FIVE PRINCIPLES OF APPLYING CIRCUMSTANTIAL EVIDENCE IN WORKPLACE INVESTIGATIONS

‘It’s the vibe…..’: determining allegations by inference from circumstantial evidence

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Introduction

It is not just judges that have to grapple with the challenge of evaluating evidence and making findings. This task is one of the more challenging functions of a workplace investigator or HR professional when conducting a workplace investigation. Although the investigation findings and outcomes are ultimately the responsibility of the delegate for the employer, in practice the investigator’s analysis and recommendations are normally accepted and form the basis for subsequent action.

Knowing how to weigh evidence and determine its factual reliability, is tricky business and often hinges on the experience of the investigator and his or her ability to ask critical questions when gathering the evidence.

This paper focuses on the particular challenges that arise in those investigations where the only evidence available is circumstantial. The paper highlights five case law principles to assist investigators evaluate that evidence.
In some workplace investigations there is no direct evidence available to support allegations of employee misconduct. That is, there are no witnesses or other documentary or electronic evidence capturing the employee ‘in the act.’

Yet, often there may be indirect (or circumstantial) evidence, which links the employee to the alleged conduct, such as:

► Phone records showing outgoing calls on the employee’s designated work phone at the time and place of the alleged incident; or
► Witness accounts that the employee is regularly seen at the site of the alleged incidents thereby establishing a pattern of behaviour;
► Swipe card records to the workplace showing that the employee regularly used a certain exit around a certain time.

**Balance of Probabilities**

Such evidence creates an impression that the employee ‘did it’ (just like ‘the vibe’ from the movie ‘The Castle’).

However, in workplace investigations, the investigator needs to be satisfied by more that just ‘the vibe’. Allegations in workplace investigations are determined according to the civil standard of proof, known as the ‘balance of probabilities.’ This standard of proof differs from that applied in criminal matters, where the occurrence of a crime has to be determined ‘beyond reasonable doubt’.
One of the leading Australian evidence textbooks, Cross on Evidence (online at www.lexisnexis.com.au) provides a detailed explanation of the ‘balance of probabilities’ standard of proof. Generally, proof of a fact on the balance of probabilities requires the investigator to determine whether, in the longstanding words of English judge Denning J, it is ‘more probable than not’ that the facts occurred (see Miller v Minister of Pensions [1947] 2 All ER 372 at 374).

This may require the investigator to compare competing versions of events from various witnesses to determine which version is more probable. Yet it is not enough that a particular version of events has a mathematically higher probability of occurring. According to the English judge, Lord Simon of Glaisdale in Davies v Taylor [1974] AC 207 at 219; [1972] 3 All ER 836 at 844, the standard requires satisfaction of odds at least a 51% to 49% that the events occurred.

However, in the Australian case of Briginshaw v Briginshaw (1938) 60 CLR 336 the High Court cautioned against a purely mechanical comparison of mathematical probabilities and stated at pages 361–2 that the balance of probabilities test required the tribunal in this case to:

“feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality ... [A]t common law ... it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal.”

Whether the available evidence in support of the allegations in a workplace investigation is direct or circumstantial, the civil standard of proof applies.

**Palmer v Doman**

Helpfully, the NSW Court of Appeal decision of Palmer v Dolman examined the evolution of the civil standard of proof in Australia and provided an explanation about the use of circumstantial evidence in civil proceedings. In this case fraud was sought to be inferred from circumstantial evidence.
The Court of Appeal highlighted the following five principles:

1. Where the only evidence available is circumstantial, the question for the investigator is whether the fact in issue can be inferred from this evidence. If so the question is whether the inference that can be drawn from this evidence is more probable: Chamberlain v R (No 2).

2. “The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while the latter you need only circumstances raising a more probable inference in favour of what is alleged... it is enough in the circumstances appearing in the evidence to give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture: (see per Lord Robson, Richard Evans & Co Ltd v Astley [1911] AC 674, at 687)”: Bradshaw v McEwans Pty Ltd.

3. “If circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as mere conjecture or surmise”: Bradshaw v McEwans Pty Ltd.

4. “The existence of other reasonable hypotheses is simply a matter to be taken into account in determining whether the fact in issue should be inferred from the facts proved”: Doney v R.

5. If there are other reasonable hypotheses, which do not support the allegations, the question becomes, although possible, is this hypothesis more probable?
Briginshaw v Briginshaw

This discussion would not be complete without consideration of the impact of Briginshaw v Briginshaw on matters to be determined by circumstantial evidence. In this case Dixon J held that if allegations are serious, with potentially serious consequences for the employee under investigation it is impossible to be reasonably satisfied of the truth of such allegations without the exercise of caution and “unless the proofs survive a careful scrutiny and appear precise and not loose and inexact”.

More recently in Neat Holdings, Mason CJ, Brennan, Deane and Gaudron JJ said at 171:

“[T]he 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.” (emphasis added).

Findings of serious misconduct should not be made lightly.

No hard and fast rules

In Palmer v Dolman, the NSW Court of Appeal considered what authoritative weight should attach to Briginshaw and held that this case continues to apply only to the extent that a court should not “lightly” make a finding that a serious allegation has been proved from circumstantial evidence. Beyond that, there are “no hard and fast rules” and the inquiry is simply whether the allegation has been proved on a balance of probabilities.
THE PRACTICAL APPLICATION

To illustrate these principles in a workplace investigation context, consider the scenario of alleged time sheet falsification stemming from evidence that:

a. the employee under investigation consistently failed to complete projects on time;

b. phone records showed regular outgoing calls from the employee’s assigned mobile phone during work hours from non-work locations at around the end of school hours; and

c. the employee’s children attend a school located in the vicinity where those phone calls originated.

The question is whether it is reasonable to infer from this circumstantial evidence that the employee regularly attended to personal matters during work hours, namely collecting his or her children from school and failed to return to work, notwithstanding that his or her timesheets show that the employee worked an eight hour day.

Employees facing such allegations commonly respond to this scenario by denying the allegations or offering possible explanations. For instance, in response to evidence showing that there were regular phone calls from the employee’s designated work mobile phone at a particular place, the employee might respond that he or she, cannot remember making those phone calls and sometimes lent his or her phone to close family members who could have made the calls. In this case, the investigator should consider the pattern of behaviour revealed by the outgoing telephone records and determine whether it is probable that the employee’s relatives made these phone calls.
Summary

So, when the only available evidence in support of the alleged conduct is circumstantial, consider the big question:

*Is the inference that can be drawn from this evidence more probable than other possibilities or not?*

Apply the five principles as outlined in Palmer v Dolman and remember that findings of serious misconduct based on circumstantial evidence should not be taken lightly.

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