NATURAL JUSTICE AND PUBLIC SECTOR MISCONDUCT INVESTIGATIONS

Max Spry*

In a paper presented at the AIAL's National Forum on 15 June 2007, the Commonwealth Ombudsman, Professor John McMillan, suggested that there was now too much natural justice, and said:

> It is no longer simple in administrative decision-making to decide what is required to comply with natural justice.

Further, Professor McMillan continued:

> The guidelines provided by courts are often presented in soothing tones – 'the principles of natural justice do not comprise rigid rules', 'natural justice … requires fairness in all the circumstances', and 'procedural fairness, properly understood, is a question of nothing more than fairness' – but the apparent simplicity and flexibility of the approach can mask the complexity of the administrative setting in which practical answers have to be found.

Similarly, Basten J of the NSW Supreme Court, said in his paper at the same AIAL conference:

> More intriguingly, the content of procedural fairness with respect to a single power may vary with circumstances. Thus an element of urgency may diminish procedural requirements. This factor renders the life of the official uncertain, especially if required (without legal training) to second-guess what attitude a court will later take, with all the benefits of hindsight and time for analysis after full argument from lawyers.

Similarly, it is not all plain sailing for someone who believes that he or she has been denied natural justice. For example, decisions about when to commence litigation relying on an alleged breach of natural justice may often be complex, and may well affect the remedy, if any, obtained. This is clear when one considers the widely differing outcomes in *Jarrett v Commissioner of Police for New South Wales* [1]and *Barrett v Howard*.[2]

However, I do not wish to consider problems of that nature in this paper. Rather, I intend to look at the cases and attempt to distil what practical steps decision-makers should take so that hopefully their decisions will not be set aside on the basis of a denial of natural justice.

In this paper, I will:

(a) briefly overview the relevant legislation;

(b) discuss what needs to be disclosed to an employee to meet the requirements of natural justice;

(c) discuss what constitutes a proper opportunity to respond;

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* *Brisbane-based barrister. Paper delivered at an AIAL Seminar in Brisbane on 12 July 2007*

(d) consider what the cases say about unbiased decision-making; and

(e) lastly, consider the consequences flowing from a failure to provide natural justice.

The legislation

The starting point of any discussion about whether natural justice applies and, if so, what it requires, must be the relevant statute.[3]

It is clear that natural justice applies to disciplinary processes undertaken under either the Commonwealth or Queensland public service statutes.

Section 15(3) of the *Public Service Act 1999* (Cth) provides that Agency Heads must establish procedures for determining whether there has been a breach of the APS Code of Conduct, and further that these procedures 'must have due regard for procedural fairness.'[4]

Section 90 of the *Public Service Act 1996* (Qld) provides that, with the exemption of decisions suspending an officer on full pay, in 'disciplining or suspending an officer, the employing agency must comply with this Act, any relevant directive of the commissioner, and the principles of natural justice.'[5]

However, as with most statutes, both the Commonwealth and Queensland Acts do not spell out what natural justice requires. The content of natural justice depends again upon the statutory context and upon the circumstances of the particular case.

As the Full Federal Court said in *Barratt*:

> Its content depends upon the statutory framework. It also depends upon the particular circumstances of the case which fall for decision.[6]

Or, as Brennan J, said in *Kioa v West*[7]:

> The principles of natural justice have a flexible quality which, chameleon-like, evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power.

What does natural justice require in investigations of purported misconduct?

In *Ridge v Baldwin* [1964] AC 40 at 132, Lord Hodson explained the features of natural justice as follows:

> (1) the right to be heard by an unbiased tribunal;
> (2) the right to have notice of charges of misconduct;
> (3) the right to be heard in answer to those charges.'

How have these features of natural justice been applied in the context of investigations into alleged misconduct by public servants? Bearing in mind, of course, what Kirby J said in *Miah*: 'Those requirements [of natural justice] are neither absolute nor rigid. They adapt to all the circumstances of a particular case.'[8]

Having said that, natural justice does not require a public servant suspected of engaging in misconduct to be given an opportunity to respond *before* a decision is made to commence an investigation into that alleged misconduct. This is because such a decision is likely to be of a preliminary nature.[9]

Notice of allegations

Once a decision has been made to commence an investigation, the employee suspected of misconduct must be given notice of the allegations in sufficient detail to allow him, or her, to respond in a meaningful way.[10] What constitutes sufficient detail is not, however, always readily apparent and may well vary from case to case.

What is not sufficient was discussed in *Etherton v Public Service Board of NSW*.[11]

The charge against Mr Etherton was expressed in the following way:

> It has been alleged that you are guilty of a breach of discipline within the meaning of par (e) of s 85 of the Public Service Act, 1979, namely negligence, carelessness, inefficiency and incompetence in the discharge of your duties.
>
> The particulars of this breach are that you failed to carry out your duties as a senior district officer, Bondi Junction Community Welfare Office, Department of Youth and Community Services, in a satisfactory manner.[12]

Mr Etherton was required to admit or deny the charge – in writing – within three days.

Mr Etherton sought particulars of the charge against him.

The Board refused that request but advised that the case against Mr Etherton would be based the following matters:

> - Mr Etherton's performance in the case work relating to G, N, B, L, N, J, C, H, and S families; and
>
> - Mr Etherton's handling of an application for a license by Ms JHW.
>
> This should not be regarded as an exhaustive list of the matters to be raised.
>
> Mr Etherton or his representative is welcome to inspect the Board's file on this matter at any time.[13]

The Board submitted that it was not obliged to identify the precise acts or omissions of Mr Etherton that it relied on to establish the charge against him. Further, the Board submitted that, given Mr Etherton's access to the Board's file, he should 'be able to work out for himself the case which he had to meet.'[14]

Not surprisingly, Hunt J was unimpressed with the Board's 'somewhat cavalier attitude'.[15]

Natural justice required that Mr Etherton be provided with 'particulars of the specific acts or omissions relied upon to establish the charge against him and to have identified for him specifically whether he is alleged in relation to each such act or omission to have been negligent, careless, inefficient or incompetent.'[16]

The requirements of natural justice were not met simply by providing Mr Etherton with the file and leaving it to him to work out the case he had to meet.[17]

The seriousness of the charge against the employee will also affect how precisely the allegations and particulars will need to be framed.

For example, in *Palmer v Austrac,* Mr Palmer, a technical adviser, was accused of submitting a report that was intentionally false and misleading – a very serious matter for someone in his position. A Full Bench of the Australian Industrial Relations Commission (the Commission) said:

> Where an employee is accused of deliberate dishonesty of this sort, basic precepts of fairness will ordinarily require that the employee be informed precisely what statements or information are alleged to be deliberately false and misleading and how they are said to be false and misleading.[18]

What is essential is that the complaint or allegation against the employee be disclosed adequately and with sufficient particularity so that the employee may respond to it.[19]

As the investigation proceeds the employee must be notified of any variation of the allegations. Also, the employee must be notified of any fresh material received by the decision-maker that is 'credible, relevant and significant'. As Brennan J said in *Kioa v West*:

> … in the ordinary course where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made. It is not sufficient for the repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it.[20]

The failure to put information that is credible, relevant and significant to the employee is clearly illustrated in *Eaton v Overland*[21].

In that case, Mr Eaton, an officer of the Australian Federal Police (the AFP) was alleged to have made inappropriate use of the AFP's email system. The allegation was investigated and a report was prepared for Mr Overland, a senior member of the AFP, who was tasked with deciding whether the allegation was substantiated. Mr Overland wrote to Mr Eaton advising him of the results of the investigation and asking him whether he wished to put anything before him as to why he should not accept the recommendation of the investigator that the allegation was substantiated.

Importantly, Mr Overland did not disclose to Mr Eaton that Mr Palmer, the then AFP Commissioner, had already expressed to him in clear terms that the allegation was substantiated.

His Honour, Allsop J, said:

> Whilst I accept that there was ample material available from Mr Eaton's own submission that the allegation was substantiated nevertheless with Mr Palmer's views disclosed, Mr Eaton would have been put on notice that not only did an investigating officer have a view about substantiation, but so did the head of the organization and moreover he had a view which threatened Mr Eaton's very employment. It is not for the Court to say nothing much could have been done. Mr Eaton was entitled to a procedure unsullied by important material not being shown to him.[22]

However, this does not mean that each new document received by the decision-maker during the course of the investigation must be provided to the employee for his or her comment. Whether the employee needs to be given an opportunity to respond depends on the content of what is being put before the decision-maker,[23] that is, whether it is 'credible, relevant and significant'.

In practice this might involve difficult questions of judgment and degree, involving balancing the importance of concluding the investigation in a timely manner while ensuring the employee is given a proper opportunity to respond to matters adverse to him or her.

In *Rana v Chief of Army Staff*, for example, Mr Rana sought to challenge the basis for his discharge from the Army. The decision-maker relied on three reports from a Dr Miller in making his decision. Mr Rana had been provided with only Dr Miller's first report. Mr Rana claimed he was denied procedural fairness in not being provided with Dr Miller's second and third reports.

A Full Federal Court rejected that claim.

It did soon the basis that Dr Miller, after considering further information provided by Mr Rana, merely reaffirmed his original opinion in his second and third reports. Dr Miller's second and third reports 'contained a restatement of his earlier opinion. … his commentary on the evidence did not raise any new issue or matter.'[24]

Arguably, *Rana's* case is inconsistent with the principle stated by Lord Denning in *Kanda v Government of Malaysia*:

> … the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of another.[25]

On one view, *Rana's* case also sits uneasily with the majority judgment in *Kioa v West*, and is more consistent with the dissenting judgment in that case – that of Gibbs CJ.

In *Kioa v West*, Gibbs CJ held that the decision-maker, having received material which Mr Kioa wished to be put before him was not required to give Mr Kioa an opportunity to respond to the Department's adverse comments on that material. The majority, of course, held otherwise. Is it too long a bow to suggest in *Rana's* case that the re-affirmation of his original report by Dr Miller on two separate occasions was information that was 'credible, relevant and significant' such that Dr Miller's second and third reports should have been shown to Mr Rana.

Indeed, the Full Court acknowledged in *Rana* that in a sense 'any reaffirmation of opinion … may be of significance to a decision-maker',[26] but nevertheless denied any breach of the requirements of natural justice.

Mr Rana applied to the High Court to set aside the decision of the Full Federal Court. His application was dismissed.[27] In dismissing Mr Rana's application, Crennan J noted that the Full Federal Court had 'observed 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.'

The problem for decision-makers when deciding whether to provide a new document to an employee is identifying when the failure to do so will result in a denial of natural justice. Not an easy task. Despite *Rana*, one might still expect decision makers to err on the side of caution and disclose any new significant document or information to the employee being investigated.

Opportunity to respond

The employee, after being given notice of the allegations against him or her, must be given an opportunity to respond.[28] This must be a genuine opportunity and not a mere formality.[29] The employee must be given an adequate opportunity to respond, including a reasonable time in which to respond. Of course, what is an adequate opportunity or a reasonable time depends on the circumstances.

An example of an employee not being given an adequate opportunity to respond is Mr Gaisford in *Fisher v Gaisford*.[30] At the relevant time, Mr Gaisford was an employee of the Department of Foreign Affairs and Trade (DFAT). Mr Fisher, a senior DFAT officer, sought to raise a wide range of matters with Mr Gaisford ranging from Mr Gaisford's suspected involvement in leaking information to the press to his involvement in making false allegations of fraud against certain DFAT officers as well as his making false allegations of paedophile activity by DFAT officers.

Drummond J said:

> There mere description in summary form of the diverse range of matters Mr Fisher said he intended to raise with Mr Gaisford and to give Mr Gaisford an opportunity to answer, in order to decide whether Mr Fisher should temporarily suspend Mr Gaisford's security clearance, is sufficient, in my opinion, to show that if Mr Fisher had thought about it for a moment, he could not have expected Mr Gaisford to be in a position, when confronted with this litany of concerns at 4.45pm on the Friday afternoon, to marshal his thoughts on the spot, to consider whether he needed to gather information to put before Mr Fisher …, to gather any such information and, finally, to formulate his answers to Mr Fisher's concerns.

Natural justice does not require that an employee be legally represented during the course of a disciplinary investigation.[31] Nor is an employee entitled to cross-examine witnesses.[32] This is because, in the usual case, an investigator has no power to compel witnesses to give oral testimony and submit to cross-examination.

Further, in the circumstances involved in *Eaton v Overland*, Allsop J considered that there was no denial of natural justice in Mr Eaton being interviewed by telephone.[33] However this may not always be the case.[34]

The privilege against self-incrimination may also bear upon the question of whether an employee has been given a proper opportunity to respond. This issue was considered recently by the NSW Court of Appeal in *Murray Irrigation Ltd v Balsdon*.[35] In that case Mr Balsdon was charged with a number of offences under the *Crimes Act*. In essence it was alleged that during the course of his employment with the appellant, Mr Balsdon had accepted bribes in return for favouring certain contractors. Soon after the charges were laid by the police, Mr Warne, the appellant's General Manager, wrote to Mr Balsdon, notifying him of various matters and stating that if he was not satisfied with Mr Balson's response, his employment could be in jeopardy. Through his solicitors, Mr Balsdon responded that he would not be responding to Mr Warne until the criminal charges were dealt with. Mr Warne then proceeded to make a decision terminating Mr Balsdon's employment. The trial judge held that in these circumstances Mr Balsdon was denied procedural fairness as he was not given an opportunity to respond to Mr Warne at an appropriate time.[36]

Unbiased decision-maker

The person entrusted with determining whether there has been misconduct on the part of an employee must be both free from actual bias and from a reasonable apprehension of bias.[37] 'The test for apprehended bias … is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question to be decided.'[38] A reasonable apprehension of bias has been found to have arisen for a wide variety of reasons.

In *Phillips v Secretary, Department of Immigration and Ethnic Affairs*[39], apprehended bias arose where the decision-maker's superior published within the department material highly critical of the employee's conduct.

Mongan v Woodward[40] is another such example. In that case Mr Woodward was the then CEO of the Australian Customs Service (ACS) and Ms Godwin was his delegate in making a determination whether Mr Mongan had breached the APS Code of Conduct. At some point Ms Godwin was provided with a minute from Mr Drury, the then Deputy CEO of ACS, in which he made strong comments about Mr Mongan's guilt and what would be the appropriate penalty.

Although Ms Godwin did not report to Mr Drury, Finn J held that a reasonable apprehension of bias arose in the circumstances:

> A fair minded observer might reasonably conclude that, in a bureaucratic structure such as is evidenced in this matter, their respective positions provided a sufficient relationship of influence as

> could make Ms Godwin susceptible to influence for impermissible reasons. I acknowledge that it might be the ideal of the APS that public servants will act fearlessly in discharging their functions. Nevertheless, it is necessary also to acknowledge that human nature is as it is.[41]

In *Scott v Centrelink*[42], a Centrelink officer issued a direction to Mr Scott. He then investigated whether Mr Scott was in breach of that direction. Duncan SDP considered there was 'a reasonable apprehension of bias in that.'[43]

Consequences of failure to provide natural justice

Generally, a decision made in breach of the rules of natural justice is invalid,[44] and will be set aside as from the date on which it was made.[45] Consequently, any sanction imposed relying on such a decision cannot stand.

Where the flawed decision results in the termination of employment, the employee may apply to the relevant Industrial Relations Commission for relief. A failure to accord a public sector employee natural justice is one factor that may be taken into account when determining whether the termination was harsh, unjust or unreasonable.[46] Where there has been a full review on the merits by the Commission, and the Commission has found the termination justified, only rarely will a failure to accord procedural fairness during the disciplinary process, result in a finding that the termination was harsh, unjust or unreasonable.[47]

Endnotes

1 (2005) 79 ALJR 1581
2 See discussion: M Will 'From Barratt to Jarratt: Public Sector Employment, Natural Justice, and Breach of Contract' 49 *AIAL Forum* 9. *Barrett* (2000) 96 FCR 428
3 See, for example: *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 571 at [53], per Gleeson CJ and Hayne J; *Barratt v Howard* (2000) 96 FCR 428 at [43]; *Salemi v Mackellar (No 2)* (1977) 137 CLR 396.
4 *Public Service Act 1999* (Cth), s 15(3)(b). Under the Commonwealth statutory scheme, a failure to follow agency procedures or guidelines does not necessarily result in a denial of natural justice but may 'create a presumption or at least a strong question as to whether there had been a denial of procedural fairness': see *Henzell v Centrelink* [2006] FCA 1844 at [31]. The result may well be different where the relevant procedures have effect has 'binding directives issued under a delegated power': *Ivers v McCubbin* [2005] QCA 200 at [24].
5 Under reg 3.10(7) of the Commonwealth Pubic Service Regulations 1999 an Agency Head may decide that procedural fairness requirements do not apply to suspension decisions (whether paid or unpaid). And, see: *Fisher v Gaisford* (1997) 48 ALD 200 and *Re Dixon* (1981) 55 FLR 34.
6 ibid at [54]. See also: *Rana v Chief of Army Staff* [2006] FCAFC 63 at [11].
7 (1985) 159 CLR 550 at 612
8 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 571 at [190], per Kirby J.
9 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 571 at [146], per McHugh J. And see also: *Ivanovic v Australian Customs Service* [2007] FMCA 503 at [11].
10 And see paragraph 5.2 of the Australian Public Service Commissioner's Directions.
11 Upheld on appeal: *Public Service Board of NSW v Etherton* (1985) NSWLR 430. And, see also: *Panagopoulos v Secretary, Department of Veteran Affairs* (FCA, 14 November 1995, Tamberlin J).
12 *Etherton v Public Service Board of NSW* (1983) 3 NSWLR 297 at 299.
13 Ibid, at 300.
14 Ibid, at 301. See also 305-306.
15 Ibid, at 306.
16 Ibid, at 307.
17 Ibid.
18 *Palmer v Austrac* [2007] AIRCFB 265, PR976711 at [37].
19 See, for example: *Henzell v Centrelink* [2006] FCA 1844 at [34]. *Henzell* also sets out (at [29]) an example of how an allegation should be framed drawn from Centrelink's guidelines.
20 *Kioa v West* (1985) 159 CLR 550 at 629.
21 [2001] FCA 1834
22 *Eaton v Overland* [2001] FCA 1834 at [161].

23 See: *Rana v Chief of Army Staff* [2006] FCAFC 63 at [27].
24 Ibid, at [34]. See also *Cawley v Casey* [2007] QSC 5.
25 [1962] AC 332 at 337. See also *Keating v Morris* [2005] QSC 243 at [156].
26 ibid at [36].
27 *Rana v Kiefel, Kenny & Graham JJ* [2007] HCATrans 190.
28 See also paragraph 5.2 of the Australian Public Service Commissioner's Directions.
29 *Ambrey v Oswin* [2005] QCA 112.
30 *Fisher v Gaisford* [1997] 590 FCA (26 June 1997), per Drummond J (with whom O'Loughlin and Goldberg JJ agreed).
31 See: *McGibbon v Linkenbagh* (1996) 41 ALD 219; *ASIC v Reid* (No 1) [2006] FCA 699.
32 *Rose v Bridges* (1997) 79 FCR 378 at 386-388; *Simjanoski v La Trobe University* [2004] VSC 180 at [45]-46]; *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC 104 at [149].
33 ibid at [147].
34 See *Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC 104 at [164].
35 *Murray Irrigation Ltd v Balsdon* [2006] NSWCA 253.
36 Ibid, cited at [26]. The trial judge's decision was upheld, with the Court of Appeal holding that the failure to respect Mr Balsdon's privilege against self-incrimination meant that the termination of his employment was harsh, unjust or unreasonable: at [39]-[40].
37 See, for example, *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 at [27]-[28]; *Eaton v Overland* [2001] FCA 1834 at [229]; *Mongan v Woodward* [2003] FCA 66 at [11].
38 Ibid, at [27].
39 (1994) 48 FCR 57
40 *Mongan v Woodward* [2003] FCA 66.
41 Ibid, at [19].
42 *Scott v Centrelink*, AIRC, PR907822, per Duncan SDP.
43 Ibid, at [108].
44 See: *Calvin v Carr* [1979] 1 NSWLR 1 at 8.
45 See: *Walworth v Merit Protection Commission (No 2)* [2007] FMCA 530 at [7].
46 *Byrne v Australian Airlines* (1995) 185 CLR 410; *Palmer v Austrac* [2007] AIRCFB 265, PR976711 at [33]; *Farquharson v Qantas Airways* [2006] AIRC 488, PR971685 at [41].
47 *Farquharson v Qantas Airways* [2006] AIRC 488, PR971685 at [41]. See also: *Banditt v Department of Corrective Services* [2005] QIC 47; 180 QGIG 97; and *Gray v Griffith University* [2007] QIRComm 7; 184 QGIG 63.