

Fairs Fair Process & Procedural Fairness

Particularly when you have to deliver bad news to a person, the processes you use are at least as important as the decision you have made.

A couple of years ago, the car manufacturing industry in my home town of Melbourne Australia ceased the manufacture of Australian cars and moved to an importing business. Over a few years 1000s of jobs were lost or transformed. Progress and change are inevitable and the transition was reluctantly accepted by most people. However, I was really surprised a few weeks ago when the first major round of layoffs were occurring at one of the manufacturers to hear the local Trades Union representative complimenting the factory management on the way they had handled the decision as to who should go now, who had a job for a few more months and who would be relocated into the new import business.

The key factor was not the decision, no one likes being retrenched, or even the fairness of the choices between who goes and who stays - the key was the empathy and consideration shown to each of the laid off workers by their management, and the fact the management team (most of whom would be losing their jobs as well) had taken the time to speak with each worker and appreciate their input to the business over many years.

By applying process fairness and giving everyone a chance to be heard, what could have been a very angry and disruptive event was transformed into a 'wake' remembering the good times and the contributions made by the industry. It was obviously still a sad and stressful time but far less so than may otherwise have been.



So what is procedural fairness and why is it important??

Process fairness is quite distinct from outcome fairness. Outcome fairness refers to judgments made about the final outcome. In this case, while it is patently unfair to lose your job after 20 or 30 years due to a combination of factors largely outside of anyone's control; outcome fairness could be achieved by using a 'lottery' (similar to many countries conscription processes) or a simple last-on, first-off approach. The outcome would be arbitrary, but completely fair. But the outcome would lack any form of process fairness with the decisions being imposed from above.

Process fairness is aligned with the concepts of procedural fairness and natural justice and particularly applies to decisions affecting the team leader / team member (or manager / employee) relationship. Broadly speaking, there are three intertwined components of process fairness.

- **How much input the team member believes they have in the decision-making process:** Are their opinions requested and given serious consideration?

- **How team members believe decisions are made and implemented:** Are they consistent? Are they based on accurate information? Can mistakes be corrected? Are the personal biases of the decision maker minimised? Is ample advance notice given? Is the decision process transparent?
- **How managers behave:** Do they explain why a decision was needed and how it was made? Do they treat employees respectfully, actively listening to their concerns and empathising with their points of view?

Process fairness makes a big difference! A study of nearly 1,000 people, led by Allan Lind and Jerald Greenberg¹, found that a major determinant of whether employees sue for wrongful termination is their perception of how fairly the termination process was carried out. Only 1% of ex-employees who felt that they were treated with a high degree of process fairness filed a wrongful termination lawsuit versus 17% of those who believed they were treated with a low degree of process fairness. Similar results can be found for patients suing doctors and customers suing businesses.

Process fairness is concerned with the procedures used by a decision-maker to reach a decision; however, it is highly likely that a decision-maker who follows a fair process will also reach a fair and correct decision. On its own, process fairness doesn't ensure that the team members will always get what they want; or that the final decision is 'fair'; but it does ensure that they have had a chance to be heard.

Fairness demands that the affected person (or people) are told about the impending decision and are given the chance to have their say before a decision that may negatively affect their existing interest or legitimate expectations is made. Put simply, hearing both sides of the story is critical to good decision-making. You get a better decision and happier team members².

There are six rules that apply to procedural justice (or natural justice), that apply equally to process fairness:

- consistency
- bias suppression
- accuracy
- correctability
- representativeness, and
- ethicality.

Process fairness in the workplace and in communication, simply requires things to be fair to everyone, when something is applied it has to be applied to everyone and the processes need to be consistent with the team's moral and ethical values.

¹ See: <http://people.duke.edu/~alind/litagate.html>. An important aspect of these studies was the finding that termination payments did not matter as much as fairness. Terminated workers receiving a higher payout, but who felt they had been treated unfairly, sued more often than those who felt they had been treated fairly even though they received less money.

² Giving team members input to the decision-making process is an important part of the overall processes needed to create a motivated team. For more on **motivation** see: https://www.mosaicprojects.com.au/WhitePapers/WP1048_Motivation.pdf



Procedural Fairness & Natural Justice

The term procedural fairness tends to be used when talking about administrative decision-making whereas the term natural justice is associated with procedures used by courts of law. Both terms have similar meaning and are commonly used interchangeably.

A critical part of procedural fairness is 'the hearing rule'. Fairness demands that a person be told the '*case to be met*' and given the chance to reply before the decision maker makes a decision that negatively affects a right, an existing interest or a legitimate expectation which they hold. The person concerned has a right:

- To an opportunity to reply in a way that is appropriate for the circumstances
- To receive all relevant information before preparing their reply. The case to be met must include a description of the possible decision, the criteria for making that decision and information on which any such decision would be based
- To a reasonable chance to consider their position and reply (what is reasonable can vary according to the complexity of the issue, whether an urgent decision is essential or any other relevant matter)
- For their reply to be received and considered before the decision is made
- To genuine consideration of their submission, the decision-maker needs to be fully aware of everything written or said by the person, and then to give proper and genuine consideration to that person's case.

If you are investigating a matter or preparing a report for a decision-maker, it is good practice to consider the requirements of procedural fairness at every stage of your investigation³. Procedural fairness is an essential part of a professional investigation and benefits everyone. As an investigator, acting according to procedural fairness can help you by providing:

- An important means of checking facts and identifying major issues, comments made by affected parties can expose weaknesses in the investigation;
- Advance warning of areas where the investigation report may be challenged.

Depending on the circumstances, as an investigator procedural fairness requires you to:

- Inform those affected by the investigation of the main points being investigated and any allegations or grounds for negative comment against them, how and when this is done is up to you, depending on the circumstances
- Provide people with a reasonable opportunity to put their case, whether in writing, at a hearing or otherwise, it is important to weigh all relevant circumstances for each individual case before deciding how the person should be allowed to respond
- Hear all parties to a matter and consider all submissions
- Make reasonable inquiries or investigations before making a decision. A decision that will negatively affect a person should not be based merely on suspicion, gossip or rumour. There must be facts or information to support all negative findings. The best way of testing the reliability or

³ This particularly applies to investigations around a matter in dispute or that is central to a conflict between two or more parties

- for more on **conflict management** see:

https://www.mosaicprojects.com.au/WhitePapers/WP1041_Managing_Conflict.pdf

- for more on **contractual dispute management** see:

https://www.mosaicprojects.com.au/WhitePapers/WP1049_Dispute_Management.pdf



credibility of information is to disclose it to a person in advance of a decision, as required by the hearing rule

- Only take into account relevant factors. However, if, in the course of an investigation, a person raises a new issue that question or casts doubt on an issue that is central to a proper decision, it should not be ignored. Proper examination of all credible, relevant and disputed issues is important
- Act fairly and without bias
- Conduct the investigation without unnecessary delay
- Ensure that a full record of the investigation has been made.

Of course, wherever there is a requirement to apply particular procedures in addition to those that ensure procedural fairness, those procedures must also be followed.

If you are the decision-maker using a report, you must ensure that:

- You allow the individual a fair hearing (or verify that the individual has been granted a fair hearing) that is neither too early nor too late in the decision-making process
- You are unbiased. This includes ensuring that from an onlooker's perspective there is no reasonable perception of bias. For example, personal, financial or family relationships, evidence of a closed mind or participation in another role in the decision-making process (such as accuser or judge) can all give rise to a reasonable perception of bias. If this is the case, it is best to remove yourself from the process and ensure an independent person assumes the role of decision-maker
- If you are relying on a briefing paper that summarises both sides of the case and makes a proposal, consider disclosing a draft of the briefing paper to the affected parties, even though a hearing may have been held earlier.

Summary

The next time you have to make a decision that will affect your team, rather than trying to make the best decision on your own:

1. Tell the people about the decision and the reasons it needs to be made
2. Ask for their input and take the time to listen, and
3. Once you have reached your decision explain the reasons clearly and leave space for feedback, particularly from anyone the decision affects negatively.

You may be surprised by the support you get from everyone.

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