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## MAKING FACTUAL FINDINGS – ASSESSING THE EVIDENCE & THE STANDARD OF PROOF

Once you have collected your evidence, you will need to assess each piece of evidence and use it to make your findings on the relevant standard of proof. This process will be documented in your investigation report.

### Assessing the evidence

Each piece of evidence you collect needs to be examined in terms of its relevance, credibility and reliability. Remember that evidence is not necessarily proof.

### The rules of evidence

In a disciplinary investigation, you are not bound by formal legal evidence rules. However, the rules do provide guidance about how much weight to put on particular types of evidence.

**Primary evidence** is direct evidence, for instance a statement from someone who witnessed an alleged act. Primary evidence is generally given greater weight, depending on factors such as the independence and the credibility of the witness.

**Hearsay evidence** is evidence provided by a person who was not a direct witness. They heard about it from another source.

Hearsay evidence is not always admissible in a court of law. But in a disciplinary investigation, you can rely on hearsay evidence. It is, however, generally to be given less weight than primary sources of evidence.

Evidence of someone's opinion (**opinion evidence**) is also generally inadmissible in a court of law, unless it is expert opinion. In a disciplinary investigation, you may take opinion evidence into account. It should, however, be given less weight than primary evidence or expert opinion.

Where there is a strong probability, some findings can be logically inferred from other facts without the need for direct evidence. For instance, if someone arrives at work at the same time every single day, unless there is evidence to the contrary it could be logically inferred that they arrived at that same time on a particular date.

Disciplinary investigations are inquisitorial. This means that findings are often made on the basis of the word of one party against the word of another party.

To make a finding in these circumstances, you may need to assess the credibility and reliability of each party.

Other evidence you can consider includes:

- the nature of relationships and power imbalances
- whether and why there was a delay in the complaint being made and
- whether any organisational systems and structures contributed to the misconduct.

### Assessing credibility and reliability

More weight should be placed on records made or evidence given closer to the date of the event. Records made or evidence given weeks, months or years afterwards are less reliable.

Consider whether each witness' evidence was consistent or contradictory, both within one sitting and across time.

Also consider whether there was opportunity and motive for collusion with other witnesses.

Where a statement accords with independent witness evidence, known facts, or documentary evidence, it is more likely to be true. Damaging admissions are also inherently likely to be true.

If a witness has failed to answer a reasonable question (without a reasonable explanation), this may be taken into account in assessing their credibility.

Keep in mind that witness or respondent criticism of a source's motives may be aimed at undermining the source's credibility, and may be made without any real evidence of dishonesty. Such criticism is unlikely to be relevant to the investigation.

Body language and non-verbal cues can be misleading, so be careful when assessing credibility on the basis of demeanour.

Past behaviour of witnesses, where markedly similar and relevant, may be taken into account.

People perceive things differently. If there are two different stories, it does not necessarily mean one party is lying. And it may also be that a person has lied about one matter, but is truthful about all other matters.

### Reviewing your evidence and findings

In reviewing your evidence and findings, you should make sure that you have:

- followed counter-allegations and contradictory lines of inquiry
- given the respondent a chance to respond to adverse evidence
- questioned witnesses about evidence that conflicts with their evidence

- given adequate weight to relevant matters of importance, and less weight to relevant matters of less importance
- only considered relevant evidence and
- sought corroboration where possible.

### Making findings: the standard of proof

The 'standard of proof' is the objective test you apply to the evidence to make a finding. If the evidence shows that an allegation is accurate to the relevant standard of proof, then you should find that allegation substantiated.

Disciplinary investigations are administrative investigations, which means the findings need to be made on the civil standard of proof. The civil standard of proof is 'on the balance of probabilities'. This is a lower standard of proof than the criminal standard of proof, which is 'beyond reasonable doubt'.

#### The 'on the balance of probabilities' test

'On the balance of probabilities' means that: the person making the finding should have 'reasonable satisfaction' that the alleged act is more likely than not to have occurred. This should be on the basis of 'logically probative evidence'.

'Logically probative evidence' means that you cannot meet the standard of proof on the basis of evidence that is merely rumour or gossip. The evidence should be relevant and logically capable of supporting the findings.

If you are unsure about whether the findings have been made on the balance of probabilities, you may consider seeking legal advice.

## Reasonable satisfaction and the *Briginshaw* test

The High Court case of [\*Briginshaw v Briginshaw\* \[1938\] HCA 34](#) is famous for its statements about the balance of probabilities test.

In *Briginshaw* it was said that, where the potential outcomes are more serious, 'reasonable satisfaction' should not be arrived at with inexact proofs, indefinite testimony, or indirect inference. This means that the more serious the outcomes, the more solid the evidence needs to be.

*Briginshaw* has at times been misinterpreted to mean that the civil standard of proof is a sliding scale, and that where the outcomes are potentially very serious (dismissal), the standard of proof is higher.

*Briginshaw* actually means that the evidence itself needs to be stronger (more substantial) if the outcomes are potentially more serious. For instance, if the outcomes are potentially very minor, you may be able to be reasonably satisfied on the balance of probabilities on the basis of uncorroborated hearsay evidence. You would be less likely to be reasonably satisfied on the same evidence if the outcome was potentially dismissal.

### What does the test apply to?

The balance of probabilities test is to be applied to every factual allegation.

It is usually the investigator's role to make these findings. Their findings will often need to be approved by the decision maker.

The balance of probabilities test does not apply to the misconduct allegations.

For example, the investigator could find that, on the balance of probabilities, Mr Smith did accept a gift from Company A. The decision maker would then decide whether this act amounted to misconduct.