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PROCEDURAL FAIRNESS

Procedural fairness should be a primary consideration throughout the investigation process.

What is procedural fairness?

Procedural fairness is also known as natural justice. It is about fair procedures. It is not concerned with whether outcomes are fair (which is 'substantive fairness').

Procedural fairness requirements vary depending on the investigation. Your organisation may have specific procedural fairness requirements.

The general rule is that procedural fairness requirements increase along with the possible severity of the outcome. You should err on the side of giving too much procedural fairness rather than too little.

Procedural fairness does not require that the respondent be given regular updates if it would hinder evidence gathering.

For the purposes of a disciplinary investigation, the most relevant procedural fairness rules are the:

- hearing rule – a right to a reasonable opportunity to be heard
- bias rule – a right for the decision not to be biased and
- evidence rule – a right for the decision to be based on evidence.

The hearing rule is the most prominent procedural fairness requirement, and is dealt with in detail in [\[FS16\]](#). Information on the other two rules is set out below.

Other general procedural fairness principles include that:

- the process be conducted without unnecessary delay [\[FS9\]](#)
- adequate records be kept [\[FS7\]](#) and
- an employee may have a support person present during an interview. [\[FS19\]](#)

The bias rule

The general principles of the bias rule include that:

- the process should be free from actual or apprehended bias – apprehended bias is when a bias may be perceived, but is not necessarily present
- the investigator and the decision maker should not have an interest in the outcome – 'interest' includes both pecuniary (monetary) interests and non-pecuniary interests (family, friends, associates, enemies) – and
- the decision should be made in good faith.

The test is an objective one. In thinking about the bias rule, consider whether a reasonable member of the public who has access to all relevant information would think that the process was free from bias (or conflicts of interest).

One way to avoid apprehended bias is for the investigator and the decision maker roles to be undertaken by different people. [\[FS10\]](#)

Risk areas

Questions put to the respondent should not display partiality, prejudgment, predisposition or bias. You should ensure that you are not working toward a predetermined outcome.

[\[FS19\]](#)

Ignoring or dismissing evidence without giving a good reason can be evidence of bias.

If you choose to put proposed adverse misconduct findings to the respondent, make sure that you have not prejudged the outcome. The Tasmanian Supreme Court case of [Rainbird v Bonde \[2016\] TASSC 10](#) is relevant to this issue. [\[FS16\]](#)

The evidence rule

The general principles of the evidence rule are that:

- there should be evidence to support the decision
- reasonable inquiries should be undertaken before a decision is made
- the findings should be based on relevant evidence and
- irrelevant considerations or evidence should not be taken into account.

Risk areas

A failure to pursue new issues raised, submissions that cast doubt on evidence, or counter-allegations may be a breach of procedural fairness. [\[FS12\]](#)

Giving the respondent a reasonable opportunity to respond, and genuinely considering their submission, is one way to reduce the risk of breaching this rule. [\[FS16\]](#)