THE HEARING RULE – TELLING THE RESPONDENT

Once the investigator has been selected, you should turn your mind to when and what to tell the respondent about the allegations.

Procedural fairness: the hearing rule

The hearing rule is the most prominent procedural fairness requirement. The general principles are that:

- all parties have a right to a reasonable opportunity to be heard (including the source)
- the respondent has a right to know the allegations against them in sufficient detail [FS11]
- the respondent has a right to respond to the allegations against them, and
- the respondent has a right for their submission to be genuinely considered before the decision is made.

The type of hearing needed will vary with the circumstances.

At what point does the right to be heard apply?

In dealing with the respondent, the hearing rule applies at several stages:

i. telling the respondent the allegations (before/during the investigation), and
ii. giving the respondent the opportunity to respond to the allegations (during the investigation), and
iii. giving the respondent a copy of the investigation report (after the investigation), or
iv. asking the respondent to respond to proposed adverse misconduct findings (after the investigation).

Stage (i): Telling the respondent the allegations

When to tell the respondent

In some organisations, it is mandatory to tell the respondent about the investigation as soon as the process starts.

If this is not the case in your organisation, you may choose to tell the respondent about the allegations at any stage before the end of the investigation.

Except in rare circumstances (see below), the respondent should be made aware of the investigation and the allegations before the end of the investigation so that they can respond to the allegations (stage [ii]) before findings are made.

You may start an investigation and it may quickly become obvious that there was no misconduct.

In this case the investigation would wrap up and no adverse findings would be made.

If the respondent did not already know about the matter, there would be no need to inform them of the allegations or the investigation.

In deciding when to inform the respondent you should consider:

- whether there is a requirement for the investigation to remain confidential (including on the advice of police) – this will especially be the case if the allegations are very serious, if there is a risk of victimisation, or if the matter is a protected or public interest disclosure [FS2] [FS7]
- whether informing the respondent may resolve the matter – in some situations, the respondent may be able to clear up the matter or may admit to the conduct, which would make the investigation a much simpler, cheaper and quicker process

- whether informing the respondent is likely to end the inappropriate conduct – although the investigation would likely need to continue, ending the conduct would be a positive outcome in a situation where allowing it to continue would not provide additional evidence, and/or could be seen as condoning the behaviour
- for how long it will be possible for the investigation to remain confidential – it is better for the respondent to be told formally than to hear it through gossip or rumour, and
- whether you need to take action such as restricting access to data or equipment, or suspending, standing down or varying the duties of the respondent during the investigation – in this case, it will not be possible for the investigation to remain confidential. [FS5]

What to tell the respondent

Regardless of when you tell the respondent, the allegations should be set out in writing for them. It is usually best that the respondent be informed of the investigation and the allegations at a meeting. The respondent should be given, in writing:

- the defined allegations
- information about the investigation process, including the name of the investigator and when the respondent is likely to be contacted
- copies or links to relevant policies and procedures
- information about their rights, including the right to be heard and the right to a support person at meetings
- where relevant, a caution against taking reprisal action or victimisation, and a direction to maintain confidentiality and/or not to speak to certain people about the matter
- the full range of sanctions that may apply under the disciplinary framework – avoid giving them a specific indicative sanction for the kind of misconduct that has been alleged
- information about accessing support, for instance through an employee assistance program, and
- the name of the decision maker.

The respondent may want to talk about the matter at this meeting. You should avoid this if possible. Make it clear to them that they will have a right to be heard at a later date. The meeting should not turn into an interview.

The respondent may want to admit to the conduct. They may be adamant that they are ready to respond to the allegations on the spot.

If this is the case, make a written record of what they say, including that you offered them a meeting at a later date, and the presence of a support person. Have them sign the document as being a true and accurate record.

Even if the respondent admits to the conduct, it is likely that you will have to complete some other procedural steps before you can finalise the matter.

Precautions

The appropriate bodies should be contacted and measures put in place before contacting the respondent if:

- the matter may involve serious misconduct [FS2]
- the matter may involve criminal conduct [FS6]
- the matter falls under whistle-blower legislation [FS2]
- there is a risk of evidence being destroyed, or
- there is a risk of victimisation. [FS2]

Stage (ii): Giving the respondent the opportunity to respond to the allegations

Putting the allegations to the respondent for a response is a mandatory part of the procedural fairness process.

Make sure that you give the respondent sufficient time to consider and respond to the allegations. Seven days is generally enough time. More or less time may be needed depending on the circumstances. This would include the seriousness and complexity of the allegations, and whether you have asked the respondent to respond in writing or in person. More time is generally needed to prepare a written response.

> *Regardless of when you inform them of the allegations, it is good practice to get the respondent's evidence after all other evidence has been gathered.*
>
> *This allows you to put all allegations to them at one hearing.* [FS17]

If the respondent is to be interviewed, it may be better for their welfare to have less notice. About three days would usually be sufficient. This gives them time to arrange a support person if required, and collect any supporting documentation.

Be open to extending the response time on request.

Generally an opportunity to attend an interview is seen as fairer than a request that an employee respond in writing. If the allegations are very serious you should lean toward offering the respondent an opportunity to be interviewed.

The respondent may decline an interview and insist on responding in writing. Unless you have the ability to direct the person to answer questions, it is likely that you will have to comply with such a request. However, keep in mind that the right to be heard is a right to a reasonable opportunity to be heard. [FS18]

> *The right to be heard is the right to a* **reasonable opportunity** *to be heard. This is an objective standard.*
>
> *You should not allow an employee to delay the investigation with unreasonable requests. They do not need to be given a 'perfect opportunity' to be heard.*
>
> *If the matter is serious, it may be reasonable for you to contact them and expect a response while they are on leave.*

Stages (iii) and (iv): The respondent's final submission

Before they make their final submission, the respondent must be made aware of all adverse material that is 'relevant, credible and significant'. In simple investigations, it may be possible to do this as part of stage (ii) during the investigation.

It is more likely that you will need to take an additional step to ensure you have complied with this aspect of procedural fairness.

If you do need this additional step, **you do not need to do both stage (iii) and stage (iv)** – they are alternatives. It is likely that your organisation will already have a policy or practice of undertaking either stage (iii) or stage (iv).

In considering which step to take, think about how you can best make the respondent aware of relevant issues. This may require you to point out critical issues that may not be readily apparent.

If the respondent has refused to respond to the allegations at stage (ii) of the investigation, you should give them a copy of the investigation report (stage [iii]).

Stage (iii): Giving the respondent a copy of the investigation report

If you choose to send a copy of the investigation report to the respondent for comment, make sure they are given sufficient time to respond. This will depend on the length and complexity of the report.

Good practice principles do not require that you, as a matter of course, provide the respondent with verbatim copies of witness statements and documentary evidence along with the report. A decision about what to give or show the respondent needs to be balanced against other considerations. These considerations might include confidentiality, privacy, security risks, and legal professional privilege. Irrelevant comments made by witnesses have the potential to upset the respondent.

An accurate summary of the evidence in the investigation report will likely be sufficient.

You may also redact from the report anything that is not relevant to the respondent. This may include, for instance, allegations against other people and consideration of systemic issues. Be mindful of the possible negative connotations of redactions for the respondent. If the report is likely to cover issues unrelated to the respondent, you may request that these issues be reported separately. [FS21]

In some organisations, it is mandatory to provide the respondent with full copies of all evidence collected.

If this is the case in your organisation, make sure that every witness is aware of this before they provide their evidence.

Stage (iv): Asking the respondent to respond to proposed adverse misconduct findings

If you choose to ask the respondent to respond to proposed adverse misconduct findings, you will need to supply them with a detailed statement of reasons. This should summarise and set out all relevant evidence, including all material that both supports and does not support the allegations. It may be helpful to give them a copy of the investigation report.

In advising of proposed adverse findings, you need to be very careful that you have not made a prejudgment. The Tasmanian Supreme Court case of *Rainbird v Bonde* [2016] TASSC 10 is relevant to this issue.

The 'show cause' process

You may also consider notifying the respondent of a proposed sanction and asking them to 'show cause' why it should not be enacted. This process is discussed further in [FS23]. You may ask the respondent to show cause when you ask them to respond to proposed adverse findings, or afterwards.

The Integrity Commission's understanding is that the show cause process is **not** generally a requirement of procedural fairness. Authority for this can be found in *Coutts v Close* [2014] FCA 19 at paragraph [117]. However, there may be particular circumstances – especially if the outcome may come as a 'surprise' to the respondent – in which it would be fairer to follow this process. There may also be specific contractual terms, case law, legislative provisions or policy which requires your organisation to follow the show cause process. If you are unsure, you should seek advice.