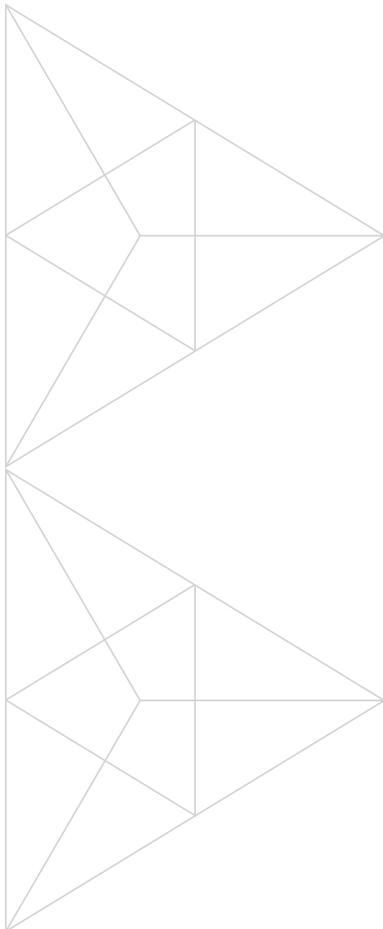


OUTCOMES

Once a determination has been made about whether misconduct occurred, the decision maker will need to decide on the investigation outcomes.

This is when you should be concerned about 'substantive fairness' for the respondent. This means that the outcomes need to be fair and proportionate.



Outcomes for the respondent

Options

Sanctions

If one or more allegations of misconduct have been substantiated, you may choose to impose a disciplinary sanction.

The most severe disciplinary sanction is dismissal. The most minor sanction is generally a reprimand, a counselling or a warning. Other examples of disciplinary sanctions include demotion, transfer, reduction in salary, or reassignment.

In some organisations, possible sanctions are set out in legislation. In others, they are contained in industrial instruments or policies. In some organisations there is no set disciplinary system. These organisations tend to use a system of formal warnings.

What is a counselling?

A formal counselling is not a counselling session. It is a formal process similar to a warning, where the employee is informed that their behaviour has not reached the required standard. It can be hard to differentiate between a counselling and a reprimand, although in theory a reprimand is more serious.

Counsellings, reprimands and warnings should be given in writing, usually at a formal meeting with a senior executive. A copy of the sanction should be placed on the respondent's personnel file.

Professional development measures

Examples of professional development measures include training and coaching, a performance improvement plan, monitoring and guidance, mediation and conciliation, and an informal chat about what could be done better next time.

Depending on the sanction and the situation, you should consider implementing a professional development measure at the same time as imposing a sanction. This is because the focus of the disciplinary process should be on improvement of conduct – not punishment.

If you decide not to impose a sanction, or if misconduct has not occurred, you may still choose to take a professional development measure. You may also take this action in relation to the conduct of an employee other than the respondent.

For instance, you may have found that the respondent's conduct did not reach the threshold of misconduct, but that their conduct fell short of expectations. You may require the employee to attend some refresher training as a professional development measure.

You should make it clear to the employee that professional development measures are not sanctions.

Management actions

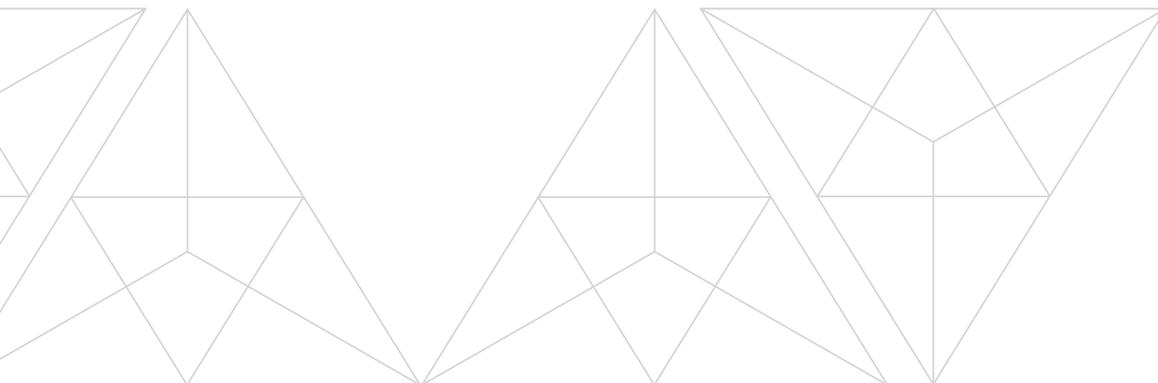
You may also consider taking some kind of management action in relation to the employee's conduct. Examples of management actions include restricting an employee's computer usage rights, and putting in place measures to support an employee with health issues. These kinds of actions should only be taken in consultation and negotiation with the employee.

What to take into account

There are many factors you may take into account in determining the appropriate outcomes for the respondent. This is the stage at which you should take all mitigating, aggravating and extenuating circumstances into account.

Keep in mind that the aim of the disciplinary process is not to punish. The aim is to protect your organisation and the public interest, reform behaviour, and to set an example for the respondent and others. Even if misconduct is substantiated, you do not have to impose a sanction.

Factors to consider in deciding whether and what action to take are set out in the table below.



The employee:	<ul style="list-style-type: none"> Employee's awareness that their conduct was unacceptable (was it wilful and deliberate). Whether they admitted to the conduct, and whether they have shown remorse, willingness to take responsibility, or apologised. Whether the employee attempted to cover up the conduct, lied or was uncooperative during the investigation. Employee's employment history, length of service, training and experience. Seniority of the employee – the more senior the employee, the higher the standards they need to meet. Impact of the outcome on the employee.
The conduct:	<ul style="list-style-type: none"> Actions taken in relation to similar conduct by other employees. Relevance of the conduct to the employee's role and duties. Premeditation and planning that went into the conduct. Culpability and whether there was any provocation, persuasion or coercion by others, including through a power imbalance (whether overt or not). Whether the employee has committed similar acts of misconduct in the past – consider whether it was identical, relevant, serious or recent (less weight should be placed on less recent conduct). Warnings or advice given to the employee about similar behaviour in the past. Whether the behaviour has been condoned or ignored on the past. Proportionality – the sanction should be proportionate to the conduct. Medical reasons for the conduct.
The public:	<ul style="list-style-type: none"> Public confidence and the reputation of your organisation. Protection of public money.
Your employees:	<ul style="list-style-type: none"> What sanction is necessary for the employee and others to appreciate the seriousness of the conduct. Risks, health, safety and welfare considerations for the employee, their colleagues, and the community. Employee morale.
Your organisation:	<ul style="list-style-type: none"> Amount of guidance and training provided by your organisation about this particular type of misconduct. Culture or practice in the work unit or your organisation. Flaws in the misconduct investigation process.

Flaws in the misconduct investigation process

Flaws in the investigation process may be taken into account as mitigating factors – for example, a breach of procedural fairness, or an unnecessary delay.

For example, two years have passed since the misconduct was committed. The employee has not committed any more misconduct in that time. The delay was due to flaws in your investigative process. This would be a mitigating factor to take into account in determining whether it was worthwhile imposing a sanction and/or a professional development measure.

Past misconduct

Past misconduct findings can be taken into account as an aggravating factor. Acts of past misconduct can be reported to the decision maker separately to the investigation report. For example, in a separate memorandum from human resources.

The exception to this is where the retention period for misconduct records has ended, and the records have been removed from the personnel file and destroyed. [FS7]

Multiple acts of misconduct

Where multiple acts of misconduct have been committed, this should generally lead to a more serious sanction. That is, it should lead to a cumulative outcome.

For instance, there may be three substantiated allegations that, individually, would each warrant a counselling. Taken together, this should lead to a more serious outcome such as a reprimand or demotion, rather than three counsellings.

If the acts of misconduct are unrelated, you may consider taking separate actions for each.

The 'show cause' process

As discussed in [FS16], you may notify the respondent of the proposed sanction and ask them to 'show cause' why it should not be enacted. This process is rarely mandated, but it is not unusual – particularly in relation to dismissals. In some organisations, the respondent is told of the intended sanction at the same time they are told of the proposed adverse misconduct findings.

If you choose to do this, give the respondent a specific date by which they have to respond. Make sure you give them sufficient time to respond. Generally – unless it is a summary dismissal – seven days should be enough, but be open to extending the timeframe if requested.

Make sure that the respondent is aware that they can seek advice, support and representation from an independent person during this process, including in preparing their response.

If you have not received a response by the deadline, you should contact them and make sure they do not intend to respond. Get this in writing if you can.

If they make a submission, you should objectively and carefully consider the submission. When you notify them of your final decision, you should set out why you did or did not take each aspect of their submission into account. [FS24]

One less common practice is to put the range of possible sanctions to the respondent, and ask them which they think would be most suitable.

*This practice is **not** recommended. It is likely to cause delays, and benefits nobody.*

What if the respondent asks for copies of evidence?

You do not usually need to give the respondent verbatim copies of evidence. However, unless there are reasons to not do so, you should comply with these requests. You should consider the provisions of the privacy legislation relevant to your organisation in responding to such a request.

In some organisations, respondents are currently required to make right to information requests to obtain evidence gathered in disciplinary investigations. If information is obtainable under the *Right to Information Act 2009 (Tas)*, insisting on a formal right to information application is unlikely to enhance the employee-employer relationship. If this is required in your organisation, make sure you have regard to section 36 of the *Right to Information Act 2009* in responding to the request. If you are unsure, you should seek advice. [FS4]

Outcomes for the source

Consider whether there needs to be an outcome for the source of the complaint. This may include action such as:

- an apology
- conciliation or an opportunity to meet with the respondent to discuss the matter
- notification of procedural changes made, or
- some other form of amendment or reparation.

It is especially likely that you will need to consider outcomes for the source if the matter involves sustained allegations of discrimination, bullying or harassment. You can contact [Equal Opportunity Tasmania](#) for advice if needed. [FS4] [FS6]

Outcomes for your organisation

Identifying areas for improvement

An important outcome of misconduct investigations is the identification and implementation of improvements in your organisation. This includes both in terms of misconduct risks, and broader organisational issues.

The investigator and the decision maker should both be alert to possible systemic or organisational issues. These matters should be reported to the appropriate areas (including the executive) and actioned. Usually, you do not need to wait until the end of the investigation to make organisational improvements.

Considerations in identifying areas for organisational improvement include whether there:

- are risks to or in systems or procedures
- are missing or inadequate internal controls
- are accountability systems in place and whether they worked
- is adequate training and guidance
- are adequate records and record keeping systems

- was adequate supervision and oversight
- are consistently applied policies, processes and standards of behaviour, or
- are cultural issues.

If you have engaged an external investigator, their views on your workplace may be helpful in making improvements. It may be useful to have a debriefing with them.

Consider whether the matter has revealed gaps in manager skills. Did the matter arise from interpersonal or other issues that could have been better managed in the first instance? If so, is there something your organisation could do to improve the skills of the managers involved?

Reviewing the investigation

At the end of an investigation it is good practice to undertake a review. You should try to identify where the process worked well, and where it could be improved. As part of the review, consider whether you need to change policies or practices.

The review could be as informal as a debriefing meeting, or as formal as hiring a company to audit the investigation.

The review could also be undertaken internally by one employee. Generally the reviewer should be someone more senior and more experienced than the investigator.

What if the decision is appealed?

If adverse findings have been made, you should have made the respondent aware of their appeal and review rights both internally (if applicable) and externally. The importance of proper process and record keeping will become apparent if the decision is appealed.

An appeal should be seen as an opportunity for learning, and should not be taken personally by the investigator or the decision maker. Reviews help to ensure accountability and transparency.