Procedural fairness and workplace investigations into employee misconduct

By Alison Page (BComm, LLB (Hons), M.IR & HRM) of WiSE Workplace Investigations

Alison Page (BComm, LLB (Hons), M.IR & HRM) before joining WiSE Workplace Investigations worked in legal, research, and communications capacities in government, corporate, academic, and non-government sectors. Her special interests are in employment, industrial relations and organisational behaviour issues. She has 10 years experience as a corporate litigation and transactions lawyer in both private and in-house practice. More recently, Alison coordinated the Women & Work Research Group, Faculty of Economics and Business at the University of Sydney. She also worked on number of research projects in that Faculty, including projects concerning parental leave, elder care leave, the Work Choices legislation and the forthcoming National Employment Standards.

In this article Alison discusses the importance of applying principles of procedural fairness during workplace investigations into employee misconduct so that subsequent decisions won’t be de-railed.

It has become standard best practice in Australian workplaces to follow principles of ‘procedural fairness’ when conducting investigations into allegations of employee misconduct.

This practice has developed in response to the adverse consequences which can flow if investigators do not conduct investigations fairly.

Employers do not decide lightly to dismiss an employee for misconduct. So there will be even more upheaval if the employee seeks to challenge this decision in the courts and have it overturned on the basis that the investigation process was flawed. At the very least the employer will face the frustration and costs of dealing with the court processes (both financially but also in terms of management time and loss of productivity). The employer is also likely to attract negative publicity, suffer adverse reputational effects and employee morale is likely to plummet.

This article takes a closer look at the principles of ‘procedural fairness’. It explains these principles and provides some practical tips to ensure that workplace investigations are conducted fairly.
What is meant by ‘procedural fairness’?

‘Procedural fairness’ applies in situations where a decision is to be taken which could have a detrimental effect on the rights, interests or legitimate expectations of a person. Historically this concept applied to formal legal decision making processes. These principles also apply to administrative decision making processes by government officials and agencies.

More recently, principles of procedural fairness have been applied to workplace investigations into employee misconduct, particularly where a likely outcome of the processes is dismissal or demotion of the wrong doer.

When an employee is charged with having transgressed a workplace rule, there are three underlying ‘rights’ to which that employee is entitled in the context of any further employer action in relation to the charges. These are based on the notion of giving the employee:

1. **notice of the allegations on which management decisions might be based.**

   In most cases this will require the employer to set out in writing the detailed allegations and the proposed penalty so that the employee knows sufficiently what is being said against him or her and has an adequate opportunity to deal with the allegations.

2. **the opportunity to ‘be heard’, that is, to respond to the allegations.**

   This may include giving the employee the opportunity to make their own submissions and present their own material; and

3. **unbiased, neutral decision making, meaning that the ultimate decision makers should be impartial**

Practical tips to ensure procedural fairness

WorkCover NSW (2008) lists some useful practical tips for responding to bullying complaints in the workplace. Many of these tips apply generally to workplace investigations, including:

1. **Act promptly** and communicate transparently in relation to all matters concerning the investigation and subsequent decisions. All parties (witnesses, the alleged wrong doer and the complainants) should be informed of how long the process will take and what they can expect to happen during and at the end of the process. If delays occur, all those involved should be informed of the reasons for the delay and when the process is expected to recommence.

2. **Support:** Where an alleged wrong doer chooses to respond to allegations in person, it is not unreasonable for them to be accompanied by a person of their choice (such as a union representative, interpreter or friend) who can either present his or her defence or simply be present as an act as support. (see also Van Gramberg, 2001)

3. **Neutral decision** which requires:
a. that the person in charge of the investigation and the ultimate decision maker should have had no direct involvement in the alleged incident.

b. that the more serious the allegations (and the possible consequences), the more important it is that the investigation is conducted by an independent person who does not directly supervise the alleged wrong doer. If there is no suitably qualified or independent persons available to conduct the investigation within the workplace, the employer should appoint an external investigator;

c. that all parties are comfortable that the person in charge of the investigation and subsequent decision-making is impartial and unbiased. This involves ensuring that this person (or persons) has no conflict of interest, that is, their private interests should not conflict with the investigation outcomes;

d. recognising the need to train supervisors and managers responsible for conducting workplace investigations and the subsequent decision making processes to ensure that they understand the concepts of fairness and ethics in this context (Van Gramberg, 2001).

4. **Confidentiality:** Management and those responsible for the investigation should use their best efforts to ensure that all investigation details remain confidential. Information regarding the investigation should only be communicated on a need-to-know basis to avoid potential defamation actions from releasing information damaging to the reputation of the alleged wrong-doer.

5. **Record:** All meetings and interviews should be documented including details of who attended and agreed outcomes (even where no formal investigation is undertaken).

6. **Evidence:** all relevant evidence should be obtained and carefully considered. It is not sufficient to simply rely on that evidence which “best fits” the circumstances and provides the desired outcome. As a matter of fairness, witnesses and the alleged wrong-doer should have an opportunity to review their statement before signing and should be provided with a copy.

7. **Documented outcomes:** The investigation findings and recommendations should be documented in a written report, and the decision of the final decision-maker noted on the personnel files of the complainant and employee under investigation (Aequus Partners, 2008)

**Recent Cases**

There are numerous cases which highlight the importance of applying the principles of procedural fairness to workplace investigations, particularly where the outcome of the investigation is either demotion or termination of employment.

The recent case of *Police Association of New South Wales (on behalf of Kim Gilmour) and Commissioner of Police [2009] NSWIRComm 51* is a classic example of how not to conduct a workplace investigation. The NSW Industrial Relations Commission found that the investigation process was “so infected by procedural deficiencies as to contaminate the process”. Some of the many investigation flaws found by the Commission included:
the relevant decision-maker admitted that she: (a) had a pre-determined view of the outcome of the investigation prior to its completion; and (b) took irrelevant matters into consideration in making her decision;

the initial investigator had been involved in one of the alleged incidents and had previous disagreements with the employee under investigation;

two witnesses present at the alleged incidents were not interviewed;

there were unreasonable delays in the process;

the employee under investigation was not given details of the allegations against him until he was interviewed, many months after the investigation process commenced; and

By way of contrast, the recent case of Rogers v Millennium Inorganic Chemicals Limited & Anor [2009] FMCA 1 (9 January 2009) suggests that employers will not always be required to conduct perfect investigations (for example, to the standard of a police investigation).

In this case the employee under investigation had been dismissed and sued the employer for unlawful termination, claiming that it had breached implied terms of mutual trust and confidence in his employment contract by failing to: (a) conduct a full investigation of the alleged matters; and (b) providing names of interviewed witnesses. The court rejected the employee’s claim because he had point blank denied being present when the alleged incidents took place. Accordingly it was irrelevant if he knew the names of those people who had given evidence.

It is likely that this decision will be restricted to its facts in the future – that is, to cases where the employee under investigation totally denies all the allegations. Usually, a failure to provide names of those making the allegations would breach rules of procedural fairness, providing grounds for the employee to legally challenge subsequent dismissal decisions. Notwithstanding this case, it is prudent investigation practice to provide all relevant names as part of the process of giving proper details of the allegations against the employee.

References
