

Supreme Court
New South Wales

Case Name: Howard v Surf Life Saving New South Wales
Medium Neutral Citation: [2019] NSWSC 1212
Hearing Date(s): 16 August 2019
Date of Orders: 13 September 2019
Decision Date: 13 September 2019
Jurisdiction: Equity
Before: Pembroke J
Decision: See paragraph [20]
Catchwords: PROCEDURAL FAIRNESS – failure to comply with regulations – fairness to plaintiff
Category: Principal judgment
Parties: Graham William Howard – plaintiff
Surf Life Saving New South Wales – defendant
Representation: Counsel:
Mr J Sheller – for the plaintiff
Dr E Peden – for the defendant
Solicitors:
Greg Walsh & Co – for the plaintiff
Hall & Wilcox Lawyers – for the defendant
File Number(s): 2018/286929

JUDGMENT

Introduction

1 At the conclusion of the hearing on 16 August I announced that I would give judgment and make orders in favour of the plaintiff. The plaintiff and the defendant did not initially require reasons but the circumstances changed and

the plaintiff has now requested reasons. This, it seems, is partly to ensure that the defendant does not repeat the mistakes that I have found that it made in this case.

- 2 The issue giving rise to this litigation arose from a determination by the defendant's Judiciary Committee on 8 June 2018 to suspend the plaintiff from membership of the North Palm Beach Surf Life Saving Club for a period of two years. That determination was the consequence of a hearing of the Judiciary Committee on 25 May 2018.
- 3 I made clear during argument that the Judiciary Committee hearing was legally flawed and that the determination must be set aside. The defendant is, of course, at liberty to proceed again, if so advised.

The Regulations

- 4 The conduct of the Judiciary Committee hearing was governed by the Surf Life Saving Australia Regulations, (October 2016). Section 5, known as the Judiciary Regulations, is authorised by Clauses 16, 18 and 39 of the Constitution of Surf Life Saving Australia Limited.
- 5 Regulation 5.1.1 provides for the commencement of proceedings, or the investigation of conduct which may warrant the commencement of proceedings, against a member 'by referring the matter to a Judiciary Committee'. Regulation 5.1.2(a) provides that 'Every referral to a Judiciary Committee shall be *clear and unambiguous and shall clearly set out the matter(s) required to be investigated or determined* by the Judiciary Committee' (emphasis added).
- 6 Regulation 5.1.3(b) provides that at least seven days' notice of the proceedings shall be given to the 'parties concerned'. The notice is required to state, among other things, 'the nature of the proceedings and *the matters or alleged offence(s) the subject of investigation or determination*' (emphasis added).
- 7 The structure and numbering of Regulation 5.1.3(c) is convoluted. But paragraphs (i)-(viii) appear under the heading 'Procedure at Proceedings'. Paragraph (iv) provides that 'The matter(s) the subject of the proceedings shall then be read to the person(s) concerned ...'.

- 8 I should add that a person against whom proceedings have been brought before the Judiciary Committee is not compelled to attend the proceedings personally and may be permitted representation through an advocate – who must not be legally trained or qualified. That is what happened in this case. The plaintiff was represented by Mr Kirkpatrick.

Contravention of Judiciary Regulations

- 9 In this case, there was a wholesale failure by the defendant to conform to the requirements of the Judiciary Regulations:
- (a) the referral to the Judiciary Committee was not ‘clear and unambiguous’ and did not ‘clearly set out the matter(s) required to be investigated or determined’ within the meaning of Regulation 5.1.2(a);
 - (b) there was no notice to the plaintiff in accordance with Regulation 5.1.3(b), stating ‘the nature of the proceedings and the matters or alleged offence(s) the subject of the investigation or determination’; and
 - (c) the ‘matter(s) the subject of the proceedings’ were not read to the person concerned, or Mr Kirkpatrick who represented the plaintiff.
- 10 These requirements for reasonable and formal specificity of the precise ‘matters’ the subject of the proceedings are mandatory. They reflect the need for a minimum level of reasonable fairness to the person against whom the allegations have been made. They are necessary for the person concerned or his advocate to make an informed decision about the precise case that he must answer. And they are essential to enable him to determine how to present his case; whether to accept some allegations and seek to rebut others; what witnesses to call; what questions to ask of witnesses; what submissions to make; or whether to seek legal advice about any possible self-incrimination.

Request for Information

- 11 The failure of the Judiciary Committee to conform to these requirements, and the difficulty which faced the plaintiff and his advocate Mr Kirkpatrick, are reflected in the latter’s letter dated 16 April 2018 to the North Palm Beach Surf Life Saving Club. That letter asked ‘kindly advise exactly which allegations will be the subject of the hearing’. Mr Kirkpatrick continued:

Mr Howard cannot be expected to defend himself without knowing which allegations are being heard and without being provided with all the evidence of those allegations. Due process ought to be followed to allow Mr Howard to collate necessary evidence in reply once all the documentation is provided to him.

- 12 Mr Kirkpatrick's request was entirely reasonable. The response from Mr Pearce, the Chief Executive Officer of the defendant, was manifestly unreasonable. And it seemed to be based on a lack of awareness of the mandatory requirements of Regulations 5.1.2 and 5.1.3. Mr Pearce simply referred to an earlier investigative report by a Mr Fullagar. He seemed to conflate the Fullagar report with the proceedings before the Judiciary Committee. They were quite separate, and legally distinct, processes.
- 13 The Fullagar report came into existence as part of a preliminary independent investigation procedure contemplated by the Member Protection Policy of the defendant. It was a precursor to any referral to a Judiciary Committee. Following the Fullagar report, which was described as an 'initial report', the defendant was entitled to take disciplinary action or refer the formal complaint to a 'Hearing Tribunal' – namely, the Judiciary Committee. Its processes, as I explained, are governed by the Judiciary Regulations. The fact that there had been an investigation and report by Mr Fullagar did not obviate the need for strict compliance with the Judiciary Regulations once the decision was taken to refer the matter to the Judiciary Committee.
- 14 This is not a mere technical distinction. The facts of this case illustrate its practical importance. Mr Fullagar's investigation dealt with complaints by two persons. He concluded that one allegation relating to the language of the plaintiff was 'substantiated'; three allegations relating to the plaintiff's conduct were 'inconclusive'; and one allegation was 'unsubstantiated'.
- 15 As Mr Kirkpatrick said in his letter, the plaintiff was entitled to know exactly which allegations were proposed to be the subject of the hearing before the Judiciary Committee – 'In circumstances where all allegations made against Mr Howard after investigation were either deemed unsubstantiated or inconclusive save for the one allegation which Mr Howard admitted and [for which he] offered apology'.

- 16 Yet Mr Pearce's glib response on behalf of the defendant was simply to say that the Fullagar report 'contains full details of the complaints against Mr Howard'. That may have been so, but it did not address Mr Kirkpatrick's question. The plaintiff was entitled to know, and Mr Kirkpatrick was entitled to seek, reasonable particularity as to the precise matters which the Judiciary Committee was being asked to investigate or determine. It did not follow that because the initial investigation by Mr Fullagar dealt with certain matters, those same matters would necessarily constitute the subject matter of the proceedings before the Judiciary Committee – especially as Mr Fullagar had effectively found in favour of the plaintiff on all issues other than the one that he admitted.
- 17 The unreasonableness of Mr Pearce's behaviour was heightened when he added, in response to Mr Kirkpatrick's request: 'Are you or Mr Howard alleging he is unaware of the complaints against him? If so, please provide particulars'. This response merely reflected Mr Pearce's lack of awareness of the requirements of the Judiciary Regulations.
- 18 The same ignorance is evident in the referral to the Judiciary Committee signed by Mr Pearce. It is undated but appears to have been attached to a letter to the plaintiff dated 3 May 2018. The referral did not 'clearly set out the matter(s) required to be investigated or determined by the Judiciary Committee' in the sense intended by Regulation 5.1.2(a). It was not 'clear and unambiguous'. It merely stated that the Judiciary Committee was 'required to consider two formal written allegations of sexual harassment ...'. There was no more detail; no specification of which allegations were being pursued; no particularisation of the precise 'matters or alleged offence(s)' which would be the subject of the hearing.

The Hearing

- 19 The unfairness of the defendant's approach revealed itself in the course of the hearing by the Judiciary Committee. Having received a referral that informed the plaintiff that it was required to consider the 'two formal written allegations' that were investigated (and mostly found to be inconclusive or unsubstantiated) by Mr Fullagar, the Judiciary Committee proceeded on the basis of only one of

the complaints. It then received evidence and made a determination based, in part, on allegations of harassment that were outside those that Mr Fullagar had considered. These additional matters were serious and included allegations of physically aggressive conduct. The very point of the repeated emphasis in the Judiciary Regulations on the need to specify 'matters' was to avoid such a situation. The procedural unfairness to the plaintiff was elementary.

Conclusion

20 The plaintiff raised other matters, a number of which appear to have been justified, but it is not necessary to deal with them all. I have said enough to explain why, whatever the merits of his conduct, the plaintiff is entitled to have the decision of the Judiciary Committee made on 8 June 2018 set aside. The defendant should pay the plaintiff's costs.

[Redacted signature]