

8

DECIDING WHETHER TO INVESTIGATE

Once you have collected material as part of the preliminary assessment, or decided that you do not need more information, you need to analyse what you have and decide whether there should be an investigation. Sometimes it will be obvious that there should or should not be an investigation. In some cases, however, there will be grey areas.

The decision should be made as quickly as possible. Ideally, this will be within three working days of having enough information to make an informed decision. [\[FS9\]](#)

Considerations

You need to undertake a risk assessment of the situation by considering risks to all affected parties – including the source, the respondent, other employees, your organisation, customers and clients, the tax or rate payer, and the public.

On the basis of the information you have, you may determine that the matter is:

- not related to misconduct and needs to be dealt with through other avenues e.g. performance management, or referral to an external body for investigation or consideration
- alleged misconduct that requires an investigation or
- alleged misconduct that does not require an investigation (if this is possible under your governing legislation and policies).

Responses to allegations should be proportionate to the nature of the allegations and the possible outcomes. Investigations are time and resource intensive. They can be difficult for all parties involved.

The extent of an investigation should also be proportionate to the allegations and possible outcomes. In general, it is best to proceed with as little formality as the situation and your governance framework permits.

There may be legislative provisions or policies that dictate whether an investigation is to occur.

For instance, in the State Service, under Employment Direction No. 5, a head of agency **must** undertake an investigation if they have reasonable grounds to believe that a breach of the Code of Conduct may have occurred. Technically, this could apply to any alleged breach, even a lower level breach.

Factors to consider when deciding whether to investigate

Severity of the matter – the more serious the matter, the more likely it will require an investigation.

Potential severity of the outcome for the respondent – the more serious the potential outcome, the higher the requirements for a thorough, evidence-based investigation.

Whether the allegations are easily proven or disproven – even serious misconduct, if easily proven and dealt with appropriately in terms of procedural fairness, may be resolved relatively quickly.

Complexity of the matter, and the potential for an investigation to uncover further misconduct.

When the alleged misconduct took place – if it is a matter that occurred some time ago, it may not be worthwhile, or even possible, to investigate it.

Apparent veracity of the allegations/suspicions.

If the matter has already been dealt with or investigated.
Whether there is likely to be any evidence either substantiating or disproving the allegations.
Number of employees that may have been involved.
Whether there has been a pattern of similar complaints.
Potential deterrent and education effects of an investigation, both for the respondent and generally across your organisation.
Whether a lack of action would negatively affect morale in the workplace.
If an investigation is necessary to clear the air.
Seniority of the respondent – relatively minor allegations should be taken more seriously if they are against a more senior employee.
Whether the alleged conduct would warrant a disciplinary sanction that could only be imposed after an investigation.
Past conduct of the respondent – for instance, it may be worthwhile escalating the seriousness of a matter if the employee has ignored previous warnings or if performance management efforts have had little effect.
Scale of any monetary amounts or benefits involved in the alleged misconduct.
Whether there are possible systemic issues at play that your organisation needs to deal with.
Public confidence – would a member of the public consider that the allegations required investigation.

Fairness in handling allegations: dealing with similar allegations in a similar manner

It is important that all employees view the handling of misconduct allegations as fair.

This includes not only within a single matter, but across matters dealt with by your organisation. Over time, as much as possible, your organisation should deal with like matters alike – both in terms of process, and in terms of outcomes.

The best way to ensure consistency is for your organisation to keep good records, including a register of misconduct allegations. [\[FS7\]](#)

Of course, there may be good reasons for your organisation not to deal with similar matters in a similar manner. Possible reasons include changes over time in good practice, or to your governing framework.

It may also be because of the particular circumstances of the case. For instance, an employee swearing at a customer for the first time would usually be handled very differently an employee who had been given repeated warnings not to swear at customers.

Contacting the respondent

You should not contact the respondent before or during the preliminary assessment. However, at the end of the assessment it may be decided that there is possibly a plausible explanation for the conduct. In this case, you may choose to put the matter to the respondent for response before deciding whether to conduct an investigation.

If you do this, it would usually be done in writing and you should make it clear to them that:

- the disciplinary process has not commenced
- you are merely attempting to ascertain the facts of a situation and
- anything they say can be taken into account in the event that a disciplinary process is undertaken.

You should not put the matter to the respondent at this stage if the matter may involve serious misconduct or criminal conduct, there is a risk of evidence being destroyed, or if there is a risk of victimisation.

Who decides whether to investigate

It is likely that your organisation has delegations relevant to disciplinary investigations. These are usually derived from legislation or industrial instruments.

It is important that the person who makes the decision has the authorisation to do so, and that this decision is set out in writing. The decision maker should not be the investigator. [\[FS10\]](#)

Managing the impact of an investigation on the workplace

If you decide to investigate, make sure you are alert to the potential impact of the investigation on the workplace.

For instance, it may cause additional absences or stress. You may need to develop internal and external communication strategies. Consider reminding staff of support avenues, for instance the employee assistance program.

Alternatives to investigating

Your preliminary assessment may reveal workplace issues that do need to be dealt with, but which do not require a misconduct investigation. It may also reveal conduct that falls short of misconduct, but which should be dealt with through professional development measures such as training.

Alleged misconduct that does not require an investigation – depending on your governing framework – may include:

- lower level misconduct, for instance swearing in the workplace
- self-reported non-serious misconduct
- alleged misconduct that is quickly proven or disproven and
- where the respondent has already made admissions.

Alternatives to investigation (which may also be the outcomes of an investigation) include:

- performance management such as a performance improvement plan
- mediation or conciliation
- an apology to the source, or some kind of amendment or reparation action
- referral to an external body
- training
- lawful direction
- advice and guidance and/or
- variation of duties.

It is important that your response, whatever it may be, is proportionate to the allegations.

Procedural fairness

If the matter involves lower level misconduct that does not require an investigation, you should consider the procedural fairness principles outlined in [\[FS15\]](#) and [\[FS16\]](#). This will be most necessary if there are any outcomes that could be seen as 'adverse' to the respondent. Minor matters should be dealt with as informally as possible and you will not need to adhere to the formal steps outlined in later fact sheets. If you are unsure, you should seek advice.

Defensible decision making

If you decide not to investigate, this decision needs to be accountable, defensible and documented. [\[FS7\]](#)

Where relevant, you should confidentially advise the source of your decision and the reasons for it. You should also tell them how they can have your decision reviewed. This includes both internally if applicable, and by taking the matter to external organisations such as the Ombudsman, the Integrity Commission, or Equal Opportunity Tasmania.

Consider whether you should notify external bodies, such as the Integrity Commission, of your decision. [\[FS6\]](#)