has determined that in the absence of a clear statutory requirement, where decision making involves different steps, the requirements of procedural fairness are satisfied if *"the decision-making process, viewed in its entirety, entails procedural fairness"*.[7]

Procedural fairness is afforded if the subject of an investigation has a fair opportunity to respond to *substantive* allegations, comments, or findings that may affect their interests before a decision is made affecting those interests.

Not all decisions, even if made in a statutory context, will affect a subject's interests.[8] For example, if an investigator is merely collecting information to report to management so that action can be taken that does not affect a person's rights or interests, there is no obligation to notify the subject of the complaint, let alone provide a copy of the investigation records or report.

Even if procedural fairness obligations exist, the High Court has also said that *"the doctrine of procedural fairness does not necessarily require that each and every new document received by a decision maker must be provided to the person affected by the decision."*[9]

There are no hard and fast rules about how often or when a person should be informed of the substance of any adverse allegation, comment or finding.

Moreover, there is no duty to deliver up all investigation records simply to appease claims of procedural fairness. Indeed, to do so could damage the integrity of the investigation. It could also lead to inadvertent waiver of privilege, breach of confidence, or liability for disclosure of protected health records or personal privacy records. It may not be good for HR functions or ongoing workplace relationships.

Be careful resisting production on legal professional privilege grounds

An investigation commissioned solely in order to obtain legal advice is protected from disclosure because of client lawyer privilege. However, if other purposes are also at play, the investigation may not be privileged.[10]

Disclosing a privileged document can waive privilege. Once privilege is lost it cannot be regained. It is always wise to work closely with your legal advisors to ensure any legal privilege is properly established, asserted, and not inadvertently waived or improperly claimed, especially in court or tribunal proceedings.

Public interest and other legal obligations not to disclose information

Sometimes there are prevailing public interests or legal obligations not to disclose information.

The *Government Information (Public Access) Act* 2009 (NSW) contains an extensive list of such categories, including statutory secrecy laws, Cabinet documents, information relating to law enforcement and public and transport safety, and adoption, care and protection of children.

In public sector employment, whistle-blower secrecy obligations, such as under the *Public Interest Disclosures Act* 1994 (NSW), may prohibit the disclosure of information that could identify a complainant. Where an employer is investigating a matter that is also the subject of a separate criminal investigation by a law enforcement body or regulator, the employer may be asked to not disclose information that may prejudice criminal investigations.[11]

Safeguarding workplace investigation expectations of confidentiality and safety

As an extension of this principle, there is no duty to disclose information that may prejudice an employers' statutory duty to ensure work health and safety. Such disclosure could lead to employees being less inclined to report incidents, for example, of sexual harassment or intimidation.[12]

In most workplace investigations, it is recognised that *"[i]t is clearly in the public interest to protect the confidentiality of investigations into issues arising in the workplace..."* and, the *"maintenance of confidentiality at a management level about the conduct of a workplace investigation, and the maintenance of confidential communications with the investigator, is generally*

4 *Kioa v West* (1985) 159 CLR 550; *Minister for Immigration and Border Protection & Anor v SZSSJ Anor* [2016] HCA 29; *Gaynor v Chief of Defence Force* (No.3) [2015] FCA 1370.

5 *Matkevich v New South Wales Technical and Further Education Commission* (No 3) (unreported) CA 40050/95.

6 *Hill v Green*; *Jarvis v Buckley*; *Wood v Buckley*; *Young v Buckley* [1999] NSWCA 477.

7 *South Australia v O'Shea* (1987) 163 CLR 379 at 289, *Ainsworth v Criminal Justice Commission* (1991) 175 CLR 564 at 579.

8 *Dr Amos v Western NSW Local Health District* [2016] NSWSC 1162 at [113], [116] and [126].

9 *VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 95-6.

10 *Sydney Airports Corporation Limited -v- Singapore Airlines Limited & Qantas Airways Limited* [2005] NSWCA 47 and *Applicant v Respondent* [2016] FWC 5006.

11 *Gene Simring v Commissioner of Police, NSW Police* [2009] NSWSC 27, at [69].

12 *STW v TX* [2005] NSWADT 262 at 32.

necessary to ensure that an investigation is conducted effectively."[13]

Accordingly, in *P v Greater Western Area Health Service (GD)* [2007] NSWADTAP 57, it was found that it would impair the effective conduct of investigations to allow records of interview, signed statements and other letters and statements collected by an investigator to be disclosed. This outcome was also followed in a recent case conducted by us: *Amos v Western NSW Local Health District; Arnold v Western NSW Local Health District* [2017] NSWCATAD 359.

> "There is a tension balancing procedural fairness expectations with safeguarding confidentiality, privacy, privilege and other non-disclosure interests."

Liability for breach of health records, privacy and confidentiality duties

There are legitimate reasons for a public sector employer to be concerned about liability for disclosure of health records or personal information in breach of privacy obligations.

The *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW) (HRIP Act) set standards for the collection, storage, use and disclosure of personal information held by public sector agencies and of health information held by both public and private organisations in NSW.

Subject to various exemptions and exclusions from the definition of personal information, it can be an offence for a public official to disclose personal information or health record information unless it is in connection with the lawful exercise of their official functions.

Resisting production by notice, summons or subpoena

Just because someone does not assert a right against disclosure of information, that does not mean that appropriate safeguards should not be taken.

It is always advisable to consider broader public interest, privacy and confidentiality obligations before producing investigation records. This is especially so when a request is made for voluntary production in the course of an investigation.

Production under a court subpoena is no guarantee against a person later alleging breach of health record or privacy information principles. For example, in *AYT v Sydney Local Health District* [2014] NSWCATAD 29, a patient made a

13 *Burke v Health Education and Training Institute* [2016] NSWCATAD 194 at [92].

complaint under the HRIP Act in respect of a District Court subpoena served on the Local Health District. The Local Health District still had to demonstrate to the satisfaction of the NCAT that when answering the District Court subpoena it did not breach the health information privacy principles and that it only complied to the extent required by law. Even under compulsory document production, it may be appropriate to seek consent or, in the absence of consent, seek orders to limit production of documents by way of redaction or other means to protect privacy and confidentiality.

Safeguarding public interest by anonymisation and suppression orders

Court proceedings are supposed to be conducted publicly.[14] Non-disclosure orders merely to protect people from injury, hurt, embarrassment or distress are usually inimical to this rule.

In some situations, though, there may be a greater public interest to protect health, safety, confidential information, or even the professional and personal reputations of witnesses to an investigation.

X v Department of Justice and Attorney General [2011] NSWIRComm 1010 concerned the suspension of an employee pending an investigation of a complaint of sexual harassment and inappropriate use of email. Industrial dispute and threatened dismissal proceedings were commenced in the NSW Industrial Relations Commission. Suppression and non-publication orders were sought to protect likely injury to the personal and professional reputations of a number of young female lawyers. It was also argued that disclosure of workplace investigation records and information would likely have a detrimental impact on the psychological welfare of the women involved. None were parties and it was accepted that no public interest would be served in disclosing their identities.

Balancing interests

This is by no means a full exploration of all the public or other interests that may be relevant in considering demands to access workplace investigation records.

It is true that government employers operate in a framework that promotes openness, accountability and transparency. But great care still needs to be taken. There can be prevailing legal duties and public interests not to disclose investigation records.

With appropriate legal advice, steps can be taken to ensure fair process as well as appropriately safeguarding legitimate privacy, confidentiality and other non-disclosure interests.

14 *Scott v Scott* [1913] AC 417 at 441; In *Rinehart v Welker* [2011] NSWCA 403 at [32]-[38] per Bathurst CJ and McColl JA where it was stated: *"The principle of open justice is one of the most fundamental aspects of the system of justice in Australia..."*.

WHAT THE WATTIE: COURT OF APPEAL CLEARS DISMISSAL AS HARSH

Would you dismiss an employee in the following circumstances:

- The employee is employed by Corrective Services NSW, an entity statutorily charged with looking after inmates.
- A Senior Correctional Officer assaults an inmate on 13 September 2014, then assaults another inmate on 19 December 2014 and again on 29 December 2014.
- When you come to make your decision, you know the employee was found guilty of the assaults but placed on good behaviour bonds.
- The employee accepts responsibility for his actions but says they were out of character and he was suffering from a mental illness at the time.

Would the dismissal be *harsh?* Corrective Services was concerned about the multiple assaults and inmates being subjected to undue force, incompatible with the employee's duties and it's responsibilities (and its statutory function). It made the decision to dismiss.

Assault is a serious matter. While there may be circumstances excusing an assault, three assaults are three (or two) too many. Some conduct, regardless of its seriousness, is just incompatible with continued employment. Was this such a case?

Decision at first instance

Commissioner Murphy at first instance held the dismissal was harsh, but ordered no back pay for the five months since dismissal: *Wattie v Industrial Relations Secretary on behalf of the Secretary of the Department of Justice (CSNSW)* [2016] NSWIRComm 1036. Commissioner Murphy acknowledged *"assaults on inmates in correctional centres by correctional officers cannot be condoned nor tolerated, even in cases where there is significant provocation"* but found the assaults were at the lower end of the scale of seriousness and there were mitigating circumstances.

The Full Bench did not disagree with the Commissioner's decision on appeal.

Corrective Services appealed again. The Supreme Court, Adamson J, held that Commissioner Murphy's decision was affected by error in that he failed to actively and sufficiently consider the relevant regulatory and legislative context of Mr Wattie's employment in determining the true gravity of the misconduct. That framework included criminal provisions against the use of force on inmates and Corrective Services' obligations to inmates.

What the *Wattie:* Court of Appeal intervenes

Mr Wattie appealed and the Court of Appeal held there was no basis to set aside Commissioner Murphy's decision: *Wattie v Industrial Relations Secretary on behalf of the Secretary of the Department of Justice (No 2)* [2018] NSWCA 124.

The Court of Appeal decision is interesting for these reasons:

- The Court of Appeal agreed with Adamson J that in assessing the seriousness of the conduct it was a *mandatory relevant consideration* to have regard to the regulatory and legislative context.
- The Court of Appeal, however, confirmed that the decision to find a dismissal unfair is a broad discretion, and it is a matter for the original decision-maker (in this case, the Commission) to determine the appropriate weight to be given to matters (including the regulatory context).
- Decisions of Commissioners are not to be read *"too finely or precisely"* – and it can be inferred that Commissioner Murphy adequately considered that framework by recognising assaults are not to be condoned or tolerated.

The Court of Appeal said ultimately the task was *"to determine … the nature and gravity of Mr Wattie's conduct and the mitigating circumstances identified in determining in a balancing exercise whether his dismissal was harsh…"*, and that is what Commissioner Murphy did.

Conclusion

Whether you agree with Commissioner Murphy's decision, the long-standing unfair dismissal regime has allowed the concept of harshness to provide redress for employees. But it can also create uncertainty for employers, as the weight given to the conduct compared to the mitigating circumstances can, and does, vary.

The best an employer can do is have due regard to the relevant regulatory and legislative context, and make a decision consistent with its statutory functions after considering the employee's personal circumstances and whether any trust remains in the relationship. The original decision may be correct, even if overturned as harsh.

> "The long-standing unfair dismissal regime has allowed the concept of harshness to provide redress for employees."

WANT TO KNOW MORE?

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Thank you for taking the time to read our NSW Government Connect publication. We hope you found it informative.

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