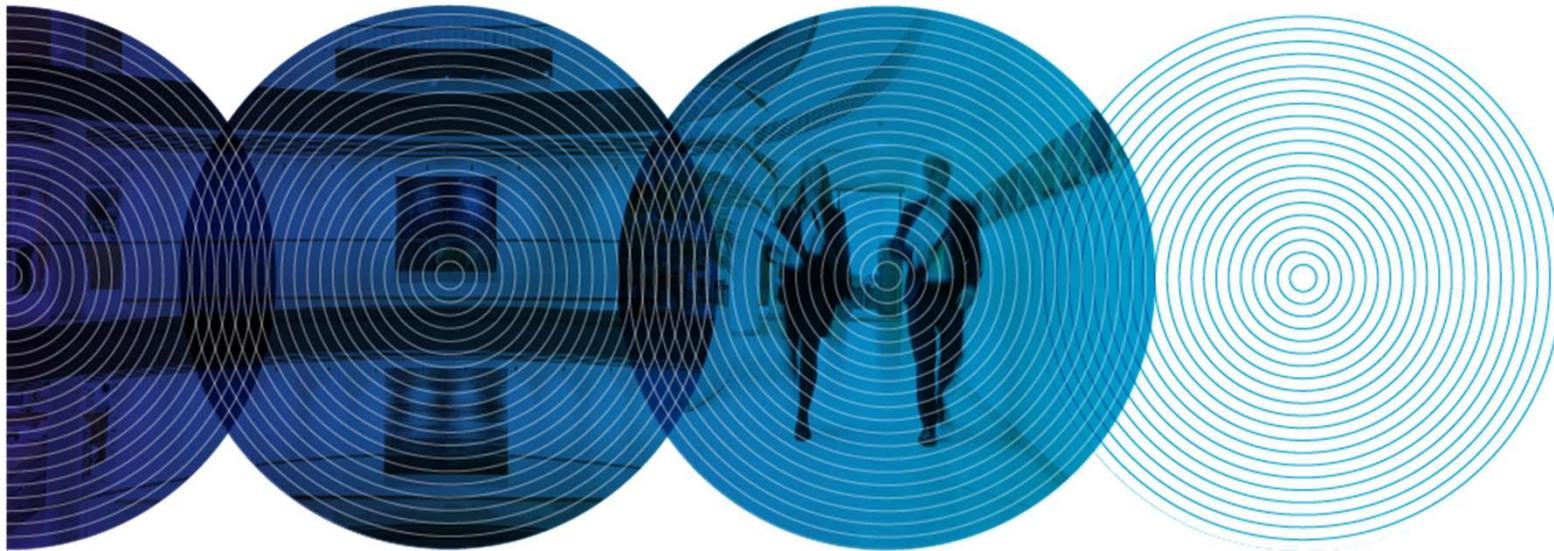

Investigations

What's fair in a 'preliminary' investigation?

23 October 2018

Donal Hamilton, Senior Associate



Key issues for today

What impacts the fairness of an investigation?

Disruption

Setting up the investigation – Terms of Reference

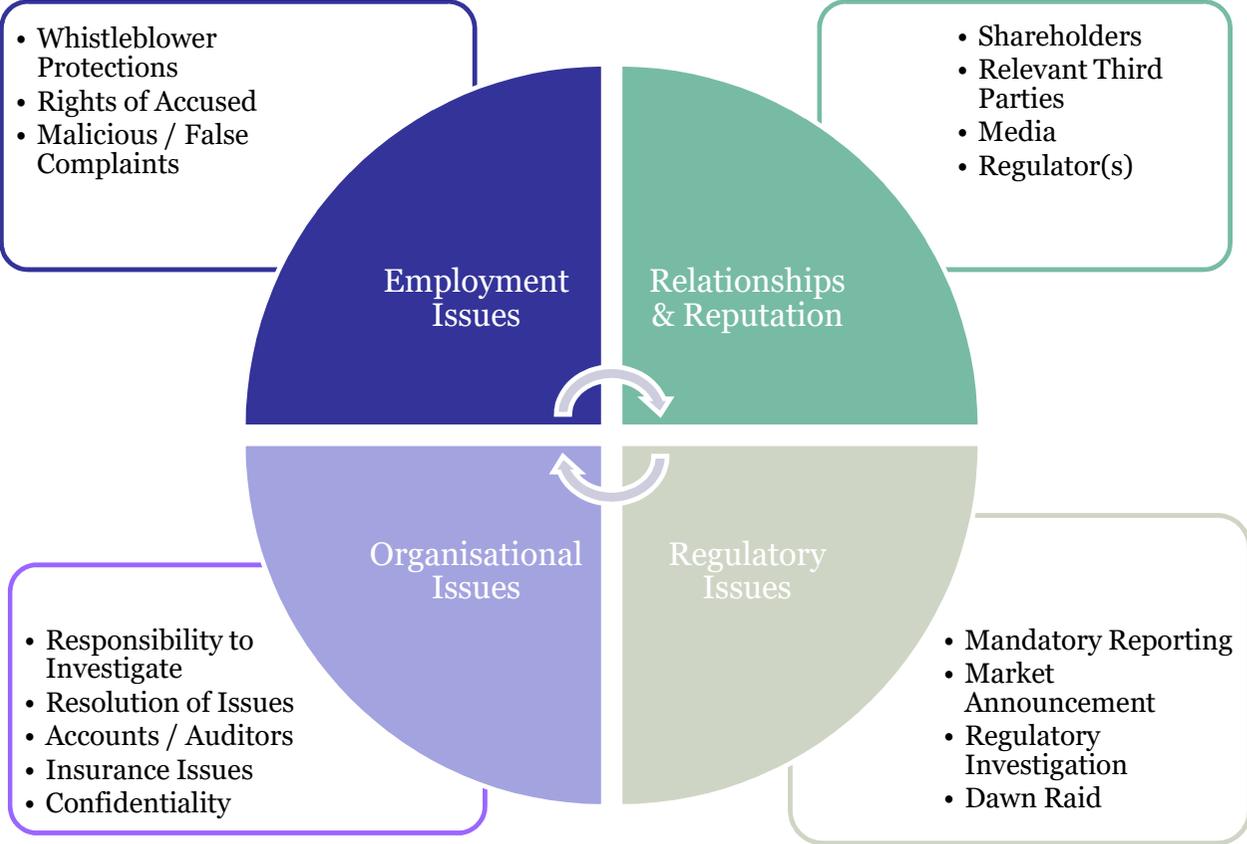
The scope of the investigation

Key procedural rights

Legal Representation and Cross-examination

The *Lyons case*

What impacts the fairness of an investigation?



Disruption



When competing interests collide...



Smith v RSA Insurance Ireland Limited (1)

- CEO of RSA Ireland
- Investigation into under-reserving in Irish subsidiary – prompted by CBI Review
- Huge pressure to appease the market and CBI
- Smith resigned mid-way into the investigation and claimed constructive dismissal
- RSA alleged he had presided over a culture of fear and had resigned to frustrate the investigation
 - *“Men were weeping into their hands, crying” and “shaking with fear....”* – RSA GC

Smith v RSA Insurance Ireland Limited (2)

- Suspension announced on Six-One News
- Announcement was made to the London Stock Exchange
- Draft report sent to the Central Bank which was outside terms of reference of the investigation
- Chief Risk Officer was on Investigation Sub-Committee
- EAT found pre-determination and bias
- Found that RSA's actions were *“taking a sledgehammer to his reputation”*
- €1.25m Award

Terms of Reference

1. Who is the Investigator? What is the timeframe?
2. What is the scope of the investigation ?
3. Could the investigation lead to dismissal?
4. What procedural rights apply?
5. What policy is being relied on?
 - Disciplinary?
 - Dignity at Work (sometimes known as anti-bullying and harassment)?
 - Grievance Procedures?
6. Is a preliminary report required?
7. Provide for an appeal



Scope of the Investigation - Natural Justice

Mooney v An Post [1998] ELR 238 (Barrington J)

*“The terms Natural and Constitutional justice are **broad terms** and what the justice of a particular case will require will **vary with the circumstances of the case**... Certainly the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and the circumstances surrounding his proposed dismissal. **Certainly the minimum he is entitled to is to be informed of the charges against him and be given an opportunity to answer it and make submissions.**”*

Scope of Investigation

O'Sullivan v Mercy Hospital Cork Limited [2005] (Clarke J)

- Line manager initiates performance process and staff member claims bullying
- Investigation commences
- Plaintiff told she was a witness, but the Investigators proceeds to make a finding of bullying against her
- Clarke J describes a sliding scale of investigations...

Scope of Investigation

Minnock v Irish Casing [2007] ELR 229 (Clarke J)

*“... in the ordinary way, the court will not intervene necessarily in the course of a disciplinary process unless a clear case has been made out that there is serious risk that the process is sufficiently flawed and incapable of being cured, that it might cause irreparable harm to the plaintiff if the process is permitted to continue. **Where an inquiry is a pure investigation which does not involve any findings, the rules of natural justice do not apply and is not a matter therefore which the courts should interfere with.**”*

Scope of Investigation



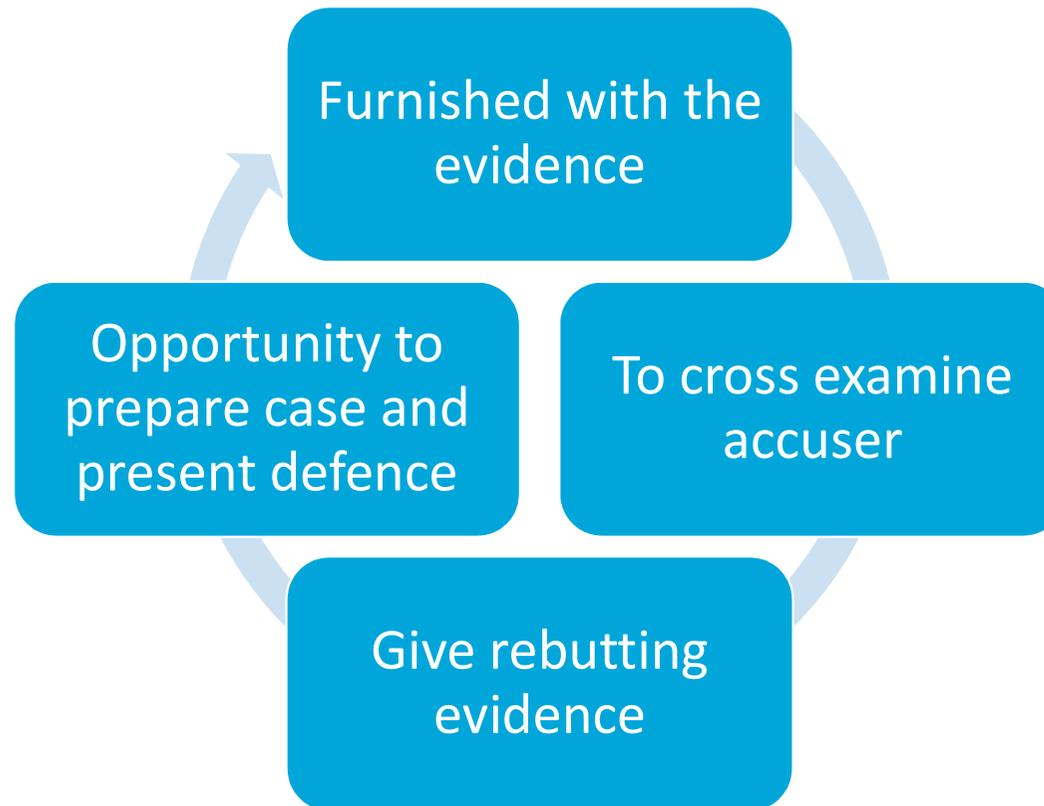
Key Procedural Rights

1. *Audi Alteram Partem* – the right to state your case and be heard in your own defence.
2. *Nemo Iudex in Causa Sua* – no man shall be the judge in his own cause i.e. the right to an unbiased process and an unbiased decision maker.

Audi Alteram Partem – *In re Haughey* (1971)



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Burns v Governor of Castlerea Prison (2009, Supreme Court)

- Two prison officers were accompanying a prisoner to a medical appointment in Galway.
- It was alleged that having left the hospital following the appointment, it took the applicants three hours more than it should have to return to the prison.
- Also alleged that they made false and inaccurate statements with intent to deceive and knowingly solicited an unauthorised gratuity.
- Refused legal representation – refused to take part in hearing.



Burns v Governor of Castlereagh (2009, Supreme Court)

Seriousness of charge and potential penalty

Are points of law likely to arise?

Capability of employee to present own case

Procedural difficulties

Reasonable speed in making the adjudication

Fairness between parties

Right to Cross Examine Witnesses

Shortt v Royal Liver Assurance [2008] IEHC 332

- Complaint of “*aggressive and intimidating behaviour*”
- Plaintiff argued that the seriousness of allegations of ‘*aggressive and intimidating behaviour*’ meant that they ought to have been tested in a more robust manner i.e. by cross examination
- Test to be applied is:
“*whether....[..]...the plaintiff was likely to be exposed to the risk of an unfair hearing or an unfair result.*”

Right to Cross Examine Witnesses

- *Shortt v Royal Liver Assurance*
 - Large measure of consistency in both parties' accounts
 - Employer entitled to proceed on the basis that the refusal to allow cross-examination was “*not likely to imperil a fair hearing or a fair result*” and was further entitled to take into account the likelihood of a detrimental effect on the complainant by being cross-examined by the Plaintiff
 - More recently, note *O’Leary v An Post* (2016) where Keane J rejected the assertion that an employee had a right to cross examine at investigation stage

The *Lyons* case

Lyons v Longford Westmeath Education and Training Board [2017] IEHC 272

- Investigation of a bullying allegation
- Applicant not permitted to cross examine his accuser
- Finding against the applicant appealed internally and rejected
- Chief Executive decided that the report ‘stands’ together with the ‘findings’ against him, and invited him to a disciplinary meeting at which dismissal was a possible result



The *Lyons* case

Lyons v Longford Westmeath Education and Training Board

- Eager J – Principles of fair procedures and natural justice need not apply to investigations that do not involve findings of fact, but they do apply to inquiries which can make formal findings

The *Lyons* case

Lyons v Longford Westmeath Education and Training Board

- The right to fair procedures and natural justice (which includes the right to legal representation during meetings and the right to cross-examine witnesses) applies at the preliminary investigation stage where the matter is sufficiently serious that it may warrant dismissal.
- Bear in mind that the CEO had ‘adopted’ the findings, so there was no further opportunity for Mr Lyons to challenge the substantive case against him.

Is that such a surprise?



The bullying investigation in Lyons allowed serious findings to be made, which could have led to the termination of employment, without adhering to fair procedures.

The *Lyons* case – legal representation

Lyons v Longford Westmeath Education and Training Board

“The Court finds that the investigation ... failed to adopt fair procedures... It is noted by this Court that this is the process adopted by many companies when dealing with complaints against employees. It is quite clear that the exclusion of solicitors and counsel, and the refusal to allow cross-examination under such policies is a breach of the Constitutional right to fair procedures.”

Burns v Governor of Castlereagh (2009, Supreme Court)

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Post-Lyons High Court Decisions

EG v The Society of Actuaries in Ireland
[2017] IEHC 392

- McDermott J was satisfied that the investigating committee examining an allegation of professional misconduct was simply involved in an information gathering process, that the full extent of rights was not required

NM v Limerick and Clare ETB [2015] 308
JR

- Applicant was not entitled to an opportunity to cross examine at the investigation stage as investigator's decision could not be regarded as a "*final or binding finding of fact*"

Post-Lyons WRC Decisions

- *A Quality Controller v A Fresh Produce Company* (ADJ-00006768)
 - Employee complained that he was not advised that he could bring legal representation to disciplinary meetings.
 - WRC held that the employee had never requested legal representation, and even if he had legal representation, the WRC was “*not convinced that a different outcome would have emerged*”.
 - Consistent with *Shortt v Royal Liver...*

Post-Lyons WRC Decisions

- *Store Manager v Restaurant Chain* (ADJ-00009398)
 - Complainant was heard in person and those making the allegations were interviewed separately.
 - The employer did not give the employee any witness statements or advise the employee that dismissal was a possible outcome.
 - No disciplinary hearing took place and the employee was dismissed after the investigation.

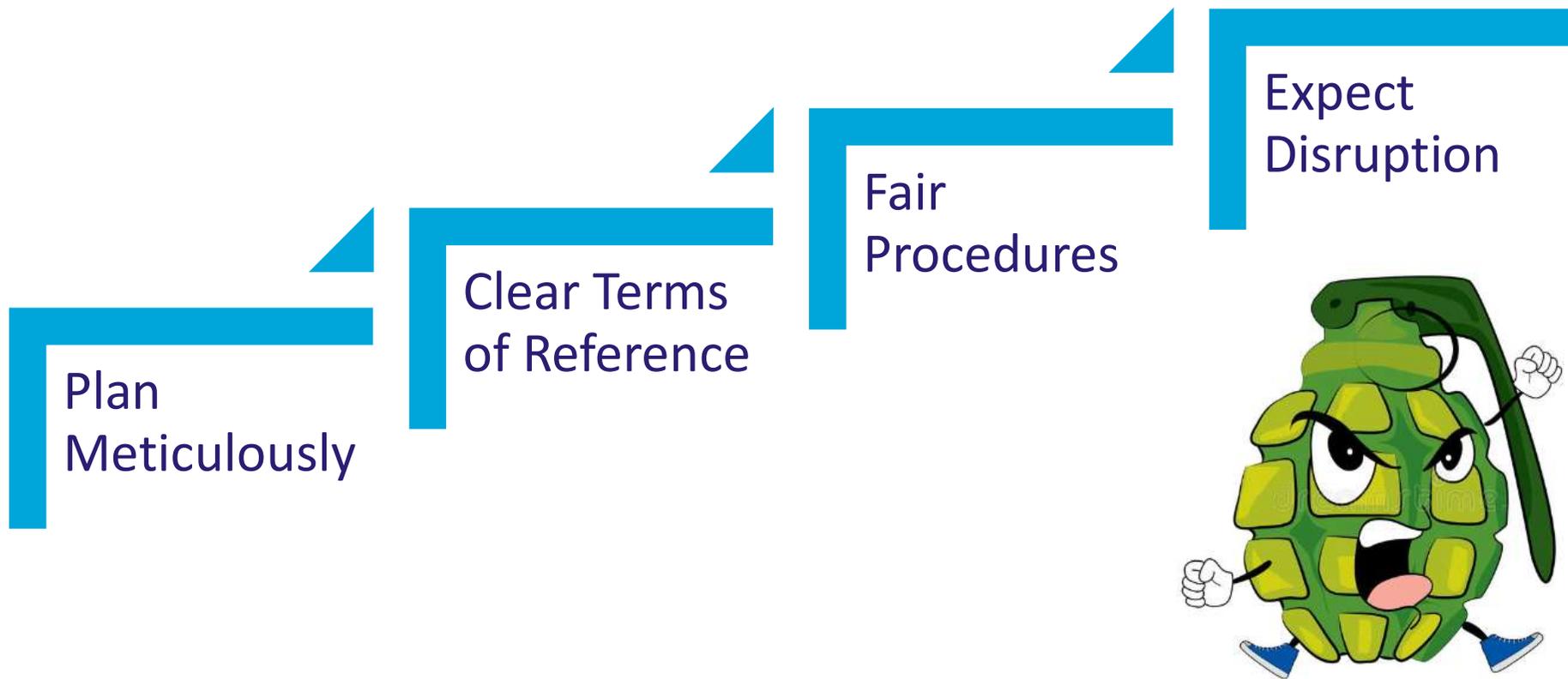
Post-Lyons WRC Decisions

- *Store Manager v Restaurant Chain* (ADJ-00009398)
 - The employee was not given any opportunity to be represented or to cross-examine any of the witnesses.
 - The WRC referenced the Lyons decision and placed particular emphasis on the right to cross-examine any witnesses.
 - In doing so, the WRC found that the procedures used in this case were “*hopelessly flawed*”.

Post-Lyons WRC Decisions

- *Retail Assistant v Retail Store* (ADJ-00010207)
 - Fact gathering investigation escalated to a disciplinary investigation.
 - The employee was not advised that the investigation could lead to his dismissal.
 - Differing accounts between the employee and team leader.
 - The WRC noted how the employee was not given an opportunity to confront his accusers, despite the decisions in *Lyons* and *Castlerea* case.
 - The WRC found that the dismissal was procedurally unfair.

Conclusion



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