

RISKS, COMMON PITFALLS AND TROUBLESHOOTING

FS25
Stage 3
Outcomes

If something goes wrong, it is best to acknowledge it and work quickly to fix or manage it.

Risks

Risks across all stages of the process include:

- breaches of confidentiality [FS4]
- poor record keeping [FS7], and
- delay. [FS9]

The decision maker and investigator should constantly consider these risks.

Specific risks to consider at each stage are set out in the table below.

Stage	Risks
Stage 1 – Allegation or suspicion:	<ul style="list-style-type: none">• not dealing with similar allegations in a similar manner [FS8]• putting serious allegations to the respondent too soon [FS3] [FS8] [FS16]• not contacting external bodies [FS6] <p><i>If you did not contact the police about potentially criminal allegations, you should do so as soon as you realise the error.</i></p>
Stage 2 – Investigation: <i>Many of the risks during this phase can be eliminated by prioritising the investigation, and by careful planning and consideration of the terms of reference.</i>	<ul style="list-style-type: none">• poorly defined allegations [FS11]• inadequate terms of reference [FS12]• lack of planning [FS17]• insufficient resources allocated to the investigation• failure to provide procedural fairness [FS15] [FS16] <p><i>Breaches of procedural fairness can generally be rectified at any stage before the final decision has been made.</i></p> <ul style="list-style-type: none">• investigator or decision maker bias or conflict of interest [FS25]• investigator inexperience or lack of understanding [FS13]• failure to consider additional allegations that arise during the investigation [FS12]• loss of focus in the investigation <p><i>You should constantly refer back to the terms of reference and the allegations.</i></p> <ul style="list-style-type: none">• failure to obtain all relevant evidence [FS20]• investigator having an adversarial mindset about proving or disproving the allegations <p><i>Remember that the process is inquisitorial, not adversarial.</i></p>

Stage 3 – Outcomes:	<ul style="list-style-type: none">• failure to consider counter-allegations made by the respondent or mitigating factors [FS12] [FS22]• reliance on unproven assertions [FS20]• confusing the role of the investigator and the role of the decision maker [FS10]• poorly drafted investigation report [FS21]• failure to analyse the evidence [FS20] [FS21]• findings not supported by the evidence [FS20] [FS21] [FS22]• findings not made on the balance of probabilities [FS20]• inconsistent outcomes [FS23]
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Common pitfalls and troubleshooting

Delay

Where there are excessive delays make sure you keep all parties updated, apologise for the delay, and do what you can to reduce the timeframes. You may need to reduce the scope of the investigation. [FS9]

Unreasonable delay may be a mitigating factor to take into account when deciding on outcomes. [FS23]

Conflicts of interest

If a conflict or bias is discovered part way through the investigation, you should take action immediately. As a first step, the conflict should be documented. [FS10]

You then need to consider whether it is possible for the investigation to continue in light of the conflict, or if a new investigator/decision maker should be appointed.

Other options are the appointment of an additional person to check the investigator's work, or redoing part of the investigation (for example, an interview).

In considering what to do, look at the seriousness of the allegations, and the nature and directness of the conflict.

In some circumstances, it is appropriate to put the issue to the respondent and ask for their opinion. They may want to waive their right to a new investigation. This would generally be done to ensure a speedy resolution. Do not pressure the respondent to make a particular decision, but do get their decision in writing.

Breaches of confidentiality

You should try to find the source of the breach as quickly as possible. If it is an internal source, you may need to issue a direction or take disciplinary action.

Work to ensure that no victimisation or destruction of evidence has occurred. You should review your investigation plan. [FS4]

Stage 3

Outcomes

Withdrawn complaints

If you are investigating misconduct that arose from a complaint, the source may have expectations around their involvement in the process. This may include thinking that they can stop the investigation by withdrawing their complaint.

You should consider the welfare of the source and why they may want to withdraw their complaint. Approach them and see if you can provide assurance or support. They may fear, or be suffering, victimisation or other repercussions.

[FS4]

If your organisation has a complaint handling policy, it may contain guidance about what to do if a complainant withdraws their complaint.

The impact of a withdrawal will depend on when the source withdraws the complaint. If the investigation is well underway, you may have no choice but to continue.

If the source withdraws their complaint at the start of the investigation, you should consider the nature and seriousness of the allegations. You should also think about the apparent veracity of the allegations, and if there is likely to be other evidence available.

Your organisation has an obligation to deal with allegations of misconduct, regardless of whether the source participates in the process. This may be hard for them to understand, and it may be worthwhile making this clear at the start of the process or in your complaint handling material.

Respondent leaving the organisation

If the respondent leaves the organisation prior to the finalisation of the matter, there are a number of steps that should be considered. The action taken will depend on the stage the matter is at.

The guidance below should be followed in consideration of any legal issues specific to your organisation. It may not be possible for all organisations to follow exactly all of the steps below.

Before the investigation has started

The respondent may leave before the investigation has started. For instance, this may happen when they are suspended or notified of the impending investigation.

In this case it will probably not be in the public interest to invest resources into pursuing the matter. However, you should take steps to protect your organisation in the event the respondent reapplys for employment. This means that you should – depending on the potential seriousness of the matter – inform the respondent in writing that:

- you will place on their personnel file a declaration about the matter, noting that they left before it was resolved [FS7], and
- if they successfully reapply for employment, the matter may be pursued.

If the matter is potentially relevant to the work of an external body – such as the police or a professional regulatory body – it should still be reported to that body. [FS6]

During the investigation

The respondent may leave part way through an investigation, before they have had a chance to respond to the allegations.

The respondent may also leave after they have responded to the allegations. This may be before you have made findings and decided on outcomes. More commonly, it will be at the 'show cause' stage. [FS23]

In these situations, you need to consider if there is a public interest in continuing the investigation. Specifically, you should think about:

- how serious the matter is
- how likely it is that the respondent will reapply for employment with your organisation or with another public sector organisation, and
- the resources it would take to finalise the matter – the further progressed the matter is, the less resources it will take to finalise it.

You need to weigh up these factors to decide whether it is worth pursuing the matter to finalisation. Where the matter is at the 'show cause' stage, it is much more likely that it will be worthwhile finalising it.

If the respondent has not yet responded to the allegations, the resources required to finalise the matter will be greater. You will still need to adhere to procedural fairness principles, which means that you will need to give the respondent an opportunity to respond before findings are made. [FS16] [FS18]

In any case, if you do proceed to finalise the matter, you should notify the respondent of those findings in writing. [FS24]

You will not be able to impose any outcomes on the respondent – although you may be able to if they are re-employed.

If you choose not to finalise the matter, you should follow the steps outlined above in relation to respondents who leave the organisation before the investigation starts.

