DISCIPLINARY HEARINGS: WHAT IS TO BE DONE?

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In the last fifty years there has been a large expansion in the law relating to decision making by disciplinary and other bodies. With this development has been an evolution in the rules of natural justice. In 1949 it was said with some caution that 'the requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, and the subject which is being dealt with, and so forth'.[1] In 1963 in *Ridge v Baldwin*[2], in reversing an English Court of Appeal decision that a Chief Constable had no right to a hearing before dismissal, Lord Hodgson said the features of natural justice, which stood out were a right to be heard by an unbiased tribunal; the right to have notice of charges of misconduct; and the right to be heard in answer to the charges. The rights of the individual depend on the character of the decision making body, the kind of decision it has to make, the statutory or other framework in which it operates.[3]

Non statutory bodies

The parties to disciplinary proceedings cannot by their consent confer jurisdiction upon a tribunal which is entirely a creature of statute. Where a position is not governed by statute, it is prudent for organisations to require a written statement from an applicant for membership, agreeing to be bound by its disciplinary rules.[4] The terms of the contract of membership of a private organisation may derive from its articles of association, code of conduct, regulations, by-laws, or rules.[5]

A court will be slow to interfere with proceedings of private bodies such as social clubs, sporting associations, the stock exchange, political parties and sometimes even trade unions. The doctrine of natural justice has no application to purely private law contractual claims, where a definition of professional conduct is put in a contract and the public law concept of reasonableness has no place.[6]

For example, it has been said that the contractual obligations on a dog club in exercising disciplinary functions were, at most, to act fairly, to take reasonable steps to apply the rules of the club and to act in accordance with the law. It was not contractually obliged to reach a correct decision, and damages could not generally flow from any wrongful decision on its part, unless there was unfairness or negligence.[7]

There is no time limit for bringing disciplinary proceedings in the absence of a rule to the contrary, though undue delay resulting in prejudice to the defendant can sometimes give rise to an abuse of process where the charges are brought under statutory enactment.[8] In a private contractual arrangement disciplinary jurisdiction ceases once the contract of membership expires, although there is no reason why members of a professional body should not agree to be bound by the rule that they continue to submit themselves to disciplinary procedures after membership ceases. A professional body may want to ensure such a condition, otherwise those who merit disciplinary action can evade it by an act of resignation.[9]

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Statutory disciplinary bodies

In Australia, whether the disciplinary hearing is of a public nature and therefore subject to judicial review, usually depends upon whether the hearing is under a statute or enactment.[10] A number of factors warrant consideration. If a function is one of public concern, such as a private company running a prison, then judicial review is likely to be available. It is relevant to consider the rights and interests of the individual affected in determining whether the accountability that judicial review demands is relevant to the particular body under examination.[11] Professions such as medicine and law are governed by statutory principles to which the rules of natural justice apply. Those rules require a right to be heard by an unbiased tribunal; to have proper particulars and notification of charges; and to be given an opportunity to answer the charges. Natural justice also allows for principles such as whether there has been an abuse of process, for example by reason of undue delay, to be applied.

***Public Sector Management Act 1994* (WA)**

One example of a statutory process which reflects many of the common law rules is to be found in the *Public Sector Management Act 1994* (WA) (*PSM Act*). Under s 82A(1) of the *PSM Act*, in dealing with a disciplinary matter, an employing authority must proceed with as little formality and technicality as the matter permits; not be bound by the rules of evidence; and it may determine the procedures to be followed subject to any statutory officer's instructions.

Under the *PSM Act* the standard of proof necessary for an adverse finding is decided on the balance of probabilities. An offence can be established on the evidence if it is found more likely than not to have occurred. Investigations are normally carried out without the ability to summon witnesses, compel responses or subpoena documents.

Commencing an investigation

Under the Public Sector Management (General) Regulations 1994 (WA) the prescribed procedures require that:

(a) suspected breaches of discipline are investigated and the respondent is notified in writing (clause 2(1) of the Act and Regulation 16);
(b) the investigation will lead to a finding being made in respect of, and may lead to action being taken against, the respondent under division 3 of part 5 of the Act, and to state the range of possible findings and possible actions;
(c) certain steps may be taken in the conduct of that investigation prior to the making of a finding, and the taking of any action, against the respondent;
(d) the respondent is notified of any interview or meeting which he or she is required to attend; and
(e) he or she has the right to have present, during any interviews or meetings attended by the respondent, a representative capable of providing advice to the respondent.

Some bodies, under statutory powers, must investigate, others have a discretion. It has been said that there are many situations in which natural justice does not require that a person be told the complaints against him or her, and given a chance to answer at that particular stage. The investigation may be purely preliminary. Where there is no penalty or serious damage to reputation inflicted by proceeding to the next stage without such preliminary notice, then that may be done.[12] Generally a person who is the subject of disciplinary proceedings is entitled to disclose confidential information if it is necessary for his or her own protection to do so. There is no confidence as to disclosure of an iniquity.[13]

Since a preliminary enquiry is not a trial, and is therefore not ordinarily attended by the rules of natural justice, there may be no requirement that the person be notified. However, an investigator may not treat a member unfairly, for example, by giving an untruthful account of the evidence against him or her in order to induce an unwarranted admission.[14]

The decision to proceed with a disciplinary action

Usually the test for proceeding with disciplinary action is a 'realistic prospect of conviction' or the existence of a prima facie case which, if un-contradicted, could be grounds for a finding of guilt.

Notification

A defendant has a right to receive fair notice of the charges against him or her. This is for the purpose of enabling a defendant to defend or answer complaints and the notice must be sufficient to enable him or her to prepare a defence or answer.[15] [16] There is no requirement at common law that the defendant receive advance notice of the evidence as opposed to notice of charges. The charges laid should specify the relevant contravention in law and a short summary of the factual elements upon which this contravention is alleged to have occurred. If there is a fundamental change in the nature of the allegations, the defendant is entitled to notice. To be effective, a notice of a disciplinary hearing must be received in good time before the hearing. It has been held that five days notice is sufficient for a disciplinary hearing and fifteen days sufficient for a professional disciplinary proceeding.[17] This would depend upon the nature and complexity of the case and the time needed to prepare an adequate defence.

Service of notice

Service of a notice means actual receipt by the person concerned. Normally mere dispatch, even under a rule which allows service by post to a party's last known address, is not service upon that person.[18] However, under section 40 of the *PSM Act* if the address of the public service office is unknown, then the notice may be forwarded to the last known address and notice of posting given. Sometimes the rules provide that proof of posting is proof of service, but even then it is probably prima facie evidence only. Notice may be deemed to have been given if there is 'obstructive conduct on the part of a person (concerned)' such as the refusal to collect a registered letter which, as he is aware, contains the notice.[19]

PSM Investigative Steps

Under the *PSM Act* there are steps in a disciplinary investigation to establish the authority to undertake the investigation; to consider the scope of the investigation; to construct an investigation plan and to draw up a chronology. This is followed by the collecting of documentary evidence, organising and commencing interviews and considering whether a site inspection is required. This, in turn, is followed by collating and analysing the evidence; considering the need for further evidence; and conducting further interviews and collecting further documentation. Finally, there is the writing of the report, and consideration if there is a need for further evidence, before finalising and presenting the report.[20]

The preliminary phase

Sometimes a tribunal holds a preliminary meeting as required by the rules or as a matter of convenience to decide whether there is anything worth investigating.[21] The procedure carries some risk of apparent bias, but generally an authority, which is required to hold a preliminary enquiry before summoning a person before it, may do so without disqualifying

itself from the hearing.[22] It would be a useful precaution for different people to sit on the enquiry and the tribunal if possible.

At what stage do the rules of natural justice begin?

The case against the right to be heard at the preliminary stage is based on convenience and simplicity. If there is a fair hearing after formal charges are laid, this is enough to satisfy procedural fairness. If not, how far back into the administrative process does natural justice have to go?[23] Public enquiries, which do not formally affect legal rights, must comply with natural justice if their reports or proceedings 'expose persons to criminal prosecutions or civil action' or damage to reputation.[24] Some codes of professional discipline provide for preliminary enquires in which there is a right to be heard. It is a practice in some turf associations to have a preliminary hearing in the presence of the potential defenders, before any charges are laid. If a charge follows, there is a further opportunity to be heard.[25]

It was said in *Pearlberg v Varty*[26] by Lord Pearson: 'fairness…. does not necessarily require a plurality of hearings….otherwise nothing could be done simply and quickly and cheaply'. In that case a taxpayer had received a default assessment based on a tax officer's estimate of his true income; the appellant unsuccessfully claimed that the tax office should have given him a chance to persuade them first that there was no need for a default assessment, without being obliged to challenge after the assessment had been received. It has been held in Australia that taxpayers have no right to be heard before the Commissioner of Taxation can obtain compulsory access to their financial records.[27]

In the absence of a special provision, a statute imposing a duty to 'enquire into complaints, and form a preliminary opinion as to whether disciplinary proceedings should be commenced, does not require a hearing at that stage'.[28]

Conversely in the Privy Council case of *Rees v Crane*[29] it was held that natural justice applied at the first stage. The legislation of Trinidad and Tobago prescribed that before a Judge was removed from office the question went before a judicial legal services commission; if there was a prima facie case of incompetence, it was then reported to the President, who then had to appoint a special tribunal to advise him; and, if the latter commission recommended dismissal the person could then seek further advice from the Privy Council in London. An adverse finding at the initial stage of the judicial legal services did attract rules of natural justice because it was a public non-binding opinion that dismissal would be appropriate.

In *Ainsworth v Criminal Justice Commission* the respondent reported to a parliamentary committee on the introduction of poker machines and recommended to the committee that the Ainsworth group of companies should not be permitted to participate in the gaming machine industry. No notification was given to the companies to be heard. A duty of procedural fairness arises because the power involved is one which may 'destroy, defeat or prejudice a person's rights, interest or legitimate expectation'. The High Court said where a report made and delivered by the Commission had, of itself, no legal effect and carried no legal consequences whether direct or indirect, no action lies, but it is different when a report or recommendation operates as a precondition or is a bar to a course of action, or is a step in the process capable of altering rights, interests or liabilities.[30] The publishing of a report, damaging to the reputation of the applicant, without having given the applicant a hearing, was found to lack fairness and a declaration made to that effect.

What is 'misconduct'?

It has been said that in order to ascertain whether conduct amounts to misconduct it is necessary to set out which standard or standards of professional behaviour are alleged to

have been breached.[31] A properly drafted statement of allegations will set out a summary of the facts relied upon concisely and usually in chronological order. The duty of the draftsman is to analyse the supporting evidence and to distil the relevant facts and discard irrelevancies. If it is alleged that the defendant knew, or ought to have known certain matters, the facts giving rise to that actual constructive knowledge should also be set out.[32]

Duplicity and vagueness

Duplicity is not a basis for interfering with a disciplinary finding, although it may be relevant to the fairness of the proceedings. Vagueness is a ground for judicial review if it leads to unfairness in the proceedings since the respondent will not know with precision what is alleged, and not be fully able to address these matters in the course of the hearing.[33]

Unreasonableness and statutory decision making

An important distinction, which follows from disciplinary tribunals acting under an enactment, distinguished from those governed by private contractual arrangement, is that legal unreasonableness in decision making may arise under public law. In *Minister for Immigration and Citizenship v Li*[34] the failure of the Migration Review Tribunal to grant an adjournment was held to be unreasonable. The adjournment had been requested to allow for the result of an assessment to be reconsidered; the Court found a referral to alter the adjournment showed a certain arbitrariness that rendered it unreasonable. The plurality considered that legal unreasonableness is not confined to an irrational or bizarre decision, or one so unreasonable that no sensible decision maker would have made it, such as was found in the *Wednesbury* case.[35] It is a decision which lacks an evidential intelligible justification. French CJ said 'a disproportionate exercise of an administrative decision, taking a sledge hammer to crack a nut, may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what is necessary for the purpose it serves'. Sometimes questions of proportionality may be relevant to reasonableness. A question may be asked whether excessive weight was given to the fact that Ms Li had an opportunity to present her case.

A disproportionate response is one way in which a conclusion of unreasonableness may be reached. A disproportionate exercise in administrative discretion might be characterised as irrational or unreasonable on the basis that it 'exceeds what, on any view, is necessary for the purpose it serves'.[36] Conversely, Gageler J said that successful invocation of Wednesbury unreasonableness has been rare, and nothing in his reasons should be taken as an encouragement to greater frequency.

Another area where disciplinary proceedings taken under an enactment give rise to a different approach is abuse of process. In *Walton v Gardiner*[37] it was said that a stay of proceedings is not confined to improper purpose or absence of a fair hearing. Certain doctors were charged with statutory offences, and granted an indefinite stay of proceedings on the grounds of undue delay in bringing the proceedings. On the other hand, where it was argued that a charge brought against a university professor, under the provisions of a collective agreement, though recognised as an instrument under the provisions of the *WorkPlace Relations Act 1996* (Cth), was not itself to be regarded as an enactment and therefore public principles of judicial review did not apply, and a stay of proceedings would not be granted.[38]

Conduct of the hearing

Proceedings of a disciplinary tribunal must be conducted in accordance with the tribunal's own rules, except to the extent to which they may be inconsistent with the rules of natural justice.[39] Natural justice requires that the hearing be fair. The common law does not

recognise the general right to an oral hearing, though such a right is usually accorded in all except the most informal tribunals.[40] Where credibility issues arise, or bad faith is impugned, an oral hearing is very likely to be required.[41] Lord Bingham said that it is often difficult to address effective representations without knowing the points which are troubling the decision maker.[42]

Is legal representation allowed?

At common law a person charged before a disciplinary hearing, even with facts amounting to a crime, is not always entitled to legal representation. Where the rules are silent the applicant should seek leave if wanting representation.[43] There is no authority that supports a right to counsel at public expense outside the higher Criminal Courts.[44] Where it exists it is usually based on a statutory provision. *R v Secretary of State for the Home Department & Others ex parte Tarrant*[45] sets out where representation may be allowed, such as where it is due to the seriousness of the charge and the potential penalties; whether there are any points of law likely to arise; the capacity of the defendant to present his case; procedural difficulties such as a need to interview and cross-examine witnesses; the need for reasonable speed in making the adjudication; and the need for fairness as between parties. This test was approved by the House of Lords in *Hone v Maze Prison Board of Governors.*[46] Where parliament creates a tribunal, and says nothing about its procedure, it will have implied powers incidental to the exercise of its jurisdiction; power to regulate its procedures; and power to make such administrative arrangements as are appropriate for it to discharge its function (*Virdi v The Law Society*[47]).

Procedures at trial

There is no general right to privacy. Indeed the principle is that quasi-judicial proceedings should be open. However, where there is no protection against defamation it is not uncommon for threats of defamation action to be made and in such circumstances the hearing may be in private.[48] The principles are said to include a procedure which is fair to both sides: that both sides must normally allow each party to call relevant evidence; to ask relevant questions; and to make relevant submissions. The tribunal is responsible for fair conduct of the trial and neither the parties nor the representatives are in control of the hearing. Procedural fairness applies to the conduct of all those involved in the hearing. The tribunal is under a duty to behave fairly, and to require the parties and the representatives to act in a fair and reasonable way in the presentation of their evidence, and in challenging the other side's evidence and in making submissions. The tribunal makes an error in its procedural rulings if it either has no power to make the ruling or if in the exercise of discretion it makes a ruling which is plainly wrong.[49]

As with courts, it is customary to exclude from the court room all witnesses until their turn comes to give evidence, except for expert witnesses. Whoever goes first is usually the person on whom the burden of proof lies, but he or she is also given the right of reply. The last word is a valuable right, which offsets, perhaps, the disadvantage, if any, inherent in having to go first.[50]

The burden of persuasion and evidential rules

In the case of disciplinary proceedings the regulator, or whoever prosecutes, carries the burden of proof, which is usually, though not always, defined as the civil standard.

However, sometimes the burden of showing that someone is a fit and proper person to hold a position is upon the applicant for registration.[51]

Where allegations involve criminal conduct usually proof to the criminal standard is required in England[52] but not in Australia where the civil standard applies. The admissibility of evidence, and the technical rules of evidence applicable to civil or criminal litigation, form no part of the rules of natural justice. What is required is that the materials are logical and probative, in the sense that they show existence of facts consistent with the finding. Evidence is not restricted to evidence that should be admissible in a court of law.

The rationale and nature of reasons

Although it is not universally accepted that there is a mandatory requirement for reasons to be given by judges, it has been said that reasons must be given in order to render practicable the exercise of rights of appeal. However, there are a number of other justifications. These include the requirement that justice not only be done but be seen to be done. Reasons are required for decisions to be acceptable to the parties and to members of the public; the requirement to give reasons concentrates the mind of the judge; and it has even been contended that the requirement to give reasons serves a vital function in constraining the judiciary's exercise of power.

The case for binding reasons as an incident of natural justice is strong. With articulated reasons it shows that the Tribunal has discharged its duty. It is one of the fundamentals of good administration.[53] A decision maker is not required to deal with every argument, but for the appellant process to work satisfactorily the judgment has to enable the appellant court to understand why the judge reached the decision. Every factor which weighed with the judge should be identified and explained. The issues should be identified and the manner in which he or she resolved them also explained. A tribunal should explain why it has accepted the evidence of one expert and rejected that of another. The essential requirement is that the terms of the judgment should enable the parties, and any appellant tribunal, to readily analyse the reasoning that was essential to the judge's decision. In relation to any award of costs, it is unlikely to be appropriate to appeal for lack of reasons.[54] Decisions should be made known within a reasonable time. Lord Denning claimed that in his first year as a High Court Judge he did not reserve judgment once, but that may be a counsel of perfection not given to lesser mortals. It remains true that decisions do not improve through undue delay.

Judicial review

Where an Act of Parliament provides for judicial review, such as it does for matters which go to the West Australian State Administrative Tribunal, the scope and nature of appeal will be defined. So too under the *PSM Act*.[55] However, where there are no defined avenues of appeal, then the principle of jurisdictional error will apply to statutory tribunals. Jurisdictional error is not a concept which can be exhaustively defined, but the definition embraces an absence of procedural fairness; addressing the wrong legal issues; taking into account factors which ought not to have been taken into account, or failing to take into account factors which it is bound to take into account.[56] It is therefore important for a decision maker to set out carefully the salient facts; and to summarise the arguments for and against the defendant. The tribunal should address all arguments open to the defendant on the evidence unless his or her representative disclaims any reliance upon such arguments. Reasons require careful analysis of why one version of events is preferred to another, and that in turn may require some comment on the demeanour of witnesses, as well as on how inferences from the facts are to be arrived at.

If the disciplinary decision maker follows precepts of a good administrative decision maker and yet jurisdictional error is revealed on appeal, he or she can perhaps take consolation in the words of Lord Asquith who said of the English trial process: 'the duty of the trial Judge is to be quick, courteous and wrong. That is not to say the Court of Appeal should be slow, rude and right, for that would be to usurp the function of the House of Lords'.[57]

Endnotes

1 *Russell v Duke of Norfolk* [1949] 1 All ER 109 (per Tucker LJ).
2 [1963] 2 All ER 66.
3 Brian Harris, Andrew Carnes (ed), *Disciplinary and Regulatory Proceedings* (Bristol Jordans, 7th ed, 2013). (2.02 & 2.03).
4 Harris (1.06).
5 Harris (1.07).
6 Harris (1.09).
7 Harris (1.12).
8 Harris (1.20).
9 Harris (1.21).
10 *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 and *Griffith v Tang* (2005) 221 CLR 99. In the latter case the argument was whether a decision to exclude a student for misconduct was 'under an enactment' as set out in the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The *Griffith University Act 1998* (Qld) provided for governance and set out general powers but 'it does not follow any administrative acts made in pursuance of this authority has its foundation in statute'. The Act contained a general power of governance, but said nothing about 'academic misconduct' in particular, or how it should be treated, so it did not follow the decision by the university officer was open to review.
11 Robert Lindsay, 'Yes Minister? The 2012 Migration Amendments: Whence Have We Come and Whither Are We Going?' 2013 72 *AIAL Forum* 63.
12 Harris (6.25).
13 Harris (6.62 & 6.67).
14 Harris (7.09).
15 *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1.
16 *McAleer v University of Western Australia* [2007] FCA 52.
17 Harris (10.17 and 10.19).
18 *Fancourt v Mercantile Credits Limited* (*1983) 154 CLR 87* (Forbes, *Justice in Tribunals* 5th ed at 132).
19 *Bornecrantz v Queensland Bridge Association Inc.* [1999] QSC 58.
20 My grateful thanks to Tuba Omer for her research on the *PSM Act*.
21 Forbes paragraph 8.1; *R v Medical Board of South Australia ex parte S* (1976) 14 SASR 360.
22 *R v Medical Board of South Australia ex parte S.*
23 JRS Forbes, *Justice in Tribunals* (Federation Press, 2002).
24 Forbes 8.4; *Re* P*ergamon Press Ltd* [1971] Ch 388 at 399.
25 *R v Williams; Ex parte Lewis* [1992] 1Qd R 643.
26 1972 1 WLR 534 at 545.
27 Forbes 6th ed para 8.7.
28 *Eckersley v Medical Board* (*Qld)* [1998] 2 Qd R 453 (Forbes 8.15).
29 [1994] 1 All ER 833.
30 (1992) 175 CLR 564 580.
31 Harris (10.13).
32 Harris (10.14).
33 Harris (10.27).
34 (2013) 249 CLR 332.
35 Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1.
36 Michael Barker & Alice Nagel, *Legal Unreasonableness: Life after Li* 2015 79 AIAL Forum 1; *Minister for Immigration and Citizenship v Li* French CJ at [30].
37 *Walton v Gardiner* (1993) 177 CLR 378.
38 *McAleer v UWA (No. 3)* 2008 FCA 1490.
39 Harris (13.01).
40 Harris (13.03).
41 Harris (13.04).
42 *Smith v The Parole Board* 2005 UKHL1.
43 Forbes 3rd ed paragraphs 11.1 – 11.4 at pages 162-173.
44 Forbes 3rd ed 11.28.
45 1984 1 All ER 799 at 816.
46 1988 AC 379.
47 2010 EWCA Civ 100.
48 Forbes 3rd ed 12.4 at pages 179-180.
49 Harris (13.27).
50 Per Lindsay J in *Stoke Rochford Management Ltd v Talton* [1998] UKEAT 611_98_1305*;* Harris (10.06).
51 Harris (12.08).
52 Harris (12.18).
53 Forbes 3rd ed 13.2 at page 249; recently in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37 North and Bromberg JJ at [127] cited cases where a failure to provide any or any sufficient reasons may amount to an error of law.

54 *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605.
55 Section 78 of the *PSM Act* provides certain appeal rights to the Public Service Appeal Board. Appeal under Part 5 for substandard performance can be made to the West Australian Industrial Relations Commission (WAIRC).
56 *Kirk v Industrial Relations Commission of NSW* [2010] HCA 1 at [66]–[77]; *Craig v South Australia* (1995) 184 CLR 163 at 177-180.
57 Attributed to Lord Asquith, reported in Anthony Sampson, *The Anatomy of Britain* (Hodder & Stoughton, 1962).