Bartier Perry LAWYERS
EMPOWERING INSIGHT

CELEBRATING 75 years

NSW Government CONNECT

ISSUE 1

MARCH 2017

Inside this issue

Welcome

Bartier Perry has been in business for 75 years, a very proud achievement. For a significant part of our journey, Bartier Perry has been working closely with various NSW Government departments, agencies and organisations in providing advice and legal services.

As the practice leader of the Workplace Team, I can say we are all thrilled at the opportunity and privilege to continue to work with NSW Government. We eagerly look forward to meeting some new departments and agencies that we have not worked with in the past.

Our Workplace Team is led by Amber Sharp, Mark Paul, Deanna Oberdan and me. At the back of this publication is a short summary of our individual experience.

We are implementing an exciting value add program this year. On the next page, you will see details of our NSW Government Webinar Series for 2017. Our first webinar is on *Resolving conflicts and bad behaviour in alternative ways* which will be broadcast on 28 March 2017. If you miss it, don't fret; it will be accessible on-line for 12 months.

This is our first edition of NSW Government Connect. While some articles are updates on legal developments, others articles are more of a reflection, designed to provoke thought.

I hope you find our writings of value, and I welcome any suggestions for future topics. We look forward to hearing from you and, of course, working with you to deliver great outcomes.

James Mattson
Practice Leader
Workplace Team at Bartier Perry

Bartier Perry's Webinar Series

As an exclusive value add for NSW Government lawyers and HR practitioners,wherever you are in NSW, we invite you to register for our 2017 webinar series on workplace law (and earn some CPD points).

We will be delivering three webinars on the following topics:

Resolving conflicts & bad behaviour in alternative ways

Speakers : James Mattson and Stephen Lancken
When : Tuesday, 28 March 2017
Time : 1-2pm

There are alternative ways to tackle employment conflicts, disputes and bad behaviour. Believe it or not, it is not a case of having to "investigate" every complaint or incident! We discuss lessons from some interesting cases and share some of our experiences. Our guest speaker Stephen will share his insights as an experienced mediator into the value of alternative dispute resolution to resolve workplace difficulties.

Injured workers: navigating the labyrinth

Speakers : Amber Sharp and Mark Paul
When : Tuesday, 30 May 2017
Time : 1-2pm

Careful and constant management of injured and ill workers is a necessity in today's workplace. But who has the courage, patience and time? What about the confidence to manage mental illness? In this session, we identify the road map to navigate workplace laws when managing an injured or ill worker back to work or out of the workplace.

Odds and ends: laws worth knowing about in employment

Speakers : Amber Sharp and James Mattson
When : Tuesday, 22 August 2017
Time : 1-2pm

Advising on employment matters requires an awareness and knowledge of more than just industrial, discrimination and safety legislation. In this session, we examine some of the odd and quirky laws that pop up from time to time. These include regulatory laws, workplace surveillance, criminal law and the GIPA legislation. Or perhaps you may have a quirky law you want to know about? Let us know.

COST
No charge

Please feel free to extend this invitation to colleagues where appropriate.

To register for any or all the sessions, please go to **www.webcasts.com.au/bartierperry/**

Procedural fairness:
calm down, it does not always apply

As employment lawyers and HR practitioners we can worry too much about the process, often leading to delay and a lack of focus on the real issues of substance, like the decision to be made.

Process, and a fair process, is undoubtedly valuable in building trust with the workforce, and respecting industrial demands. However, it is important to keep in mind that absent statutory command, the legal obligation to afford a fair process only arises at certain times (such as when considering a dismissal, or a disciplinary demotion) and not in respect of every decision or matter that arises in employment.

A good reminder of this point arose in the case of *Dr Amos v Western NSW Local Health District* [2016] NSWSC 1162 in which Mark Paul acted for the LHD.

> The Court said it was "simply a statement of a self-evident truth in that the possibility of disciplinary action resulting from future misbehaviour always exists".

Western NSW LHD was considering suspending Dr Amos, a visiting medical practitioner, and gave him the opportunity to respond to that possibility. Dr Amos had previously been issued a warning letter for misbehavior, and was also the subject of an adverse investigation report, originally into complaints by Dr Amos but which had brought to light complaints about him. The LHD said it would consider the warning letter and the investigation report in assessing whether to suspend.

Dr Amos said the LHD could not rely on the warning letter or the investigation report. He asked the Supreme Court to quash both the warning letter and the investigation report, saying he had been denied procedural fairness when the letter was issued and the report prepared.

Under administrative law, principles of natural justice (or procedural fairness) apply when a right, interest or legitimate expectation of an individual may be adversely affected by a decision: *Kioa v West* (1985) 159 CLR 550. Or, as the High Court recently said, the exercise of a statutory power must be "apt to affect" the interest of an individual before the requirements of procedural fairness

will apply: *Minister for Immigration and Border Protection & Anor v SZSSJ & Anor* [2016] HCA 29.

Before being issued with the warning letter, Dr Amos said he had not been told a warning letter would issue to him so he said he had been denied procedural fairness. Dr Amos also said the warning letter adversely affected his reputation. The Court disagreed with both of these submissions.

While the letter did contain a "warning", it was only a warning that further incidents may result in further disciplinary action. The Court said it was *"simply a statement of a self-evident truth in that the possibility of disciplinary action resulting from future misbehaviour always exists".* The letter also did not affect his reputation. The letter *"was a private communication between Dr Amos and the LHD. It was only to be kept on his file",* the Court said.

Accordingly, there was no entitlement to procedural fairness upon issue of the warning letter. But, of course, procedural fairness would apply at a later time if the LHD were to take action on the warning letter. Dr Amos also complained about the investigation report because he did not know when he was interviewed that the report might be critical of him. That was correct, but the Court found that the investigation report was not apt to affect an interest of Dr Amos, and so the need for procedural fairness did not arise. The report was *"no more and no less"* than a gathering of information for the chief executive to consider.

The investigator was not exercising any statutory powers or making any decisions on behalf of the chief executive. The chief executive was not treating the report as *determinative* of a decision. Thus there was no obligation to afford procedural fairness at the stage of the investigation. The chief executive was providing procedural fairness in the making of a decision about suspension by giving Dr Amos a chance to reply to the report, and also the warning letter.

Undoubtedly, process is important, but *Amos* reminds us that the obligation to afford procedural fairness arises at a particular point in time. Until that time, being distracted on process can result in delay and frustrations. A balance needs to be struck and *Amos* provides some insight as to where that balance can be found.

It's confidential: avoiding the world-wide release of staff disclosures

Employers rely on its staff to disclose issues of conflict, discontent and inappropriate behaviour. Without that disclosure, employers may be unaware of any issues or the extent of any problems. And disclosure of the mere existence of a problem is also not enough. Employers need frankness and openness from employees to gauge and understand the real issues. Muted honesty never assists.

Unfortunately, some employees will not be frank and open without a promise of confidentiality. Perhaps it is the Australian culture to not dob in a mate.

Confidentiality in this context does not mean however there will be no disclosure of what is said by the employee. An employer will need to respond. Confidentiality simply means that the employer will not advertise what is said broadly and beyond those that need to know.

In these circumstances, a tension can arise between the principles of openness in the *Government Information (Public Access) Act 2009* and the employment and HR imperatives to protect confidentiality and prevent victimisation. While an employer can lawfully direct

Confidentiality simply means that the employer will not advertise what is said broadly and beyond those that need to know.

an employee to not disclose matters arising in an investigation, under the GIPA legislation no restriction is placed on material over which access is granted.

This tension reveals itself when a disgruntled employee or other person seeks investigation reports and source material like complaints, interviews and workplace surveys.

Under GIPA legislation there can be an overriding interest against disclosure of such information because disclosure of the information could reasonably be expected to have the following effects:

- prejudice the supply of confidential information that facilitates the effective exercise of an agency's functions; or
- result in the disclosure of information provided in confidence.

> Protecting the confidences of staff, and the processes of managing sensitive workplace matters, is important for functional, professional and safe workplaces.

In Noble v University of New South Wales [2017] NSWCATAD 2, an employee sought access to a culture report commissioned by the University into one of its faculties. The report summarised the feedback provided by staff, and reported on matters like team cohesion, behaviours and accountability, executive messaging and leadership qualities.

In Jones v NSW Department of Education [2017] NSWCATAD 51, an employee was the subject of a formal performance monitoring program to manage her performance following previous investigations. The employee sought access to information about her that was provided to her employer by other employees.

In both cases, the employer had assured staff of the confidentiality of their opinions. If it did not, *"...people would be unwilling to come forward and co-operate and sources of such information would not be available"*, the Tribunal said in *Jones.*

The Tribunal refused access to the information. *"The information provided was thus sensitive personal information the disclosure of which could reasonably be expected to adversely affect their relationships with each other and thus the functioning of their team"*, said the Tribunal in *Noble.*

Commenting on the consequence of releasing such information, the Tribunal concluded:

> *If the University or another government agency is impeded in its functions of conducting processes to improve staff performance, or undertaking staff reviews for management purposes, this is likely to result in greater staff conflict and poorer staff performance.*

Protecting the confidences of staff, and the processes of managing sensitive workplace matters, is important for functional, professional and safe workplaces. Do your processes adequately address confidentiality?

Briginshaw v Briginshaw – what is its significance?

Those of you dealing with disciplinary matters will often hear of *Briginshaw v Briginshaw.* An employee might say you can't proceed with disciplinary action because the case hasn't been proved to the 'Briginshaw Standard'. What does that mean? Does it matter?

Briginshaw v Briginshaw [1938] HCA 34, was a matrimonial dispute that proceeded on appeal to the High Court about whether the claim of adultery had been proved to the requisite standard. In confirming that the standard was the civil standard, the High Court reflected on the process of judicial officers making decisions about disputed facts. Without reviewing the case in detail, it's enough to say that the High Court observed that when deciding a difficult issue in civil proceedings or reaching a challenging conclusion, we instinctively

require more evidence. The High Court reminded judges to be cautious when reaching a conclusion, but to remain aware that whatever the issue, it's still the civil standard – the balance of probabilities.

Over the years the message from the decision has morphed into a requirement that when the issue is serious, such as potential dismissal, the allegations are of serious misconduct or when a finding has significant consequences, such as professional misconduct, then the evidence has to rise to a higher standard, the so-called 'Briginshaw Standard'.

And in a similar fashion the circumstances in which there is an obligation to apply the 'Briginshaw Standard' have been expanded from hearings before a court to encompass many employment decisions, from proceedings in an industrial commission through to the reaching of conclusions by an investigator. Indeed, there are some disciplinary policies that place an obligation on investigators to apply the 'Briginshaw Standard'.

In our view, that is a double mistake – *Briginshaw* does not prescribe a standard higher than the civil standard, and *Briginshaw* only applies to evidentiary disputes before courts, but not to the making of administrative decisions like those of a fact-finding investigator. And that's not just our view. It was in 1995 that Justice McHugh said during the course of the hearing of a High Court appeal:

> *The problem is that there are only two standards of proof: balance of probabilities and proof beyond reasonable doubt. I know Briginshaw is cited like it was some ritual incantation. It has never impressed me too much. I mean, it really means no more than, "Oh, we had better look at this bit more closely than we might otherwise", but it is still a balance of probabilities in the end.*

Justice Gaudron also questioned if *Briginshaw* was broken.

Take for example, the comment in *Briginshaw* that in reaching a decision the "gravity of the consequences flowing from a particular finding" is a relevant consideration. Approaching the investigation and finding of acts in this way must not only be a difficult task but may also lead to bizarre outcomes. Imagine the conversation between an investigator and the manager who is charged with making a decision about the employee:

Investigator : *Here are my findings about whether the supervisor is a bully.*

Manager : *I'm thinking of dismissal.*

Investigator : *In that case he is not a bully.*

Manager : *Well maybe just a warning?*

Investigator : *Then he is a bully!*

Shouldn't the findings of fact about what occurred be the same after careful thought regardless of outcome? *Briginshaw* has taxed lawyers and judges over the years with no real universal clear understanding. So why confuse an investigator or the investigative process?

So our message is to tell the investigator to report the facts (that is, the information they gathered) and, if they are asked to make findings, tell them to give it some careful thought and set out their reasoning for their views. But be wary of applying the 'Briginshaw Standard'. As Branson J said in *Qantas Airways Limited v Gama* [2008] FCAFC 69, reference to the 'Briginshaw Standard' may just lead you into error.

So what happened in *Briginshaw*? The High Court found there was no adultery by Mrs Briginshaw, whether on the criminal or the civil standard. Simply being in a car with another man for twenty minutes, does not mean adultery was committed. Mr Briginshaw was obliged to continue to provide financial support to Mrs Briginshaw.

Amendments to Industrial Relations Act 1996

Late last year, the NSW Parliament passed the Industrial Relations Amendment (Industrial Court) Bill 2016 changing the composition of the Industrial Relations Commission.

Historically, the Commission was two pronged, carrying out both judicial and non-judicial functions. In response to consultation with key stakeholders, the NSW Government decided to:

- abolish the Industrial Court; and
- shift functions of the Industrial Court to the Supreme Court.

The Commission will continue to deal with all non-judicial matters including the arbitration of industrial disputes and setting wages and conditions of employment.

The Commission will also continue to conduct conciliation of matters transferred to the Supreme Court.

The types of matters transferred to the Supreme Court include: prosecutions for breaches of industrial legislation and instruments, recovery proceedings, unfair contract claims, proceedings for declarations and proceedings for contravention of dispute orders. These matters will be assigned to a judge of the Supreme Court sitting in the Common Law Division in the Administrative Law – Industrial List.

The President of the Commission, Justice Walton, has been appointed to the Supreme Court. Commissioner Tabbaa is Acting Chief Commissioner.

If there is reasonable doubt, give the employee the benefit of the doubt?

From time to time employers need to form a view about whether an employee has engaged in misconduct. If there is doubt about the matter, must the employee be given the benefit of the doubt?

At least in legal proceedings, misconduct only needs to be proved on the balance of probabilities. That is, it must be shown that it is more probable than not that the misconduct occurred.

Amber Sharp recently represented Sydney Trains in the matter of *Dhillon v Sydney Trains* [2017] FWC 553. Mr Dhillon said his dismissal was unfair because he did not engage in the misconduct alleged.

The dismissal turned on what occurred on the night of 7/8 October 2015. A passenger left his mobile phone (in a green case) on a train after alighting from the train in a rush; having fallen asleep during the trip. After alighting, he looked into the train and saw his mobile on the floor where he had previously been seated.

Sydney Trains contended that Mr Dhillon took the mobile telephone. Mr Dhillon conducted a "sweep" of the train that night. CCTV footage from the train appeared to show a green case on the floor, Mr Dhillon bend down and then the green case was no longer on the floor.

When first questioned, Mr Dhillon said he had not found any mobile telephone on his sweep.

Did Mr Dhillon take the phone and not report it missing? This case usefully illustrates how *Briginshaw* can be misapplied.

Dismissal is a serious consequence for an employee with

14 years unblemished service. An allegation of theft is most serious. Despite this, the standard of proof remains the balance of probabilities.

Mr Dhillon argued there could be other explanations for what occurred, including that he quickly inspected an empty telephone cover and left it as rubbish for the cleaners to collect, and in so doing the cover was moved further beneath the seat and thereby "out of shot" of the CCTV camera. Mr Dhillion raised more tangential scenarios, including that the passenger's mobile telephone may have been removed from its case by another person on the train while the passenger was asleep. Mr Dhillion was really arguing there was reasonable doubt.

Sydney Trains, after careful consideration and investigation, formed the view that Mr Dhillion took the phone. The Fair Work Commission also came to the same view. There may be some doubt but it was more probable than not he took the phone. No higher standard of proof needed to be met because the allegation and consequences were serious.

"Dismissal is a serious consequence for an employee with 14 years unblemished service. An allegation of theft is most serious. Despite this, the standard of proof remains the balance of probabilities."

Sexual harassment: it's just not on

The Industrial Relations Commission of NSW has given short shrift to a claim by a Senior Special Constable dismissed for sexual harassment that his dismissal was unfair because, amongst other things, he wasn't properly trained in the Code of Conduct or Harassment, Discrimination & Bullying Policy.

Now we all know that for the purposes of avoiding vicarious liability for conduct that amounts to sexual harassment by the employee, the employer must demonstrate it took all reasonable steps to prevent the conduct. This includes implementing workplace polices which properly articulate what amounts to sexual harassment and making clear the conduct is prohibited, and then routinely training employees in those policies. Indeed, Buchanan J had much to say about the necessary content of those policies in *Richardson v Oracle* [2013] FCA 102.

However, for the purposes of an unfair dismissal application, responsibility for one's own conduct cannot be avoided on the basis of inadequate policies or training.

In *Torres v Commissioner of Police* [2017] NSWIRComm 1001, Commissioner Murphy found that Mr Torres had engaged in conduct including openly discussing in front of other staff, including junior employees, one's predilection for anal sex and having one's behind licked; asking junior female employees whether they liked having their behinds licked; sharing with work colleagues details of the various metal work jobs that one has had performed on one's penis; and divulging to work colleagues details of one's private sex life and sexual conquests.

Commissioner Murphy found:

104. I reject entirely the proposition that training, or lack thereof, can, in any way, exculpate the applicant with respect to those aspects of his conduct upon which the respondent relies as justification for the decision to dismiss him.

105. Any officer who occupies a senior position, such as that occupied by the applicant, should not, and does not, need to undergo training, or to have policies in place, in order to arrive at the realisation that it is absolutely unacceptable conduct in the workplace to: [engage in the conduct set out above]

106. No senior officer should, or does, need training or policies to realise that inflicting that type of behaviour on work colleagues, in particular, junior employees, in the workplace is unacceptable conduct which should not be tolerated and which cannot be excused.

107. The applicant must accept full responsibility for his own conduct. The attempt by him to lay blame on a lack of training must fail.

A victory for commonsense.

Want to know more?

Our dedicated team of lawyers have a wealth of knowledge and expertise from working with NSW Government.

JAMES MATTSON

P 02 8281 7894
M 0414 512 106
jmattson@bartier.com.au

James has worked for Bartier Perry for 15 years acting for all levels of government and private sector employers. James often appears as an advocate in cases and specialised in managing difficult employees and litigants. James is the author of the Employment Law chapter in the legal text, Social Media and the Law.

AMBER SHARP

P 02 8281 7885
M 0404 860 244
asharp@bartier.com.au

A self-confessed workplace relations nerd, Amber has over 15 years' experience as a workplace relations lawyer. Clients love her straight talking and solutions oriented approach. Amber is a strategic litigator who specialises in termination and discrimination disputes. Amber has extensive State government experience.

MARK PAUL

P 02 8281 7846
M 0412 040 291
mpaul@bartier.com.au

Mark has worked for Bartier Perry for over 35 years. Mark practices in employment law and workplace relations, acting for major employers in the public and private sector as well as individuals with complex employment problems.

DEANNA OBERDAN

P 02 8281 7963
M 0402 233 669
doberdan@bartier.com.au

Deanna has gained a wealth of experience and knowledge in employment and industrial relations over the last 16 years, having advised a range of corporations on various employment issues and industrial disputes.

About Bartier Perry

Based in Sydney's CBD, Bartier Perry is an established and respected mid-tier law firm which has been providing expert legal services for 75 years.

Our practice has corporate clients from a wide range of industry sectors, and appointments to statutory bodies from all levels of government.

With over 55 lawyers, we offer personalised legal services delivered within the following divisional practice groups:

> Corporate & Commercial and Financial Services

> Commercial Disputes

> Property, Environment & Planning

> Insurance Litigation

> Estate Planning & Litigation, Taxation, and Business Succession

> Workplace Relations

Bartier Perry's
Value Added Services

Bartier Perry provides legal services in all areas of business law. Our legal services are supported by a full range of value added services. These offerings include client seminars and training, participation in industry events, boardroom lunches and Bartier Perry Bulletins.

If you would like to go on our mailing list to receive bulletins and invitations that are of interest to you, please complete the information below and email to – **events@bartier.com.au**

Please tick your areas of interest:

- ☐ Administrative Law
- ☐ Building & Construction
- ☐ Business Succession
- ☐ Commercial Disputes
- ☐ Competition & Consumer
- ☐ Contracts & Procurement
- ☐ Corporate Governance
- ☐ Data Protection & Privacy
- ☐ Deceased Estates
- ☐ Dust Diseases
- ☐ Elder Law
- ☐ Environment & Planning
- ☐ Finance & Capital
- ☐ Insolvency & Debt Recovery
- ☐ Intellectual Property
- ☐ Information Technology
- ☐ Mergers & Acquisitions
- ☐ Personal Property Securities Act
- ☐ Property
- ☐ Public Liability
- ☐ Superannuation
- ☐ Taxation
- ☐ Trusts
- ☐ Wealth Protection
- ☐ Wills & Estates Planning
- ☐ Work, Health & Safety
- ☐ Workers Compensation
- ☐ Workplace Relations

Bartier Perry Pty Ltd
Level 10, 77 Castlereagh St
Sydney NSW 2000 Australia

DX 109 Sydney
PO Box 2631
Sydney NSW 2001

T +61 2 8281 7800
ABN 30 124 690 053
bartier.com.au