

# DEFINING THE ALLEGATIONS

FS11

Stage 2  
Investigation

The decision maker's first job is to define the allegations. This process will require you to decide on:

- the allegations of fact (**factual allegations**), and
- how each factual allegation amounted to an act of alleged misconduct (**misconduct allegations**).

In legal terms, properly defined allegations are those that have been sufficiently 'particularised'.

## When to define the allegations

The allegations should be defined at the start of the investigation. This is so that they can be given to the investigator as part of the terms of reference. [FS12]

The allegations will also need to be put to the respondent at some stage during the investigation. [FS16]

Allegations can change, or new allegations may emerge as the investigation progresses. If this happens, the respondent must be given a chance to respond before any findings are made on the revised or new allegations. [FS12]

## Defining the factual allegations

Allegations need to relate to acts that can be proven or disproven by evidence. They should not be allegations about character – for instance, that someone is a bully. Do not make broad allegations of poor behaviour. You need to link each allegation to a particular act, or failure to act.

The allegations need to be specific enough to allow the respondent to respond. However, they should not be so narrow that the investigation will need to be restarted if the facts turn out to be slightly different. For instance, the phrase 'on or about' should be used in relation to dates.

## Example

This is a poorly defined factual allegation:

*Allegation 1: Mary Watts behaved dishonestly and stole some money.*

This is a better defined version of the same matter:

*Allegation 1: On or about 15 May 2016, Mary Watts took approximately \$200 from the office petty cash to her home.*

*Allegation 2: On or about 16 May 2016, Mary Watts fabricated a story to her manager to explain the approximately \$200 missing from the office petty cash.*

## Patterns of behaviour

Defining allegations can be particularly difficult where the matter involves a pattern of low level misconduct that together amounts to more serious conduct. The classic example of this is **bullying**.

Well-defined bullying allegations are set out as examples below. Do keep in mind that these have been simplified for the purposes of this document. In reality, each bullying-related allegation may require more explanation, and may be more lengthy and complex.

Where bullying is alleged, there is likely to be an extensive list of allegations rather than just a handful. If the allegations are numerous, and if it will not affect the potential outcomes, you may define and investigate just the most serious allegations.

*Allegation 1: On or about 10 October 2016, Robert Jones humiliated Rosa Lee by discussing her recent performance review in front of other staff.*

*Allegation 2: On or about 20 October 2016, Robert Jones belittled Rosa Lee by telling her she was 'incompetent' in a raised voice in front of other staff.*

*Allegation 3: On or about 17 November 2016, at a staff morning tea, Robert Jones belittled Rosa Lee in front of other staff by mocking her cooking by using words to the effect of 'I wouldn't eat food you cooked if I was starving to death'.*

*Allegation 4: On or about 2 December 2016, Robert Jones denied Rosa Lee the opportunity to participate in the new roads project, despite allowing other staff with a similar level of qualification and experience to participate, and this action was unreasonable.*

*Allegation 5: On or about 15 December 2016, Robert Jones humiliated and abused Rosa Lee at the staff Christmas party by shouting in a raised voice that she was 'an incompetent cow' or words to that effect.*

## Defining the misconduct allegations

Each factual allegation needs to be related to a breach of the code of conduct, policy or law. The table below explains this process.

<b>Complaint:</b>	John Smith accepted a wide screen television as a gift from Company A on 15 May 2016. Mr Smith works at Government Department.
<b>Information collected in the preliminary assessment:</b> [FS3] [FS8]	<ul style="list-style-type: none"> <li>• Government Department is a regulatory body that oversees Company A.</li> <li>• Mr Smith has not declared that he received a gift from Company A.</li> <li>• Company A has recently been approved to expand its operations. Mr Smith signed off on this approval.</li> <li>• Mr Smith is not allowed to accept gifts from Company A under clause 9 of Government Department's Gifts and Benefits Policy.</li> <li>• Potentially relevant clauses in Government Department's Code of Conduct include: <ul style="list-style-type: none"> <li>Clause 5: <ul style="list-style-type: none"> <li>› <i>An employee who receives a gift in the course of his or her employment or in relation to his or her employment must declare that gift to the CEO.</i></li> </ul> </li> <li>Clause 7: <ul style="list-style-type: none"> <li>› <i>An employee must not make improper use of –</i> <ul style="list-style-type: none"> <li>(a) <i>information gained in the course of his or her employment; or</i></li> <li>(a) <i>the employee's duties, status, power or authority –</i></li> </ul> </li> <li>› <i>in order to gain, or seek to gain, a gift, benefit or advantage for the employee or for any other person.</i></li> </ul> </li> <li>Clause 9: <ul style="list-style-type: none"> <li>› <i>An employee must disclose, and take reasonable steps to avoid, any conflict of interest in connection with the employee's employment.</i></li> </ul> </li> </ul> </li> </ul>
<b>Factual allegations:</b>	<ol style="list-style-type: none"> <li>1. Mr Smith accepted a gift from Company A on or about 15 May 2016.</li> <li>2. Mr Smith did not declare the gift he received on or about 15 May 2016 from Company A.</li> <li>3. Mr Smith used his position as a regulator to gain a gift or benefit.</li> </ol>

<b>Fully defined misconduct allegations:</b>	<ol style="list-style-type: none"> <li>1. Mr Smith accepted a gift from Company A on or about 15 May 2016, which is a potential breach of Government Department Gifts and Benefits Policy clause 9, which states ...</li> <li>2. Mr Smith did not declare the gift he received on or about 15 May 2016 from Company A, which is a potential breach of Government Department Code of Conduct clause 5, which states ...</li> <li>3. Mr Smith used his position as a regulator to gain a gift or benefit, which is a potential breach of Government Department Code of Conduct clause 7, which states ...</li> </ol>
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## How to select the most appropriate misconduct allegation

It is likely that there will be a variety of ways to characterise each allegation as misconduct. For instance, allegation 3 above could also be:

- a failure to declare and manage a conflict of interest
- a failure to act with honesty and integrity, and
- a number of criminal offences (that is, a breach of the law), including bribery and extortion.

The most fitting characterisation will be determined on the basis of the facts established by the investigation.

### Example of changing an allegation during the investigation

Take misconduct allegation 3 above as an example.

The investigation may uncover that Mr Smith did receive a gift from Company A, but that he did not ask for the gift and that he tried to give it back to the company. However, Mr Smith did not declare the gift, and did not discuss how it should be managed with his employer.

In this case, misconduct allegation 3 may be better characterised as a breach of Government Department Code of Conduct clause 9 – failure to declare and manage a conflict of interest. This

would need to be put to Mr Smith before the final decision was made.

For a method of avoiding having to change allegations in this way, see below.

### Example of defining alternative allegations at the start of the investigation

To avoid having to change the allegations during the investigation as above, it may be best to define multiple alternatives at the start of the investigation.

For instance, allegation 3 could be worded as follows:

*Mr Smith used his position as a regulator to gain a gift or benefit, which is a potential breach of Breach of Government Department Code of Conduct clause 7, which states ...*

**or in the alternative** *is a potential failure to declare and manage a conflict of interest in breach of Government Department Code of Conduct clause 9, which states ...*

The investigation may show that the first alternative was not supported by the evidence, but that the second alternative was supported by the evidence.