# THE STANDARD OF PROOF IN WORKPLACE INVESTIGATIONS

Workplace investigations are an area of law that is seen as a second tranche cause of action in termination of employment matters. Frequently, allegations are raised by the former employee that the process was procedurally flawed and this raises principles of natural justice.

This can be seen in unfair dismissal matters, whereby a component of the unfairness arises from the process of the investigation leading to the dismissal. However, even though the investigation process itself may be robust, the standard of proof used to make any findings may be called into question. In other words, although you may have followed all the appropriate steps, the findings themselves may not be sound.

## Another dimension

A recent case has explored the issue of the standard of proof required to make valid findings in an investigation. Can there be a third standard of proof pursuant to contract under which to make a finding during a workplace investigation? The recent NSW Supreme Court decision in the matter of *Bartlett v Australian & New Zealand Banking Group Limited* [2014] NSW SC 1662 decided on 24 November 2014 raised just this issue.

## *Briginshaw v Briginshaw* are we sure?

This case is the accepted authority for the level of certainty to which allegations, in investigations, should be substantiated. It guides the interpretation of section 140 of the *Evidence Act*.

The often cited statement of Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361-362 is of importance in illustrating the point:

> Fortunately … at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.
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> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

His Honour in this case was concerned with the appropriate standard of proof in respect of individual allegations of material fact, rather than with the standard of persuasion appropriate to be adopted in respect of all allegations made in a particular civil proceeding.

Of most importance to us, his Honour did not purport to identify any particular standard; rather he made plain that before accepting the truth of evidence of a particular allegation, the tribunal should give consideration to the nature of the allegation and the likely consequences which will follow should it be accepted. His Honour made the observation that the common law had not developed a third standard of proof; it acknowledges only the two standards – the criminal standard of beyond reasonable doubt and the civil standard of on the balance of probabilities or reasonable satisfaction.

## The *Evidence Act* 1995

*Briginshaw v Briginshaw* was decided long before the enactment of the *Evidence Act 1995* (Cth) ("the Evidence Act"), which now sets out the federal rules of evidence. Part 4.1 of the Evidence Act is concerned with standard of proof. It provides in s 140 as follows:

> (1) in a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
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> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
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> (a) the nature of the cause of action or defence; and
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> (b) the nature of the subject-matter of the proceeding; and
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> (c) the gravity of the matters alleged.

Justice Branson in *Employment Advocate v Williamson* [2001] FCA 1164; (2001) 111 FCR 20 at [65], in a section of his reasons for judgment, with which Kenny J expressed her agreement (see [108]), expressed the view that s 140(2) of the Evidence Act was intended to reflect the common law position, as to the strength of evidence necessary to establish satisfaction on the balance of probabilities. She referred to the following passage from *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 ("*Neat Holdings*") at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ:

> *The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J commented in Briginshaw v Briginshaw:*
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> *'The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved …'.*

Her Honour went on at [66]-[67] to question the accuracy of certain judicial observations to the effect that in cases of a particular kind a "standard of proof above mere satisfaction on the balance of probabilities is appropriate" and suggested that in every case it was necessary to consider not only the nature of the case, but also the nature of the particular fact in issue, of which proof is required, including its inherent gravity and unlikelihood.

## A New standard of contractual proof case

### Brief facts

The case that we are interested in for the purposes of the presentation, concerns the ANZ Bank terminating the Plaintiff's employment without notice on the basis of serious misconduct. Apparently an email was doctored with very sensitive information and leaked. The Plaintiff in the matter was the director of ANZ's Institutional Property Group for NSW. So in other words, a senior executive. Following the Plaintiff's dismissal he sued ANZ for damages for breach of contract alleging that he was not guilty of serious misconduct and, accordingly, that the ANZ was not entitled to terminate his employment without notice. Of particular interest is that his claim for damages was in the order of $9 million in respect of lost remuneration and bonuses calculated on the basis that he would have worked for the ANZ for a further 10 years until 15 August 2022.

## ANZ defence

The ANZ defended the proceedings on the basis that it had a right to terminate the Plaintiff's contract summarily. An alternative argument was that the Plaintiff's damages were limited to $74,795, being a net amount of four months remuneration, since ANZ was entitled under a clause of the contract to terminate his employment without cause and pay him four months salary in lieu of notice. ANZ submitted that this was what would have occurred had the summary dismissal not been available. ANZ argued that if it proved the Plaintiff had sent the doctored email that was the subject of the dispute and the determination, it was entitled to terminate the employee's employment without notice since such conduct would amount to serious misconduct within the meaning of a clause of the contract.

The clause upon which ANZ relied was:

> **14.3 Termination by ANZ**
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> *b) ANZ may terminate your employment at any time, if,* ***in the opinion of*** *ANZ, you engage in serious misconduct, serious neglect of duty, or serious breach of any terms of this employment agreement. In such circumstances, you will be entitled to payment of your total Employment Cost (TEC) (as described in schedule A) up to the date of termination only.*

## The meaning of the words "in the opinion of the ANZ"

There was an issue about the circumstances which entitle the ANZ to terminate the Plaintiff's employment contract under clause 14.3(b). The Plaintiff's primary submission was that the ANZ was only entitled to terminate the contract if it could prove that he was actually guilty of serious misconduct. In the alternative, the Plaintiff contended that if the ANZ could terminate on the basis of its opinion that the Plaintiff was guilty of serious misconduct, such opinion had to be reasonable, correct, formed in good faith, with proper regard for the Plaintiff's interests and, in compliance with the Performance Policy, not capricious, arbitrary nor unreasonable. The ANZ contended that it needed only to prove that, on 15 August 2012, it held the opinion that the Plaintiff was guilty of serious misconduct.

ANZ contended that the decision-maker at the time of the termination, only needed to hold the opinion on the basis of the report by the handwriting expert that the Plaintiff was guilty of serious misconduct, and therefore the ANZ was entitled to terminate the contract.

The judge found that the words "in the opinion of" were not gratuitous and therefore ruled that they were to be given their full force and effect, having regard to the nature of the

contract and the capacity of the employee's conduct to affect the reputation of the ANZ, both in its capacity as an employer and as a bank.

The words "in the opinion of the ANZ" contained in clause 14.3(b) mean that the underlying **fact** is not the determining matter; rather: the relevant fact is whether, in the opinion of the ANZ, the Plaintiff was guilty of serious misconduct. This is an important distinction.

**Whether there was an implied term that the ANZ's opinion in clause 14.3(b) had to be correct, reasonable, formed with the proper regard to the interests of the Plaintiff and neither arbitrary nor capricious**

Counsel for the Plaintiff submitted that there was an implied term in the contract that the opinion was required to be reasonable, correct, formed in good faith, with proper regard for the Plaintiff's interests and in compliance with the Performance Policy and not capricious, arbitrary nor unreasonable.

His Honour found that for a term to be implied, it must satisfy the tests set out in *BP Refinery (Westernport) Pty Limited v Hastings Shire Council* (1977) 180 CLR 266 at 282 to 283; *Codelfa Construction Pty Limited v State Rail Authority of NSW* [1982] HCA 24; 149 CLR 337 at 347 as follows:

(i) It must reasonable and equitable;

(ii) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(iii) it must be so obvious that "it goes without saying";

(iv) it must be capable of clear expression;

(v) it must not contradict any express term of the contract.

He rejected the submission that there was an implied term that the opinion was required to be "correct" since this would have the same effect as deleting the words "in the opinion of the ANZ" from clause 14.3(b) and would therefore fail the fifth test as contradicting an express term of the contract.

For the same reasons he rejected the submission that there was an implied term that the opinion in clause 14.3(b) was required to be formed in accordance with the Performance Policy. Clause 10.1 of the contract provides that, unless otherwise stated, the policies are not incorporated into the contract. Accordingly, no term could be implied which imports the

Performance Policy into the contract. The proposed term would not otherwise satisfy the tests for implying a term.

Whether there is an implied term that the opinion must be reasonable, formed in good faith and neither arbitrary nor capricious is a more difficult question. Whether contractual powers and discretions may be limited by good faith and rationality requirements adopted and adapted from public law is not settled. Nor was it the subject of argument in *Commonwealth Bank of Australia and Barker* [2014] HCA 32 at [42] per French CJ, Bell and Keane JJ and [107] per Kiefel J.

His Honour was not satisfied that any such term ought to be implied. It does not meet any of the tests for implied terms set out above. In his view, the only question under clause 14.3(b) is whether the ANZ actually held the opinion that the Plaintiff was guilty of serious misconduct. If bad faith could be established, this would tend to gainsay a conclusion that the ANZ actually held the requisite opinion, which would have to be held, as Lathan said at 606 in *Australian Workers Union v Bowen*: "bona fide". However, to require that an opinion be held "bona fide" does not import the requirement that it be formed, as opposed to held, in good faith.

## Conclusion: "In the opinion of ANZ"

Ultimately, His Honour was satisfied that Mr Corbally, who was relevantly in this case the mind of the ANZ, held the opinion that the Plaintiff was responsible for sending the doctored email. It is common ground that this amounted to serious misconduct within the meaning of clause 14.3(b). Accordingly, the ANZ was entitled to terminate the Plaintiff's employment without notice. There was, accordingly, judgment for the ANZ.

## So what does this mean for us?

When conducting a procedurally fair workplace investigation, the employment contract and any relevant policy and procedure wording should be reviewed to identify any provisions which may bear upon the appropriate standard of proof to be applied.

The ANZ case also has implications in respect of drafting employment contracts, policies and procedures in respect of termination clauses and other procedural matters such as investigation clauses.

Employers may not apply their minds to these matters, which consequently may not be scrutinised until disputes arises. In light of this case, employers should speak to their

solicitors about a review of their documentation to ensure they are in the best possible position to manage their workforce.

Should you have any queries about an upcoming investigation in your workplace, please contact Tim Trezise on (02) 9390 8337.